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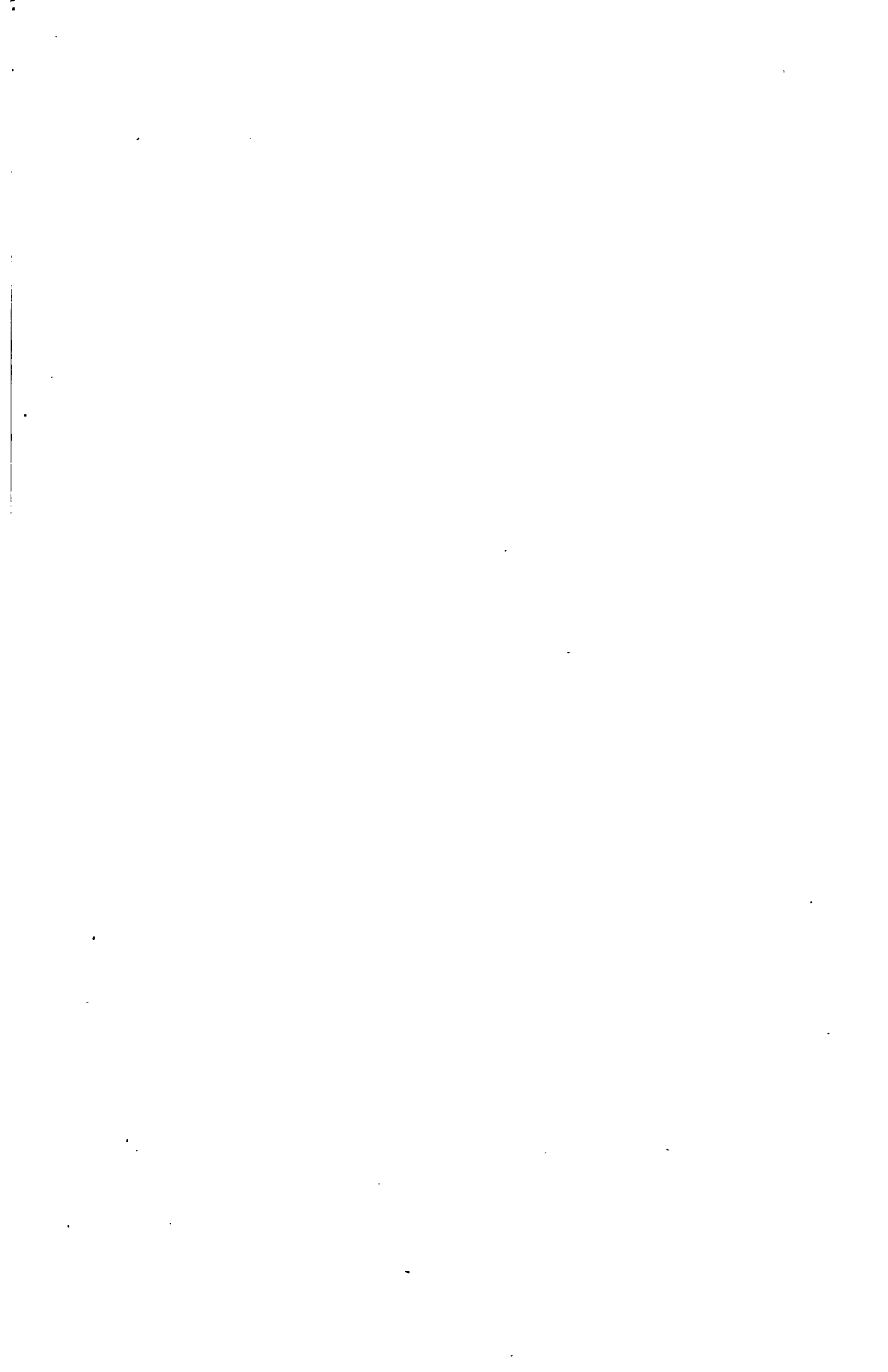
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**A SUPPLEMENT**  
**TO**  
**A TREATISE ON THE SYSTEM OF EVIDENCE**  
**IN TRIALS AT COMMON LAW**



id 207

A  
S U P P L E M E N T

TO A TREATISE ON THE SYSTEM OF  
EVIDENCE c†  
IN TRIALS AT COMMON LAW

CONTAINING  
THE STATUTES AND JUDICIAL DECISIONS  
1904-1914

BY  
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## PREFACE

It is the purpose in this Preface to offer some comments on the merits of our law of Evidence and of its treatment nowadays by courts. During the last ten years has appeared much public criticism of procedure and courts. How far is it justified in this present field of the law? Much hopeful but indefinite aspiration for the better is felt. How should we proceed to realize it in this part of the law?

The law, as a practical force, always receives its final effect (in our system) through a pronouncement of the judge. The virtue of the law as we get it is therefore dependent on two elements, — the rule and the man. In a critical view of it, the part played by the judges and their methods must be taken account of.

This survey will therefore inquire into :

I. The qualities of current judicial decisions (*A*) in general, (*B*) in the law of Evidence.

II. The merits of the rules of Evidence (*A*) in general, (*B*) in particular.

**I. The Judicial Decisions.** *A. In general.* One who has perused several thousand contemporary decisions cannot help forming some impressions of their juridical qualities. By this is meant their adequacy as a regular mode of doing justice, irrespective of the soundness of specific legal rules involved or the correctness of individual decisions. For every critical judgment there must be a standard. It will not be a standard too ideally high, if we take as models the opinions by many judges in many States in the generation just before the Civil War, — Shaw, Bronson, Tilghman, Lumpkin senior, Gaston, Ryan, Blackford, Doe, Gibson, Nelson, Beasley, Napton, Selden, Daly, Appleton, Goldthwaite, Walworth, and a score of others.

By that standard, what are some of the shortcomings of the usual opinions rendering justice in the usual State Supreme Court? The following impressions are offered as representing the composite traits of a typical Court; though they may be inapplicable to a particular Court at a given time.

1. A first shortcoming to be noted is the lack of acquaintance with *legal science*. By "legal science" is meant all that is above, between, and behind the particular rules and precedents, — the system of legal knowledge, — that which distinguishes the architect from the carpenter. In an administrator of the law, one's equipment as a scientist may be in general denoted

## PREFACE

by one's attainments in (a) legal history, (b) legal philosophy and jurisprudence, (c) sound discrimination of the best sources of knowledge.

(a) Acquaintance with *legal history* is almost totally lacking. There are now ample modern sources for a knowledge of the history of the great principles of our law. They are unknown to our judges. The citations of Pollock and Maitland's *History* since its appearance in 1895 could be numbered on the fingers of both hands. There exist now plenteous other standard authorities. But whenever there is an expounding of history, Blackstone suffices. For the judiciary's purposes, the world stopped still with him.

(b) The *philosophy* and *jurisprudence* of the law are unknown. Austin, Salmond, Holland, Amos, Sidgwick, Spencer, Terry, Gray, might as well not have written. To be sure, Anglo-American legal science itself has, until very recently, covered formally but a part of the field, chiefly the so-called analytical jurisprudence; but even this has suffered "the long divorce of steel" from the law, so far as judicial opinions reveal.

(c) There is no *discrimination* in the use of the expository authorities. Such a discrimination is the mark of a sound legal education and a correct scholarly standard. But, in the judicial opinions, the superficial products of hasty hack-writers, callow compilers, and anonymous editors, are given equal consideration with the weightiest names of true science. Obviously, any printed pages bound in law-buckram and well advertised or gratuitously presented constitute authority fit to guide the Courts.

Note, however, that it must be *bound*: for if it is in periodical form, it is ignored. For ten and twenty years past there have been at the service of the profession some half a dozen legal periodicals, publishing the weightiest critiques of current legal problems. There is nothing in judicial opinion to show that these articles have ever been read; apparently their great labor and acute skill have been wasted on the judges.<sup>1</sup> The article by Louis Brandeis and S. D. Warren on "The Right of Privacy" (published in the *Harvard Law Review* some twenty-five years ago) is the most notable of the rare exceptions discoverable.

What are the apparent causes of this lack of knowledge?

(1) One, of course, is the lack of a systematic, thorough, *law-school education*. Very few of the judges have had the benefit of it; statistics alone could show just how few.

(2) Another cause is the lack of *time* permitted to the judges for browsing around, in the world of legal science, outside of the narrow pasture in which they are tethered. This will be again referred to as explaining another quality.

(3) A further, and perhaps a main explanation, is the judges' *indifference to legal science*. This indifference they share with most of the profession. What they respect is mere precedent, — a prior decision, and the latest de-

<sup>1</sup> And when occasionally they are read, and *used*, they are studiously not cited. A notable example of this was recently related to the writer, by one who had it directly from a chief justice.

## PREFACE

cision. This respect is, in turn, sensed by the authors. What ought to be a genuine juristic treatise is degraded to a mere collection of precedents, — preceded by sentences beginning "Some Courts, indeed, hold etc." and "It has been decided, however, on the contrary, etc." The judges measure a treatise by its value as a digest. By thus settling a standard of valuation, they disparage the careful, helpful thinker and encourage the mere compiler. The progressive development of the law by analysis and construction is stifled.

2. Another shortcoming is *unfamiliarity* with the body of *controlling precedents*. The judges do not know well and fully the precedents of their own court. Instead of judging the briefs and arguments by the law known to them beforehand, they look up "the law" after the briefs are in, and confine themselves to the boundaries of the briefs. The opinions give the strong impression of being discoveries by the judges, — discoveries, that is, of what they never knew before. The opinion exhibits conscientiously the mental lucubrations experienced in making this discovery. The lengthy opinions redundantly quote well-settled platitudes from earlier opinions, — re-proving old truths, which are apparently new and therefore interesting to the writers. Many opinions give precisely this impression: "The learned counsel for the defendant is in error in arguing that 2 and 2 make 5. The weight of authority (and we frankly state that this view seems to us more reasonable) holds that 2 and 2 are 4. In Coke's Second Institute, fol. 6, etc. In Chancellor Kent's Commentaries, book III, page etc. We quote a few leading opinions, etc. The Supreme Court of Missouri, as far back as *Brown v. Jones*, 24 Mo., said: '2 and 2 have always been held to make 4.' We are therefore constrained to hold etc." — It need only be added that this trait is almost lacking in a few of the States on the Atlantic shore, where (possibly) the life-tenure of the judges explains their greater adeptness in ignoring platitudes and other settled things, and in addressing themselves directly to the precise shade of distinction involved in the new case before them.

The main ulterior causes of this trait are "tolerably obvious" (as a well-known professor of mathematics used to say blandly to his freshmen), but are deep-rooted, — far beneath the personnel of the judges.

In the first place, the judges are rarely left long enough in the *tenure* of their *positions* to become thoroughly familiar with the precedent-law of their own court.

In the next place, the *overburdening labor* cramps them. The numbers of appeals, and the popular demand for quick despatch, unite to make a pressure for hurry. This means that there is no time to study and master *ad hoc* the whole law of a subject. There is only time to master the record of the specific case, and for this purpose to peruse the precedents cited on the brief, or some of them.

In the third place, there is *no standard* set by a highly trained body of Supreme Court advocates, specialists, who themselves know all of their subject and skilfully present the concise essence of the actual controversy.

## PREFACE

The appellate lawyer may be any ill-trained lawyer; most of them are (relatively) tyros in that field. Hence there is no high standard by which to force the judges to the highest standard.

All three of these causes go back to the profession and to the community at large. Both refuse to make judicial tenure long and secure, — refuse to sanction a proper system of appeals, — refuse to have a select, skilful, and well-organized bar. Therefore they must expect the natural results. A common-place standard at the bar and in the community is bound to limit the achievements of public judicial officers, — inasmuch as we do not live under a benevolent despotism.

3. Another shortcoming is *over-emphasis* on the *technique* of legal rules in detail, with corresponding under-emphasis on policies, reasons, and principles. This is a difficult thing to describe to those who do not sense it without description; but it is very marked. It is the kind of thing that is like the dead bark on the outside of a tree, in contrast to the living, growing inner core. Too much of our law is dead bark, — at least in the judicial opinions. Two thirds or more of them are needless, — dry repetitions of well-settled things. The treatment tends to become mechanical. Reasons are lost from sight. The new generation of judges thus never hears of the reasons. And so gradually “you cannot see the forest for the trees.”

As examples of what opinions might be, but seldom are, in the exposition of living principles, two good illustrations are *Murphy v. Wabash R. Co.*, 228 Mo. 56 (trespassers on a railroad track) and *Coleman v. MacLennan*, 78 Kan. 711 (privilege for libel).

4. Another shortcoming is undue servitude to the bondage of *precedent*. The rightful dominion of precedent is indeed a profound problem in legal philosophy; and the present day, in Europe as in America, hears radical questions as to the defining of its scope.<sup>1</sup> But wherever its boundary be placed, our own practice far oversteps it.

In the first place, the granite *fixity* of an exact precedent is unduly respected; there is a fetish of immutability.

And, in the second place, the infinite *variety* of justice is forgotten. A precedent is built up narrowly by them out of a few elements; the really new and special elements of the present case are not allowed to have any effect. For example, if a court had once held that a passenger's alighting from a moving train was negligence *per se*, and should then insist that it was bound so to hold in every succeeding case where that fact occurred, we could all appreciate the error of this bondage. Few courts have submitted to it in that particular instance. But an equivalent bondage does enthrall them in most topics of the law. Only, they do not realize how needless it is.<sup>2</sup>

<sup>1</sup> Vol. IX of the Modern Legal Philosophy Series (“The Science of Legal Method”) devotes itself to this.

<sup>2</sup> Read a recent opinion of the Kansas Supreme Court, on the use of dying declarations in civil cases, to see a manly freedom from this needless slavery.

## PREFACE

Nor how futile! For a main supposed virtue of *stare decisis* is the blessing of certainty in the law. Yet that blessing has obviously failed us. And an important reason for this failure is the hodge-podge use by one State Court of the decisions of other State Courts. Except in four or five States, the opinions are full of citations from other States. Those other States' decisions are not binding as precedents; their use tends to unsettle the law of the Court that resorts to them. To rely upon a ruling from another Court, not in the least binding, is of course to give a quality of optionalness in the use of precedents. And so the genuine doctrine of precedents is every day undermined by this loose resort to the law of other States. We possess all the drawbacks of having *stare decisis*, and also all the drawbacks of not having it.

The immediate causes of this loose practice are mainly two already mentioned, — the lack of thorough familiarity with the Court's own prior decisions, and the facile resort to digests and compilations.

5. A shortcoming kindred in its nature to the preceding is *over-consideration of every point of law* raised on the briefs. This shows faithfulness and industry; for which we should be and are grateful. But it tends to remove the decision from the really vital issues of each case, and to transform the opinion into a list of rulings on academic legal assertions. The opinion is as related to the meat of the case as a library catalogue is to the contents of the books. This is far removed from the true and high function of the Supreme Court.

One immediate cause of it is the removal of the Supreme Court on high, away from direct touch with the arena of the litigation. This peculiar American separation of the trial judge from the appellate judge has tended to make the latter more and more of a legal monk, immured in a Carthusian cell and cultivating his little plot of the law's barren logic. But (as Mr. Justice Holmes has said) "other tools are needed besides logic; the life of the law has not been logic; it has been experience."

One more and a deeper cause there certainly is for this trait, — the substantial loss (temporary, let us hope) of the conception of justice, in contrast to rule of law, as an element in every case. Whenever this conception shall be restored to its due place, and judges shall be less timid about mentioning the word, this defect will lessen. Read some of Chief Justice Furman's recent opinions, in the Oklahoma Court of Criminal Appeal, to see how judicial law can frankly express itself in terms of justice, when needed, and yet maintain the true spirit of law. For the older generation, Lumpkin senior, of Georgia, and Doe, of New Hampshire, are good examples.

6. Finally, another shortcoming is the *one-man opinion*. Of course, nobody knows just how widespread this practice is. And the method of deliberation and decision of the issue, and of preparation and approval of the opinion, differs widely. But even where in form it is an ample method, we believe that (except for a few Courts, and for a few much-controverted cases in the other Courts) the opinion is almost always *intellectually* a one-man opinion. And that is what we lament.

## PREFACE

The standard we speak up for is that *all the law* of every opinion should be intelligently affirmed to be law by every member of the Court. If not, it is not Court law, but individual's law. And yet the very merit of a bench Court is that it shall represent the fusion of all the variant knowledges, experiences, temperaments, and talents of five or seven or nine representative leaders of legal thought, and thereby shall come as near to being safe and sound as human devising can make it. This standard means, for example, that if seven important issues of law are raised on appeal, and if one of them is a supposed rule that a creditor, to maintain a bill to reach a fraudulent purchaser from the debtor, must first have reduced his claim against the debtor to a judgment, then each and every member of the court who signs the opinion sanctioning or repudiating that rule must be able to say that he believes it from personal familiarity with the sources of law in his State. Anything less than this is intellectually not a full Court opinion.

That full Court opinions, in this sense, are few, is the strong impression given by the opinions themselves. The main cause for this state of things is one among the complex of causes already mentioned, — the pressure for quick despatch, created in part by the profession mobbing the appellate courts with appeals, and in part by the community's disinclination to give the judges ample time for the personal study of every case.

Two supposed shortcomings must now be mentioned, only to repudiate their existence or relative importance.

7. *Corruption and political bias.* Amidst the ululations of the demagogues, and the suspicions of the laity, it is a duty to express a sense of satisfaction at the lack of reasonable grounds for complaint on the score of corrupt intent and political bias. Few of us can know the hearts of any of the judges, — whether attackers or defenders. We must rely for our working estimates upon their attitudes as exhibited in their judgments of law upon the facts of the cases submitted. Those data give us no right to form any sinister impressions. On the contrary, they give us the right to be eminently satisfied, and all along the line of the States. Doubtless there are particular judgments, now and then, for which the hidden motive of one or two judges was either a corrupt subservience to a political creditor or a partisan political basis. But, in the first place, these instances are negligible in estimating the mass. In the next place, they represent (so far as they have occurred) not a judicial shortcoming, but a shortage in the morality of the community; any other number of representative lawyers that might have replaced them would have contained as many men susceptible to such weaknesses. And in the third place, in their effect upon daily judicial justice as a system, they are of small consequence relatively to the habitual shortcomings already enumerated.

Whatever the significance of such instances in popular politics, they should not blind us to the great fact that the daily labors of the fifty Supreme Courts on the thousands of litigated cases are marked by conscientiousness and im-

## PREFACE

partiality. Too much dust has been stirred up in public discussion on this issue. Wherever such charges are merited, they can and should be attended to on the merits of each charge. But it is unfortunate that the clouds thus raised about our judiciary have obscured the study of the real shortcomings which habitually deteriorate the system of judicial justice, as a whole and every day.

8. *Economic and class bias.* This is another shortcoming of which much has been made of late years. The fact, in some extent, cannot be denied. But the question is, what is its significance for the steady qualities of our judicial law?

In the first place, it was shared with the profession and the community as a whole; it was not a peculiar trait of the judicial system. For example, up to ten years ago there was not a voice raised to upbraid the judges with the fellow-servant rule; none of us (virtually) knew any better.

In the second place, a main occasion for the apparent contrast between judicial and public opinion has been the constitutional limitations upon legislative power, committed to the judiciary for protection. This is a peculiar governmental function, — something outside of the regular system of justice in litigation. The issue raised by it is an issue as to the wisest method for distributing political powers, — not an issue as to judicial justice.

In the third place, any shortcoming in this respect, on the part of the judges when allotted that political function, is certain to be corrected by the force of public opinion, whenever that opinion has itself been clarified and focussed and has spread to the incumbents of the bench. Already, indeed, the bench is seen, within only a few years, to have become responsive to this public opinion. In other words, this shortcoming, being due to the judges' convictions on matters of general public conviction, is bound to right itself in due season, — whatever may be the subject of the views. But the professional, the essentially judicial, shortcomings, will never be directly affected by changes in current public opinion. They are technical, they concern the judges' way of thinking about their own specialty; hence they are esoteric; and general public conviction does not know about them and does not get at them.

This is why the shortcomings that are going to remain habitual are more to be concerned over. They are incurable, unless within the profession we set about analyzing them and seeking consciously to remove them. And this is why the emphasis has here been put upon the six traits already enumerated. They are traits of the judiciary in the core of their professional work, — traits of their way of doing justice under the law. And they are blemishes on the system, as judged by a standard which our profession is capable of appreciating and accepting.

**I. The Judicial Decisions.** *B. In the Law of Evidence.* What are the special traits of the judicial attitude, in Supreme Courts, in their treatment of the law of Evidence? We may assume it understood that the solid func-

## PREFACE

tion of the law of evidence is to assist the discovery of truth in trials, while safeguarding the jury from false estimates of evidence, by means of rules of exclusion based on long experience in jury trials.

1. *Enforcement of rules regardless of Dispute over their Need.* A cardinal shortcoming is the judicial habit of enforcing a rule of evidence, regardless of whether there is any dispute as to the need of enforcing that particular rule in the case in hand. The rules of evidence, that is, are erected into a supreme end in themselves. They are not restricted to their sole value, as tools for truth. For example, a plaintiff suing on a contract for goods offers a copy of a shipping receipt affecting part of the goods. The rule of evidence requires that he should first show loss of the original. His showing does not disclose due diligence. The rule forecloses him; the copy is rejected; the proof fails for that part of the case. Meanwhile, the opposing counsel, except for his objection, sits silent; the Court never once asks him, "Do you really dispute the correctness of this copy? Is there any word in it that is falsified?" For all that the trial Court or the Supreme Court knows or asks, the copy may be exactly correct, and the opponent may have no *bona fide* doubt at all on that point. If so, the rule's enforcement is a vain piece of legal tactics; for the sole and acknowledged purpose of that rule is to secure accurate copies. If in fact the rule's sole purpose is achieved, it is *functus officio*, — ended, for that case and that offer. Why use it merely to penalize the party?

In thousands and thousands of rulings this is and long has been the way of using the rules of evidence. No other applied science in the world uses its rules in that way. Suppose an architect were to prepare the data for sinking deep caissons in a sand subsoil, and then should find unexpectedly from the drills that solid rock underlies three-fourths of his building area at a depth of twenty feet. Would he go on to order the caissons, wait six months for them, blast out the solid rock, and sink his caissons in spite of all? He has got his solid foundation without them; shall he needlessly spend all the time and money on them nevertheless? There is only one answer to this for the architect. But the judge with his rules of evidence doggedly persists in the other answer.

Of late years, in England and Canada, the system of settling issues before trial by a master or judge in chambers, and the general spirit of the Rules of Court of 1883, has placed those courts (so we hear) where they should be in the present respect. But in the United States no signs anywhere appear of such a spirit. Read any brief; read any opinion. In vain you search. The wrangling at the trial, and the logic-chopping in the opinions, go on pertinaciously, regardless of whether there is any real basis for dispute as to the fact.

What is wanted is a principle something like this: *A rule of evidence need not be enforced, if the Court, on inquiry of counsel or otherwise, finds that there is no bona fide dispute between the parties as to the fact which the offered evidence tends to prove or as to the danger which the rule aims to safeguard.*

## PREFACE

Such a principle, faithfully observed by judges, would clear the air of much of the legal malaria now caused by the rules of evidence.

2. *Trial Court given no Discretion.* Another marked shortcoming is the Supreme Courts' habit of treating the rules of evidence as a rigid steel-work invariably applicable in precisely the same way. The rules are never allowed to bend. The Supreme Court, sitting up aloft, far removed in time and space from the actual trial, does not know whether the case was one in which the rules might have been allowed to bend; therefore the rules are rigidly enforced on appeal, and hundreds of new trials granted accordingly.

But this is highly academic and unpractical, — as unpractical as the chambered abstractions of any professorial dryasdust. Every man of experience knows that the rules of evidence are based on generalities, on broad policies of experience, and are meant for typical situations, — but for those only. We all know that in the application of them, from case to case, the abstract situation, for which they are supposed to be meant, does not necessarily exist; it is varied, in the case in hand. And therefore the rule should bend. For example, one Supreme Court has a rigid rule of thumb, for proving loss of the original of a document, that inquiry must have been made of the last possessor. This is a very sensible rule, *as a rule*, but to enforce it rigidly without exception, as that Court does, is the opposite of sensible.

Again, the application of most rules of evidence to the facts depends on circumstances so varied and so elusive that no appellate court can expect to be well possessed of them from the bare record. The trial judge, on the other hand, is well possessed of them. Why should the Supreme Court insist on including that part of the work in its function? For example, a party desiring to use a copy of a lost original must show due diligence in searching for the original. This preliminary fact is best decided by the trial Court. Yet in hundreds of opinions the Supreme Courts attempt to pass on that question.

True enough, Supreme Courts are frequently found declaring that the application of a rule was "in the trial Court's discretion, unless that discretion was abused." But mostly, we regret to say, this expression is, as the Spaniards say, mere palaver. For the Supreme Court then goes on to examine elaborately the trial Court's ruling, and, as likely as not, reverses it. In other words, it is often an abuse of discretion not to agree with the Supreme Court, if the latter on its lesser information takes the opposite view. The Supreme Judicial Court of Massachusetts, on many rules, does faithfully relegate their application to the trial judge. In no other Supreme Court is any such habitual attitude noticeable.

What is wanted is a sharp distinction, faithfully enforced, between the rule, of law and its application. On the former — the tenor of the rule — the Supreme Court should determine. On the latter, the trial Court's ruling should be final. And for most rules, the principle should also be recognized that, for special reasons, an exception may always be made by the trial Court.

## PREFACE

3. *Charging the Jury on the Weight of Evidence.* Another radical shortcoming is the prohibition to the trial judge (outside of the Federal Courts and those of a few Atlantic States) to express his views to the jury on the weight of the evidence in the case.

This is a large question. Many members of the bar strongly prefer this practice. Yet many others are coming to believe that the other and orthodox practice, coeval with the jury system itself, is after all the only wise one. But here it is desired merely to point out the way in which the present system maximizes the weaknesses of the rules of evidence.

Those rules are mainly aimed at guarding the jury from the overweening effect of certain kinds of evidence. The whole fabric is kept together by that purpose. The rules are supposed to enshrine that purpose. Hence, of course, when such evidence enters in technical violation of that rule, the apprehended harm may be done, — *i.e.* the jury *may* be misled or mis-affected by it, to the hurt of the truth. And so, the harm being possibly or probably done, but incurably, now that the jury has gone, the Supreme Court can only say, "Try it over, with another jury."

But why use such a cumbrous method? Why not let the trial judge correct the possible misimpression by a few words at the trial? In hundreds of instances this can be done with entire effect and safety. Take the Opinion rule, for example. A policeman, on a murder trial, telling about the bloody hatchet he found, is asked, "Was it human blood?" and the answer gets in. "Yes, it looked to me like human blood." Instead of ordering a new trial because the jury *might* give to this layman's guess a value which it does not have, why not let the trial judge say to the jury in his charge: "You must not pay any attention, gentlemen, to the policeman's notion about the blood being human. He knows nothing about the difference between different kinds of blood. He is no expert in blood. You heard chemists here, on both sides, testify from their analyses and give their reasons and scientific processes. Decide from their testimony. Do not mind what the policeman thought."

Hundreds of petty slips could be amply corrected in this way. But not under our present system. No; the ponderous machine of a new trial must be laboriously set going again from the beginning; all the complicated levers, cranks, cogs, and wheels must turn once more; and vast effort and tedious time again be consumed, — all to do what could as well be done by merely removing the gag from the trial judge's mouth.

Any one who will study the opinions of Supreme Courts can satisfy himself that the permission to the trial judge to express his opinion on matters of evidence would remove a large part of the supposed harm done by trifling transgressions of the rules of evidence, and would thus remove much of the abuse of new trials.

**II. The Law of Evidence; its Faults and its Future.** Suppose that we were now to change the law of Evidence, at needful points; what changes should be made?

## PREFACE

Before offering a critical summary of such changes, three or four general facts must be rehearsed ; for perhaps we do not all realize them to be facts, and perhaps extreme partisans on either hand will benefit their cause by conceding them.

1. A *complete abolition* of the rules is at least arguable, — not merely in theory, but in realizable fact. They are to-day mostly ignored in the practice of four important jurisdictions, — in the Interstate Commerce Commission, in Patent litigation, in Admiralty trials, and in (some of) the Juvenile Courts. This shows that, in the United States and to-day, justice *can* be done without the orthodox rules of Evidence.

These four exceptional cases are of course explainable as abnormal. In the first place, there is in all four practices no separation of jury and judge ; and the safeguarding of the lay jurors from misleading evidence is a main reason for the orthodox system of Evidence. In the next place, there are no lawyers (ordinarily) in the Juvenile Court ; while, on the other hand, the practice of the first three classes of cases named is chiefly in the hands of a select group of specialists, both judges and lawyers ; and this makes for mutual confidence, discouraging petty evasions of the rules, and also petty insistence upon them. And there are other explanations. The one place, however, where the absence of the rules receives a fair test most nearly approaching (but for the jury) the conditions of ordinary civil and criminal jurisdiction is the Juvenile Court, — at least, the Chancery type of it (as in Illinois and Colorado), not the Criminal Court type of it (as in New York). Whether it can permanently demonstrate its ability to dispense with the rules, remains to be seen. Meanwhile, it must not be taken as a demonstration, but merely as a suggestion that the thing is not so impossible as the Bar would have supposed, ten years ago.

2. To *abolish* the bulk of the rules, in the ordinary courts, would be a *futile* attempt. To pass a law (supposing this possible, in the hasty manner of our "freak" legislation) would amount to little or nothing. You cannot by fiat legislate away the brain-coils of one hundred thousand lawyers and judges ; nor the traditions embedded in a hundred thousand recorded decisions and statutes. And the plain fact is that trials are to-day being managed by these men and these books, as the living receptacle of the rules. More than this, the temperament is there, — the temperament in which the rules find a solid lodgment and nourishment. The thing has been tried in many countries and in many ages ; and as a reform it has never succeeded (exceptions excepted), even when enforced by a powerful government. As an importation of alien law (which is not the case in hand), it has sometimes succeeded, but only after a century or more of slow pressure. Any one who knows our profession from within knows that it would be a vain dream to think of abolishing the rules of Evidence, as a system, until all mature practitioners and judges now alive had passed into the grave. And in the meantime, since trials must go on, a new generation will have been bred into the same system.

## PREFACE

Furthermore, assuming that the fiat were issued and accepted, the new method would have all the risk of an experiment only. We cannot be sure how it would work. We have no experience except under the present system. The present one has some deep roots in the necessities of human nature. And, as human nature will go on just the same, can we expect to handle it without any rules at all? Certainly as much false justice may be done by a chaotic trial as by a chess-game trial. Do we know that our judges and our lawyers, as men, and without any rules, will be able and willing to manage the ordinary jury trial, in matters of proof, as successfully as (for example) the Interstate Commerce trials are managed?

And so, much as we might wish to try the experiment, and promising as the other examples may be, it is hopeless to plan such a radical change. We may as well realize that the change will have to come as a growth, — a growth of improvement both in the rules and in the men. And this is the way in which almost all legal progress, that was *progress*, has come about.

3. Most practitioners, to-day, are *unskilled in the rules of Evidence*. This is a hard saying; but those who ought to know report it so unanimously. The trial judges know the rules better, but still imperfectly. Is it not startling to reflect on the meaning of this?

It means, in the first place, that the rules to a large extent fail of their professed purpose. They serve, not as needful tools for helping the truth at trials, but as game-rules, afterwards, for setting aside the verdict. Neither lawyer knew them well enough to avoid numerous violations of them at the trial; but afterwards the defeated lawyer (having duly emitted a gatling-gun fire of objections) studied a few of them for the purpose of pointing out on appeal his opponent's errors. If, then, the new trial is needed because neither the successful lawyer nor the trial judge knew the niceties well enough, then by hypothesis the system of evidence failed, after all, for that trial, to accomplish its purpose.

And, in the second place, it means that there are thousands of trials in which neither attorney knew enough either to observe the rules' niceties or even to point out his opponent's errors, and yet a verdict was reached which satisfied the judge. In other words, owing to ignorance of the rules, they were not enforced, and yet justice (presumably) was as well done as if they had been enforced. How far this is the fact, no one can know. But the widespread ignorance of the rules shows that it *must* be a large fact. And the moral is that we can probably get along just as well without enforcing many of the niceties of the rules.

4. The *jury* of laymen must be reckoned with. Our system of Admissibility is based on the purpose of saving the jurors from being misled by certain kinds of evidence. Their inexperience in analyzing evidence, and their unfamiliarity with the chicanery of counsel, distinguish them from the judge in this respect. As long, then, as the jury system is retained, certain fundamentals (at least) in our rules of Evidence must be retained.

## PREFACE

To be sure, the jury itself might be abolished. Here we have the examples of the Interstate Commerce Commission, and the others, to warrant us in supposing that the rules of Evidence might no longer be needed. Will it be, or should it be, abolished? This is a hard question, nowadays, for some to answer; for a few, it is easy. For some of those few, it is easy to answer: No.

In the first place, no one would think of abolishing jury trial merely to enable the rules of Evidence to be discarded. It would have to go by reason of its own defects, if at all.

In the next place, its own defects may be incidental and remediable, not inherent. They have never been fully examined with this distinction in mind. Some of them are obviously incidental accretions of American practice, and are no essential part of jury trial; for example, evasion of jury duty by responsible citizens, excessive challenging, over-nice disqualifications. All these have tended to reduce the intelligence of the jury; and a restoration of jurorial intelligence (which the change of these practices might effect) would render so much the more needless the precautions of the rules of Evidence.

Again, the constitutional limitations upon jury trial have prevented (except in three or four States) any experimenting with a jury system improved but not abolished. It will be time enough to flee to our Charybdis, the judge-jurors of fact, when we have sufficiently tested the possibilities of our Scylla, the lay-jurors of fact. Till then, it will be wiser to wait.

We must keep in mind, then, that the modern American jury's defects are in large part non-inherent and remediable, and that we have experimented very little with its great possibilities of improvement. How, then, can we fairly propose its radical abolition?

With this in mind, and also the vast popular agitation which must inevitably precede any radical step, it is safe to assume that jury trial will be with us for at least a generation to come. If so, the improvement of the rules of Evidence must be made with the retention of the jury as a necessary condition.

5. Our system of Evidence is *sound on the whole*. In the first place, it was and is based on experience of human nature, — and that is saying a great deal for it. It was not created by legislative fiat, — like our Patent law. It was not devised by chambered jurists, — like the German Civil Code. It was not (for the most part) founded on anachronistic tradition, — like some of our Property law. It simply grew. And it grew during the last two centuries, so that its human nature basis is not far enough away to be possibly out of date.

That human nature is represented in the witnesses, the counsel, and the jurors. All three have been considered, in their weaknesses. The multi-fold untrustworthinesses of witnesses; the constant partisan zeal, the lurking chicanery, the needless unpreparedness, of counsel; the crude reasoning, the strong irrational emotions, the testimonial inexperience, of jurors, — all

## PREFACE

these elements have been considered. Tens of thousands of trials have forced them out into the open, where thousands of judges have observed them; and their observations have profited by them, in thinking out principles and formulating rules.

All this has not been created out of nothing; it rested on a solid basis of experience in human nature at trials. And that human nature has not essentially changed. The main basis is there yet. The changes have not been in the great factors.

The rules of Evidence, then, are to have at least that presumption in their favor which sensible critics always give to the conclusions of experience, even when all of the data of that experience are not specifically known to the critic.

In the next place, that human nature, in the same factors, will always be with us. Witnesses, counsel, jurors, will continue to exhibit similar weaknesses. The trial will always be struggle, revealing nakedly those weaknesses. And there will always have to be some apparatus for testing and checking those weaknesses. We can expect to improve the apparatus, but not to ignore the weaknesses. And just as long as man continues to be a reasoning animal, and to desire to profit in his narrow personal task by the combined experience of others, just so long will trial judges crave and devise generalized rules for making some headway through the welter of lies and errors and doubts and documents and inferences that is heaped up before them at a trial.

The lone judge seeks support and relief in these generalized rules. He cannot intellectually avoid it. Make him (and not the jurors) the judge of facts and he will seek it just the same. For four centuries the fact-judges of Continental Europe worked with a system of self-devised mechanical rules, which they have now for a century repudiated as shackles; but what now seem shackles were but the effort of the helpless human individual, weighted down by his responsibility and his doubts, to seek relief in a system of rules. And it may safely be asserted that one reason why the modern American trial judge (since 1850) has so unduly exalted the "technicalities" of Evidence rules is that he is less sure of himself, less strong professionally and temperamentally, than his American predecessors and the English judges, and hence seeks relief and refuge in the elaborate system of rules of Evidence.

And so we may as well understand that (for some time to come) the tendency to keep a system of rules of Evidence, as a refuge for the judge in handling the problems of human nature, will be inescapable.

And, in the third place, the present rules as a whole are sensible ones. Taking each of them in the big, there is hardly one that is not based on some aspect of human nature, which needs some such a rule of warning. (Always the Opinion rule must be excepted; for that was never anything but a futile historical bastard.) And, when out of the whole bundle, we select the three or four great principles which clash most sharply with the practice of other countries, — the hearsay rule, the character rule, the privilege against self-crimination — we find that they are among the contributions of Anglo-American character to the world's types of justice; they represent deep traits

## PREFACE

of variant civilizations, bound up with our whole attitude, — not to be lightly changed, nor without changing ourselves.

The way we use the rules is one thing; but the rules themselves are quite a different thing. Our abuse of them should not obscure our minds to the good sense that is in the rules. And the petty details and infinitesimal absurdities to which they have been elaborated need not force us to disown the substance of their good, any more than the systematic excesses of college athletics oblige us to reject the sound core of physical training for youths.

6. Our *judges* and our *practitioners* must *improve in spirit*, as a prerequisite for any hope of real gain to be got from better rules. In the end, the man is more important than the rule. Better rules will avail little, if the spirit of using them does not also improve.

Counsel must become less viciously contentious, more skilful, more intent on substance than on skirmishing for a position. The whole condition of below-par, now noticeable, is here involved. It has many symptoms and many causes. Enough here to note that some of them directly affect counsel's handling of the Evidence rules.

Judges must become stronger and better equipped at the trial bench, and more liberal and more justice-seeking on the appellate bench. The rules must be treated only as means to an end; and this cannot be until the men on the bench see them in that light and make it a prime aim to treat them so. The rule is the complement of the man. The weaker the man, as a dispenser of justice, the more the rule is exalted and the stiffer its bonds become. Improvement of the rules will need more sympathy and intelligence to handle them effectively.

ALL THE RULES IN THE WORLD WILL NOT GET US SUBSTANTIAL JUSTICE IF THE JUDGES AND THE COUNSEL HAVE NOT THE CORRECT LIVING MORAL ATTITUDE TOWARDS SUBSTANTIAL JUSTICE.

And now, with these premises, we may survey the merits and needs of the rules of Evidence themselves.

**Merits and Needs of the Rules of Evidence.** *A. In general.* The three general defects, running through the whole system — in its use, mainly, not so much in its fabric, are: *Inflexibility*, *Exaggeration of Details*, and *Exaggeration of Errors*.

1. *Inflexibility.* This is a plain enough vice. It is due to the exaltation of the rule into an end in itself, instead of a means to an end, *viz.* a correct verdict.

How can this vice be got at? By applying measures which involve least change with most efficiency. These would seem to be three.

(a) The rules are now enforced, as such, *regardless of whether a dispute exists* in the case in hand, which the rule would serve to safeguard. This defect has been already enlarged upon (*supra*, I, B, 1; p. xii). To remedy it, a simple expansion of the principle of Judicial Admissions will furnish the tool.

Let the Court decline to enforce the rule if, on counsel's admission, there is

## PREFACE

no need for it in the case in hand; and let the Court require counsel to make proper avowals.<sup>1</sup> Put in the form of a Code section, this principle might be thus phrased: "*A rule of Evidence need not be enforced if the Court, on inquiry made of counsel, or otherwise, finds (a) that there is no bona fide dispute between the parties as to the fact which the offered evidence tends to prove, (b) or as to the danger which the rule aims to safeguard.*" This principle may to some seem somewhat loose. But the law of Evidence needs a good deal of loosening; and in this respect, at least, we can afford to do some experimenting.

(b) The rules, as now enforced, are not left at all to the *trial Court's determination*, but are defined and applied by the appellate Court. This defect has already been outlined (*supra*, I, B, 2; p. xiii). The question is how to get at it, without abdicating the appellate Court's function of defining the law. A fair and workable distinction would seem to be the distinction between the tenor of the rule itself (which is the main thing to safeguard), and its application to the specific offer. This distinction could be enforced in the following form: <sup>2</sup>

"1. In all rulings upon the admissibility of Evidence, the trial judge's ruling is final and absolute; subject to the following distinctions and exceptions.

"2. The trial judge is bound to obey the rules of Evidence, and therefore does not have discretion, in the sense of determining the admissibility of evidence by his personal views or changeable beliefs as to what is just.

"3. The trial judge's determination is not final (i.e. it is subject to the usual methods of appeal) in so far as his statement of the tenor of a rule of law is objected to as an erroneous statement of the rule.

"4. The trial judge's determination is final,

"(a) In the application of a rule of Evidence to a particular offer of evidence; and

"(b) In the finding of any facts preliminary to or otherwise involved in the application of the rule to the offer."

If the bench and the bar could stomach this simple dose — a mere extension of the present principle of judicial discretion — a vast mass of needless matter would be purged from our system of trials and appeals.

Here again, however, we encounter the man-element — the need of personal improvement, not merely of better rules. In many (or most?) trial courts to-day, and in many (or most?) trials, the typical incident is: *Counsel A*: "Now state to the jury what you thought—"; *Counsel B*: "Object!"; *Judge*: "Objection overruled!"; *Counsel B*: "Exception!" And so far as this blind and unintelligible canine snarling and yapping may be assumed to be an incurable trait, no rule like the above could serve. For, to that end, in the first place, both judge and counsel must know what rule is supposed to

<sup>1</sup> How the Court should deal with disingenuous counsel is a large problem, which itself also needs attention. This shows how the improvement of Evidence rules is bound up with other improvements.

<sup>2</sup> In the writer's "Pocket Code of Evidence," these phrasings have already been put forward (§§ 49-52), with some comments.

## PREFACE

apply; and, next, the rule must be openly *stated* so as to separate the rule itself from its application. Until all court officers improve in knowledge and in spirit, no improved law can serve the situation. How disgraceful and degraded it commonly is, we seldom pause to reflect. And its worst feature is that it has dragged down our most accomplished and highminded practitioners to employ their talents in this ungentlemanly spectacle.

(c) The rules are now enforced with over-strictness, on appeal, because there is *no corrective* to avoid the possible *misleading of the jury's mind* by the violation of the rule. The trial judge being a mere umpire — and a dumb one, at that, as to the jury — the appellate Court feels obliged to order a new trial, and thus to vindicate the rule. If the appellate Court could have some assurance that the jury had been duly warned of the net value of the evidence, it would not feel bound to treat the error as vital. In other words, a large part of the sacred inflexibility of the rules, in the appellate Court's treatment, is due to the lack of any dependable corrective at the trial.

That corrective is the *trial Court's charge on the weight of evidence*. This needed remedy has already been outlined (*supra*, I, B, 3; p. xiv). Enough to say here that the abandonment of that orthodox practice, fifty or sixty years ago, was one of the greatest mistakes the American people ever made. The sin of our fathers is now being visited upon us. And the depressing feature is the bigoted alarm which so many good practitioners feel at the proposal to revert to orthodoxy. They shudder with the needless dread of the blindfold fraternity neophyte who at his initiation extends his arm to be branded with — a lump of ice! And they seem unwilling even to reflect upon the surviving example of the Federal system; for the latter's concededly excellent method is within every one's reach to observe in a hundred courts all over the land; and yet the conservatives act as though the judge's charge on the evidence were something anachronistic and un-American, suggestible only by a revived emissary from King George the Third.

What is wanted is a general return to this safeguard of jury trial, in some such principle as this:

*"The judge may express to the jury, after the close of evidence and argument, or from time to time before then, his personal opinion as to the credibility or weight of the evidence or any part of it."*

The foregoing three measures, then, are both needful and practicable for removing the first great defect of our rules, their Inflexibility.

2. *Exaggeration of Details*. This next great defect is hardest to get at. It cannot, apparently, be got at directly. You cannot stop the working of logic. And if the working of that logic — say, of the rule for accounting for the absence of an original document before using a copy — leads to numerous petty detailed rules, each one unavoidable in logic, the problem of drawing a line somewhere and declaring "Here the rule shall stop; it is getting too refined and subtle and petty" — this problem is practically insuperable,

## PREFACE

considering the difficulty of reaching an agreement as to a thousand such points and as to communicating this agreement to practitioners and judges.

So the remedy must be sought by indirection. In other words, minimize the effect of such details. What specific measure could avail to this end, we are unable to suggest.

3. *Exaggeration of Errors.* This third defect lies at the doors of the appellate Courts. The nauseous and intellectually disgraceful doctrine of "reversible error" has too long stained the pages of our appellate opinions. Much has been written and legislated against it; and time will bring its complete erasure from our records. No more need be said against it here.<sup>1</sup>

But a warning should be sounded against futile measures. They are too commonly seen in the phrasings of legislative proposals. They commonly run: No new trial shall be granted where the errors "do not affect the substantial rights of the parties," or "do not cause any manifest wrong or injury," or "do not prejudice the defendant," etc. These abstract terms do not bind the minds of judges who believe that there are vested rights in the observance of the rules of Evidence. — Another form runs: No new trial shall be granted "if the evidence erroneously admitted or excluded *would* not have changed the result." But this form, conversely, is too narrow; for it obliges the appellate Court to speculate upon what the jury *would* have done, and this speculation will easily lead to reversals on far-fetched hypotheses. — The sound form requires the appellate Court to determine according to what the jury *should* have done. And more than one Court has gone to this length, in these words: "We do not reverse for the error, because the verdict rendered is the only one that could have been rendered by the jury," or "because we can clearly see that a correct result was reached by the jury."

We now come to consider the specific rules of Evidence.

### *B. Changes in Particular Rules.*

The question is to be asked, for each of the main rules: *should it be abandoned, or at least be radically altered?*

The order of topics used in this Treatise may be followed. The three main groups are (in Book I, What Facts are Admissible): Part I, Rules of Relevancy; Part II, Rules of Auxiliary Probative Policy; Part III, Rules of Extrinsic Policy.

**Book I. What Facts are Admissible. Part I. Rules of Relevancy, etc.** Here we have three further groups: Title I, Circumstantial Evidence; Title II, Testimonial Evidence; Title III, Autoptic Proference.

*Title I. Circumstantial Evidence.* There are here three general controlling policies, viz. the avoidance of Undue Prejudice, of Unfair Surprise, and of Confusion of Issues. But these policies result in but two main rules, and the multiplicity of sub-rules and exceptions is due to the firm instinct of Courts

<sup>1</sup> See § 21 of this Treatise and Supplement.

## PREFACE

to avoid trespassing on these two main rules. One of them is the rule against using Personal Character; the other is the rule against using Particular Instances of External Happenings.

1. *The rule against Character.* This appears in two further separate rules. One forbids the use of a *party's general traits of character*, unless exceptionally; the other forbids evidencing it, in the excepted classes of cases, by *particular instances of conduct*, unless exceptionally. The former rests on the policy of avoiding Undue Prejudice; the latter rests on the same policy, plus those of avoiding Unfair Surprise and Confusion of Issues. Are these policies sound in the main, as represented in those rules?

We are convinced that the policies and the rules are sound, in the main. (1) The policy of avoiding Undue Prejudice is based on weaknesses of human nature which are to-day as obvious as ever. In criminal cases, this policy is one of those that marks off the Anglo-American system from the rest of the civilized world. Nothing in the French system attracts us to believe either that it is intrinsically better than ours, or that it would be workable with our judiciary and juries. Our own rule represents a safeguard against a real danger to which the search for the truth will always be liable so long as the decision of facts is committed to any but Solomons. The failures of justice, now observable in the pursuit of offenders, are not attributable to this rule, but to many other and independent conditions. — In civil cases, the rule is equally needed, especially in personal injury cases, where emotion is apt to overpower calm reasoning. — What is needed, however, is less fetish-worship of the rule. With the proper safeguards of the judge's charge on the weight of evidence, of a sane rule for new trials for error, and the like (noted *ante*, pp. xii–xiv), no obstruction to justice need be apprehended from this policy. (2) The policies of avoiding Unfair Surprise and Confusion of Issues are much less important, and have been greatly overworked. The dangers they are meant to guard against are merely exceptional contingencies. Cast-iron rules are not suitable for protecting against such contingencies. Flexible rules are here the need. The principle of the trial Court's discretion (*ante*, p. xiii), with the other relaxatory rules above noted, would here furnish ample protection. Most of the thousands of rulings here involved could as well have been disposed of by those principles, and need not have cumbered our records; while the general principles would have been preserved.

2. *The rule against Particular Instances of External Happenings.* Of the three great policies above mentioned, here the second and third are chiefly involved, — *i.e.* avoiding Unfair Surprise and Confusion of Issues. Most of the rulings here recorded are far-fetched; many of them were needless obstructions to the search for truth. The policies are sound enough, — emphatically so. The evil has arisen from using the policies as inflexible rules. They apprehend merely contingencies. They are as if a man resolved never to go out of the house in winter because he feared that he might slip down on the ice; but the sensible man goes out, keeps a watch for icy spots, and then steps around them. Here again the principle of the trial

## PREFACE

Court's discretion would bring almost all of the needed relief. Justice Doe's opinions have demonstrated this, once for all.

3. *Sundries*. There remain the miscellaneous mass of sub-rules which are due, directly or indirectly, to the purpose of not infringing on these other main rules; *e.g.* the rules about admitting former crimes as evidence of Intent, etc. These present a difficult problem. As long as the above main rules of exclusion are kept, and no matter how much they are liberalized, the task of defining the boundaries will be inevitable. Our best hope is that this minor mass of quiddities can be sufficiently taken care of (*i.e.* to prevent obstruction) by the general safeguards already proposed (*ante*, pp. xx-xxii), — the judge's charge on the evidence, the liberal new trial rule, the trial Court's discretion, etc.

*Title II. Testimonial Evidence.* This includes three groups of rules, for Testimonial Qualifications, Impeachment, and Corroboration, respectively.

1. *The rules requiring certain Testimonial Qualifications.* Here the sound general policy suited to the times is to complete the abandonment of rules of exclusion, and to rely upon the testimony itself for criteria of its weight. For one reason, the tendency of a century past has been in this direction. For another reason, the present lines of definition of the elements which make a witness admissible are out of harmony with the teachings of science, and have become merely arbitrary. No one can maintain that there is in reality any such vital distinction as the law now draws between witnesses that may be listened to and weighed and witnesses that may not be listened to at all.

(1) In the first place, the few remaining rules of exclusion based on Mental Derangement and Immaturity may as well go. They are vain.

(2) In the next place, the rules, now remaining in many States, excluding a person Convicted of Crime, must go. They have been anachronisms for fifty years. They are arbitrary and futile obstructions.

(3) In the third place, the rule universally in force (except in four or five States) against the Survivor of a transaction with a Deceased Person, must go. It is of a piece with the long discarded disqualification of interested persons. It involves a mass of verbal technicalities, and it shuts out at least as much truth as falsehood.

(4) In the fourth place, the disqualification of Husband and Wife to testify on behalf of each other (still preserved in about a third of the States) must go. It was repudiated sixty years ago in England.

(5) Finally there is the rule requiring Personal Observation by the witness' own senses. This is a healthy rule, — no wiser or safer was ever devised. It raises the quality of our verdicts, by forcing the parties to seek for the most trustworthy testimony. But it needs to be more flexible. It should have numerous general exceptions; and it should receive constant exceptions, without definition, for casual details, in every witness' testimony, where its strict enforcement is pedantic. Here, again, the principle of the

## PREFACE

trial Court's discretion, with the others already noted (*ante*, pp. xx-xxii), would bring most of the needed relief.

(6) The rules for Refreshing and Recording Recollection are a troublesome snag. They are based, indeed, on good sense and logic. But the historic precedents have left the law much confused; its distinctions are of little real importance compared with others which modern science points out but the law does not enforce; and the present rules cannot be administered without barren technicalities, difficult to master. On the whole, they seem to do more harm than good. Reliance on cross-examination would probably answer the purpose, together with two or three simple rules that could be retained.

2. *The rules excluding certain modes of Impeachment.* As to general considerations, it would seem that we overwork certain modes of impeachment, and that we underestimate others. Apparently, in the Continental countries, little stress is laid on these things, — not enough, to be sure. We possess the great sound idea, viz. that you never can tell how credible a witness' assertion is until he and it have been thoroughly scrutinized in every aspect. Here modern psychological science confirms our inherited tradition.

But where we part from science is in overemphasizing certain elements and underemphasizing others.

What we overemphasize is the witness' moral character. No need to expound here the several details of this fallacy. "No case! Abuse the opponent's witness," — this anecdotal instruction to a certain counsel expresses truly enough the tendency too frequently seen with the mass of trial practitioners. Probatively, the cause is seldom advanced, by these methods, as much as we think.

What we underemphasize, on the other hand, is the study of the witness' personal equation as to temperament, memory, the bases of perception, etc., etc.<sup>1</sup> We are satisfied to use a few practical expedients — contradiction, self-contradiction, etc. — without really understanding their probative force. What we need, therefore, is to develop the study of testimony as affected by these various elements, and to lessen our reliance on the crude bludgeon of character-evidence. But this must be a development of the future.

Now as to the specific rules of exclusion. They hardly need radical change; the change should come mostly in the manner of using what is already admissible.

(1) The rule excluding proof of specific instances of misconduct by extrinsic testimony does very well; it is based mainly on the sensible policies of avoiding Unfair Surprise and Confusion of Issues. The rule allowing such inquiries (in all but a few States) on cross-examination of the witness himself is a fair rule, — when left to the trial Court's discretion, and not dragged up needlessly (as it usually is) to become an appellate Court question.

<sup>1</sup> See the passages collected in the present writer's "Principles of Judicial Proof" (1914).

## PREFACE

(2) The rule excluding contradiction and self-contradictions, when evidenced by other witnesses, on "collateral" points is another healthy rule, — easy to administer if left to the trial Court's discretion.

(3) The rule requiring a prior inquiry to the witness before proving a self-contradiction is a sensible one; but it is enforced with needless and harmful inflexibility. It should have several general exceptions, and should be left entirely to the trial Court's discretion. That application of it to documents, known as the rule in *The Queen's Case*, is a lamentable error in logic and in policy, long ago discarded in England and some of our States, and should be abolished out of hand.

(4) The rule against impeaching one's own witness is an irritating relic of worn-out tradition, — a relic of the Saxon days of the compurgation-system. It does as much harm as any one rule in our system. No party "owns" a witness, and this rule tends to cultivate the too natural features of partisanship which must always attend our system of trials. If a witness is unworthy of credit, let this be shown up, no matter who first called him. If the counsel has been guilty of disingenuous conduct, let the Court deal with him. None but fantastic reasons were ever put forward for the present rule. As great a criminal judge as Chief Justice Furman has spoken in favor of the rule; and that obsession, no doubt, is widespread. But it is an illusion, which would be dispelled by a short experience under trials without the rule.

3. *The rules excluding certain modes of Corroboration.* These seem to be more or less futile, and not worth while keeping. What they now exclude would not seriously infringe on the policy of avoiding Confusion of Issues, and does involve some useful probative material. We know so little scientifically, as yet, of the logical and probative bearings of this kind of evidence that we can hardly afford to exclude any of it. One kind, in particular, the Courts perversely shut out, under the present rules, viz. a witness' identification of a party when first confronted with him before trial and freshly after the event; for the sake of eliminating this incredible perversity, it would be a fair bargain to let all these rules go, — if that were necessary.

4. The rules for *parties' admissions* should be liberalized. And yet, to enlarge their definition would, of itself, probably be of little avail. The Courts are to-day looking at this subject through the large end of the telescope; the principle looks to them unduly narrow. Their timidity at receiving agents' admissions, in particular, must improve; here the practice of courts is far away from the realities of commercial life. The subject, moreover, is to-day loaded with logical quiddities, more or less futile.

*Title III. Autoptic Preference.* Here we are fortunate in having withstood successfully the pressure to adopt any rule of exclusion for autoptic preference at the trial.

But for preference out of court, i.e. the jury's view of a place or object irremovable into court, we are still laboring under a rule of exclusion which is so unscientific and so unpractical that to call it childish would be unfair

## PREFACE

to the intelligence of childhood. The still prevailing limitations on juries' views come down to us from the technique of feudalism; England herself has long shaken them off; but (except in a few States) we remain supine. If a sensible man wants to make sure whether a window is broken or a house burned down, he puts on his hat and goes out and sees for himself what the fact is. But our Courts seem to regard a jury's view as if it were an act which would expose them to an infectious disease or a moral contamination. And all related methods, such as the impounding of an object causing damage, or the preparatory inspection of premises by witnesses, are equally frowned upon, so far as the Courts' assistance is concerned. One timid Court, for example, in the case of a boiler explosion, where the common-sensed sheriff had impounded the boiler so that proper evidence of its possible defects could be timely obtained, pronounced it a wrongful act and made the sheriff liable in damages!—This whole spirit of impotence must be abandoned. To that end, the present limitations of rule must be replaced by the unlimited English rule, which goes beyond the halfway measures now in the Codes of California and a few other States.

**Part II. Rules of Auxiliary Probative Policy.** Many of these are the peculiar product of the Anglo-American genius for practicality, and in principle are wise and indispensable. A few of them are barren technicalities. A few of them are the product of our American distortion of the jury-system, and their change would be bound up with other conditions.

*Title I. Preferential Rules.* 1. The rule for *producing the original of a document*, where that original is available, is a rule of practical good sense, which no one need think of abandoning. And its details have been worked out, on the whole, with only necessary logic and consistency. Its trouble now seems to be that there is too much logic about it, *i.e.* the mass of detailed applications of it form so cumbrous a mass that, though their logical connection may be unimpeachable, they are practically unmanageable. To apply the details with such minute correctness is not worth the while, in most cases.

This is a hard situation to meet, by mere rule. A few Courts have tried to cut the Gordian knot by holding the rule to be not enforceable when the document is merely "collateral"; but this, though a move in the right direction, has not been successful. Much could probably be accomplished here by the two general principles already noted (*ante*, pp. xx-xxii), viz. judicial dispensation of the rule where the parties are really not in dispute over the probandum, etc., and trial Courts' discretion in the ruling.

2. The rule for *calling the attesting witness* has, by legislation everywhere, already been reduced to a minimum of obstructiveness; and what remains is sound in principle. It needs only an infusion of flexibility, which the general principles already noted (*ante*, pp. xx-xxii) could presumably effect.

*Title II. The Hearsay Rule.* We come here to the greatest and most distinctive contribution of Anglo-American law (next after the jury trial)

## PREFACE

to trial procedure. Bentham thought this much of it, and we can afford to continue in that conviction.<sup>1</sup> But if it is the greatest and most valuable, it is also (like other great truths) overworshipped and overworked, — especially in its unessential details. The difficulty about it is that it has two principal aspects, one of which is vital and the other is not.

(1) The vital aspect is that we are *not to credit any man's assertion until we have tested it by bringing him into court* (if we can get him) *and cross-examining him*. Now the development of this art of cross-examination, during two centuries, is the great valuable contribution of the rule. And modern psychological science confirms emphatically this empiric result; for it has shown us something of the hundred lurking sources of error that inhere in all testimonial assertions; and we now perceive that our traditional expedient of cross-examination was the true way to get at these sources of error, and that it owes its primacy to permanent traits of the human mind. To abandon our insistence on the necessity of this test would be to surrender the best single expedient anywhere invented for getting at the truth of controversies. For this reason, the abandonment of the Hearsay rule, in this vital aspect, is unthinkable.

(2) But it has another aspect. By the rule for a witness' qualifications, personal knowledge is required, and this works out as follows: The witness who testifies about an affray between A and B at the corner of Broad and Washington streets must have been at the corner of those streets where he could see and hear the matters he testifies to. So that if witness X begins to testify about the affray, and it appears that he saw and heard nothing of the affray itself, but merely sat next to Y in a street-car going home and heard Y's story of the affray, we discard X immediately and insist on having Y; because X would be giving us virtually *nothing but Y's assertion*, and we will not accept Y's assertion unless it is made here in court where we can test him and it. Now thus far we are merely enforcing the Hearsay rule in its vital aspect; *i.e.* we are refusing to credit Y's untested assertion, offered merely through X as a mouthpiece, — precisely as we should have refused to receive a letter written to the judge by Y. But suppose that X, the first witness, was actually at the street-corner in issue, and did see and hear the affray, and thus is fully qualified with some basis of personal observation for his assertions; then, when he launches into his story, we may expect to find interspersed in it: "As I came up to the corner, I heard the clerk in the drug store shout, 'Who threw that stone at the window?' . . . And the boy said, 'There come the police.' . . . And when he went off, a man said, 'Here is the knife he dropped,' and I gave it to the policeman and said," etc., etc. It is at this point that the Hearsay rule is overworked. This is its incidental aspect, *i.e.* logically, each one of these quoted remarks is a hearsay assertion, and we must exclude it and wait till the various persons themselves can be offered, to tell what they saw. And yet each one of these re-

<sup>1</sup> The testimonies from various authorities, quoted in this Treatise at § 1367, deserve re-perusal, by any one who doubts.

## PREFACE

marks has usually a very subordinate or even negligible testimonial value in itself. Their recital does not infringe upon the great spirit of the rule. Practically, the rule is not violated, in ninety-nine such cases out of a hundred. And in the hundredth, when the recited assertion has a vital testimonial value, its utterer can be had and is in fact ready and is put upon the stand, so that the value of his assertion can be duly tested; and nothing is there really lost for lack of such testing, and nothing is really gained by excluding the first witness' recital of it. — Now, the foregoing misguided form of application of the Hearsay rule marks the daily testimony in hundreds of trials. One result has been to take away all natural straightforwardness from the witness' narration, and to break it up into a series of answers to bits of questions, framed by inexpert counsel. Another result has been to multiply tenfold the time and tedium of a trial. A third result has been to exclude a vast amount of useful detail of evidential facts. And, finally, a result has been to bring the Hearsay rule into disrepute, by the abuse of this its incidental and unessential feature.

What, then, shall we do with the Hearsay rule?

1. Keep it, in its vital feature.
2. In its application to former testimony and depositions, liberalize its application. An important measure would be to authorize the prosecution in criminal cases to take depositions, — an authority now lacking in most States; the amount of needless hardship inflicted by the detention of witnesses pending trial must be very great.
3. In its application to extra-judicial assertions, adopt the Massachusetts statutory exception for admitting all statements made by persons now deceased. This is merely a logical extension of the spirit of the rule; for the rule aims to insist on testing all statements by cross-examination, *if they can be*; i.e. if the person has passed beyond the power of the law to procure him, the test may be dispensed with. No one could defend a rule which pronounced that all statements thus untested are *worthless*; for all historical truth is based on un-cross-examined assertions; and every day's experience of life gives denial to such an exaggeration. What the Hearsay rule implies — and with profound verity — is that all testimonial assertions *ought to be* tested by cross-examination, as the best attainable measure; and it should not be burdened with the pedantic implication that they must be rejected as worthless if the test is unavailable.
4. For the same reason, all the Exceptions to the rule, now anywhere recognized, should be liberalized and enlarged, and adopted where not yet in force.

Of the specific Exceptions, only one or two need here a comment. (1) The Dying Declarations exception is by some regarded with distrust. There seems to be no good reason for this. The distrust seems to be due merely to an instinctive overworship of the value of exclusionary rules. Let some judges tell us that they have actually seen several instances of false dying declarations which have brought an unmerited fate to innocent men; then

## PREFACE

we shall begin to have some *reason* for hesitation. But there are no signs of any such scientific examination of the subject. (2) The use of Official Statements, *e.g.* by certified copies of documents, etc., is burdened unbearably, in almost all our States, by a preposterous wagon-load of crude and needless statutes, prescribing detailed rules; the broad simple rules of the British law and of a few of our States ought to be substituted. And a broad simple rule for proof by official certificate should be adopted; the modern extension of our administrative system requires some such expedient for proof of hundreds of facts never really disputed. We are here lumbering along, as if in our ancestors' stage-coach, without any of the modern conveniences and expeditious methods. (3) The exception for Statements of a Mental or Physical Condition is now reaching a state of futile intricacy. This is seen chiefly in two fields: (a) In personal injury cases, the injured person's statements of pain, etc., are hedged about with a mass of quiddities. The purpose is plain, to avoid letting false claimants impose on juries. The efficacy of the effort may well be doubted; there is a risk of such imposition, but the Hearsay rule is not, and is never going to be, the main means of stopping up the risk or of revealing the imposition. Most of the rulings on this subject give the impression of being merely rulings upon cards played in a game. (b) In testamentary causes, the testator's statements are governed by a number of fine-spun rules. They are logical enough; but they let in quite as much as they exclude of the utterances that are supposed to do harm; and it may be doubted whether, in an issue so subject as this is to the jury's uncontrollable sense of justice, the Hearsay exception ever affected the result appreciably. Sir George Jessel's way of dealing with this class of evidence was, after all, as good a way as we can expect to find. (4) The Spontaneous Exclamations exception offers a large opportunity for liberalization. The way in which, in personal injury cases, the law here puts on blinders for this class of evidence, when it comes to investigating the details of the actual occurrence, would seem farcical, — if we could only stand off at a distance and look at ourselves. Jury trial, fine as it is, has a good deal to answer for; but can we censure jury trial here, merely because the judges have such an exaggerated traditional fear of the jury's emotions that they, the judges, go daft in shutting out the important facts from the jury?

5. The remaining measure needed is to devise some way of permitting qualified witnesses to narrate an occurrence without the exclusion of the incidental hearsays. The vice of the present practice is plain enough. But to frame a measure which will remove it, while keeping the essence of the Hearsay rule, is not easy.

*Title III. Prophylactic Rules.* Two of these call for special comment.

1. *The Oath.* At present, the oath needs reconsideration in three aspects.
  - a. Although the statutes making the oath *optional* ought to be re-drafted on the lines of some of the more advanced types, there should be no abolition

## PREFACE

of the oath. For its abolition, indeed, there appears to be no demand. Observation shows that the oath is still, or may be made, a real force for veracity with the great multitude of persons.

b. But the *administration* of the oath is to-day a travesty, a lamentable failure, — in most courts, at least. All its solemn compulsion is eliminated by the irreverent, disgraceful, and almost blasphemous manner in which it is administered. Two or three measures, at any rate, would do much to restore its virtue. (1) It should be administered by the judge, not the clerk. (2) It should be repeated, word for word, by the witness. (3) It should be administered anew to each witness, not once only to a group. And (4) some savor of solemnness should be secured for the occasion, in one way or another. — All these things can be done by the judge without change of law. To the judges' indifference, and not to the oath itself, is mainly due the present insignificance of its function.

c. The *capacity* of children to take the oath is still beridden with limitations which are inappropriate in principle and futile in practice. The example of England's statute should be universally followed.

2. *Discovery before trial* should be enlarged, by clearing away almost all its present limitations. Here we strike the hidden snag — and a solid one it is — of professional tradition. The partisan-contentious system of trials is the largest feature of the Anglo-American system, and is a possession which we ought not to abandon. Something is said later (p. xxxiv) about this. But we can afford to part with its abuses. One of them is the gaming expedient of holding one's cards secret until the play is made.<sup>1</sup> Of course the conservative will urge that to disclose the cards furnishes the unscrupulous opponent with a means to cheat. This is no doubt a danger. But the answer is, first, that the danger is probably exaggerated; and, secondly, that the present conditions are so wrong that the other risk should now be experimented with; the presumption at least has now shifted.

What specific measures should be used? (a) In civil cases, the rule for documents and party's testimony should be enlarged to include all facts, whether bearing on the applicant's own case or not. (b) The rule for witnesses' testimony should be made to go equally far. (c) In Federal courts, discovery in all the foregoing features should be introduced; the Supreme Court having shown a lamentably reactionary attitude on this subject. (d) In all courts and all classes of cases, the rule should be extended to include discovery of premises and chattels. (e) In criminal cases, the defence should make discovery of its witnesses, equally with the prosecution.

But none of these mere rules will help much until the sporting theory ceases to dominate in counsel's motives.

*Title IV. Simplificative Rules.* In this field, two rules mainly need attention.

<sup>1</sup> Mr. Sherman Whipple, of Boston, has lately published vigorous denunciations of the present method.

## PREFACE

1. The rules for *order of presenting evidence* are in general sound; they are apparently better (for us) than the Continental rules. But one of them is wholly bad, viz. the rule against putting in one's own case on cross-examination. Besides the general demerit which experience has shown in this rule, it has the peculiar fatality that it is the rule which apparently the crudest practitioner first learns and most obstreperously invokes, like a little terrier with a rat. And the judges seem to elevate it to the dignity of an Eleventh Commandment. Moreover, this rule combines with others to make some particularly obnoxious results. It must be abandoned absolutely.

2. The *opinion* rule. Words fail one to express the nauseous excesses of this rule and the senseless harm done by it. The depths of its present inanity, as a rule of Evidence for sensible men, are recorded in the annals of every trial. Of course, if one cannot see this, there is an end of the matter. But those who cannot see it should at least endeavor to question their own faith in the doctrine.

But how to get rid of it, is not so simple a matter to settle. It is insidiously mingled with two other rules almost inextricably.

(a) The rule for *expert qualifications* requires that on a topic requiring special experience the witness must be shown to possess that special experience. This rule is, of course, to be kept. But what does the expert then give, as his testimony? It is commonly termed his "opinion." But this "opinion" is not what the so-called Opinion rule excludes or lets in. Hence, to abolish the Opinion rule does not affect the above rule, *i.e.* the rule that a witness who is not qualified by special experience, when needed, cannot testify on that subject.

(b) The rule for a witness' *knowledge by personal observation* (already discussed, p. xxiv) excludes his "opinion" in so far as such an "opinion" may imply merely an impression based on hearsay and not personal observation. Hence, to abolish the Opinion rule would not mean abolishing this rule. For example, a witness to an affray, who merely heard the accused utter a threat the day before and testifies to it, should not be allowed to answer, "In your opinion, is the defendant guilty?" But he should be allowed (the Opinion rule being abolished, *i.e.* the rule prohibiting inferences from observed data), to be asked, "In your opinion, was the defendant in earnest when he uttered that threat?"

(c) The *hypothetical question*, which figures as one of the overworked technicalities of present practice, is not a result of the Opinion rule, but of the above rule (b). Hence, to abolish the Opinion rule does not mend this part of the situation. Medical men who have experience of the witness-stand resent with irritation the hypothetical question. Yet the necessity for it is unavoidable; and the medical man's disapproval of it merely shows how distinct are the conditions of a jury trial and a medical prescription. But what can be done to remedy the abuses of the hypothetical question? Several minor measures would assist; but to explain them would here take too much space.

## PREFACE

In sum, what specific measure would eliminate the Opinion rule, while preserving the other rules that ought to be preserved? Something like the following would perhaps serve; note that any such measure must contain within itself certain educative (as it were) phrases, which would point out how much was removed and how much preserved:

"An inference or opinion may always be stated by a witness; irrespective of whether

"(a) the data upon which the opinion is based are or are not capable of being so stated by him in words that the tribunal is equally capable of drawing the inference; or whether

"(b) the data are or are not stated by him before stating his inference; or whether

"(c) the inference involves the very subject of the issue, or one of the issues, before the tribunal;

"Provided that the trial judge may in his discretion exclude testimony involving an opinion or inference,

"(1) Whenever the topic is one which requires special experience for drawing the inference, and the witness is in the judge's estimation not so qualified; or

"(2) Whenever the witness has not had adequate personal observation of any data from which such inference might be drawn; and

"(3) Except that in the latter case the judge may permit the inference to be stated if the data are stated hypothetically to the witness and if he is qualified by experience to draw inferences on the subject."

However, if the present tangle cannot be successfully abated by the above or some similar rule, then we need not hesitate to cut at the root and to abolish the bad and the good together. Nothing here could be worse than the present state of things.

Among the special applications of the Opinion rule, two or three may here be noted. The rule against an opinion as to safety, care, reasonableness, etc., is one of the most obstructive, and could easily be cut out, by itself. The rule against an opinion to character is one of the most obvious violations of common-sense, — an aberration, too, from historic tradition; it can be set right without attempting to solve the rest of the problem. The rule about handwriting testimony is mingled with other rules, but can also be set right without attempting the whole problem; the English statute, already adopted in a few States, makes a good rule-of-thumb.

*Title V. Quantitative Rules.* Here the several rules call for distinct treatment.

1. The rules as to *required numbers and kinds of witnesses* are in theory unsound. When our judges resume their rightful control of trials, and when the judge's charge on the evidence is restored, we can afford to get along without most of these rules. Nevertheless, in the meantime, their vagaries do relatively little harm. Regarded as cautions of experience for

## PREFACE

judge and jury, they are (virtually all) wise and useful. Regarded as rules of the ritual, to be literally recited by the trial judge and technically enforced by the appellate Court, they degenerate into futilities. A few of them have crystallized into needless details. A few of them are a favorite theme of quibbling for some Courts. But on the whole, there is no fault to be found with their general wisdom.

2. The rule for *verbal completeness* is a sound rule, needing only that general liberalization of administration which all our rules need.

3. The rules for *authentication of documents* represent one of the most vital and creditable features of our law. Probably no other single rule, except the Hearsay rule, is so useful a safeguard against the frailties of human credulity. Experiments conducted over some years<sup>1</sup> have shown that jurors of the most intelligent class need these safeguards. Here, as elsewhere, a more liberal administration is needed. The chief application needing definite improvement of rule is the exception for authentication by official seal; hundreds of useless statutes cover this with needless and variant details; a simple statute of the English type should replace them.

**Part III. Rules of Extrinsic Policy.** This is one of the fertile places for misguided growths in the law of Evidence. Judges consider too little that this group of rules frankly aims at no purpose of reaching truth in trials, but deliberately stifles truth; and does so by setting up some other policy, over against the search for truth, as more needful and deserving of protection, for the time being, at the expense of truth. If judges thought oftener of this, they would oftener ask themselves whether this other policy really is more needful and deserving of protection, and whether the rule does really give enough such protection as to be worth while. Some such reflection would have avoided most of the excesses now noticeable in the details of these rules.

*Title I. Rules of Absolute Exclusion.* Here only one rule has found even a partial lodgment, and in a few Courts only; but there is a disposition there to give it undue homage. The remarks at § 2183 of this volume will here suffice.

*Title II. Rules of Privilege.* Here may be seen excesses, all along the line; and yet all but one or two of the privileges are sound at the core.

1. *Sundry privileged topics.* We are fortunate in being burdened with few of these. The ancient one for the *party-opponent in civil cases* has now gone by the board; except that it remains, in most jurisdictions, in its application to the party's chattels and premises, and in a few jurisdictions, in its application to the party's person. It ought to be completely eliminated. It is merely another feature of the sporting theory of justice.

2. The privilege for *anti-marital facts* has gone in some States, in civil cases; most States, and England, retain it for criminal cases. Its retention is a piece of comprehensible but quite misplaced sentimentality.

<sup>1</sup> In the writer's classes.

## PREFACE

3. The privilege for *self-criminating facts* is at last brought to the bar to defend itself, for the first time in more than two centuries. Positive signs of unfaith in it are visible, even in our own profession. But we hope that it will be acquitted, or at least placed on probation and given a warning to reform. It has for a long time been conducting itself as an undesirable citizen, and the only question is whether the community does not need its talents, in spite of its past misuse of them. The significant fact that a congregation of lawyers and criminalists in Wisconsin has deliberately proposed to remove the constitutional ægis which protects it should at least force a full and frank consideration of its case by enlightened professional opinion. But we have seen no reason to alter the views expressed on its behalf in § 2291 of this Treatise. — The possible details of reformatory measures would here take too much space.

4. The privilege for *communications between attorney and client* plays only a small part in the decisions, although of course it excludes a vast mass of evidence. Over against some recent arguments for its abolition,<sup>1</sup> we still believe in the adequacy of the arguments for its retention (set forth in § 2291 of this Treatise).

5. The privilege for *marital communications* is less strongly defensible. And yet its obstruction to evidence is comparatively little. What it needs is some flexibility; the trial Court should here have liberty of discretion to make exceptions. But also it needs to be treated as a mere privilege, *i.e.* optional when claimed by the spouse. Most Courts erroneously treat it as an absolute rule of exclusion.

6. *Jurors' communications* belong really under the Parol Evidence rule, applied to the solidity of verdicts, and need not be here considered.

7. The *privilege for official secrets* makes relatively little obstruction; but it contains the germs of a vicious growth. It has only two or three legitimate applications; and it should be watched, to prevent its spread to noxious possibilities.

8. The privilege for *communications between physician and patient* is sound enough for an occasional and narrow application; but its illogical and indiscriminate extension has made it one of the most farcical measures of needless obstruction. In three principal classes of cases — will cases, insurance cases, and personal injury cases — it is to-day nothing but a powerful joker in a pack of cards, to be slapped triumphantly on the table whenever the game is going against one. Some judges in appellate Courts treat it with a respect which is simply incomprehensible. That any sensible system of trials should so long retain in its law so discreditable a rule of evidence will some day be difficult to believe.

**Book II. By whom Evidence must be Presented.** Two general topics here deserve attention; 1, the contentious system in general; 2, the burden of proof between the parties, and the specific presumptions.

<sup>1</sup> Mr. Sherman L. Whipple, of Boston, in addresses before the Connecticut and the Florida Bar Associations.

## PREFACE

1. *The Contentious System, in general.* A good deal has been heard, of late, against our "contentious" system of trial procedure.<sup>1</sup> The word carries with it a derogatory argument. But we must distinguish, of course, between general "contentiousness," which is a fault of behavior, and "contentious procedure," which merely denotes the scientific fact that our system relies upon *the parties, not the judge*, to search for evidence and to present it, each in rivalry with the other. The former may be merely a remediable abuse, separable from the system itself; the latter may be a sound principle.

And in inquiring whether the procedural principle be sound, we must remember that it is a characteristic and historic feature of our system. It stands in emphatic contrast to the Continental system. Nothing is more interesting than the history of the rise and development of the inquisitorial system,<sup>2</sup> which now dominates on the Continent. The examining judge and the trial judge, in that system, seek before trial, and adduce at the trial, the bulk of the evidence;<sup>3</sup> and the parties' counsel, in this part of the litigation, act mainly as vigilant guardians. That system, too, has had its excesses, — and the very name "inquisitorial" carries in our language a derogatory flavor, due to those long past excesses. So that the ultimate question is not whether our system exhibits abuses; but whether our system, without its abuses, is better for us than would be the other system, without its abuses.

The world has had plenty of experience with both systems, and the inquiry is at least open. Here it is desired merely to point out that the problem is an historic one of contrasting systems, and that to change our system is a much more radical thing than to remove the abuses.

Our system indeed will have a good deal to say for itself, when the time comes. It is intrinsically quite as efficacious as the other to "beat and bould out the truth" (in Sir Matthew Hale's quaint phrase). It is much better suited to the traditions of our bar and to the temper of our people. It is much better suited to the spirit and training of our judiciary. Indeed, any other system, for us, is inconceivable, until times and manners change radically.

But, obviously, our system has been hard ridden. Its abuses of administration are multiple. Here, however, we are concerned only with rules of law. And the one notable improvement needed is that judges should remember that they *possess the lawful power* to summon witnesses and to extract testimony.<sup>4</sup>

In both these aspects there is noticeable, of late, a dangerous tendency to forget the dignified and potent traditions of our law.

<sup>1</sup> Mr. Whipple, of Boston, in the addresses already cited; Mr. Herbert Harley, of Chicago, in *Bulletins of the American Judicature Society*; Mr. R. S. Gray, of San Francisco, and Mr. Abram Adelman, of Chicago, in the *Journal of Criminal Law and Criminology*, V, 654, 663; Mr. Wesley W. Hyde, of Grand Rapids, in the *Illinois Law Review*, VIII, 239.

<sup>2</sup> Esmein's "History of Continental Criminal Procedure," *passim* (Continental Legal History Series, 1914).

<sup>3</sup> Subject to modern modifications, especially in civil cases.

<sup>4</sup> § 2484 in this Treatise.

## PREFACE

(1) That the trial judge has the power to *select* and summon and place on the stand a *witness* not called by the parties, has never ceased to be our law, although the practice is now with us rare. But that a modern court could go so far (*post*, § 2484) as to hold that a statute applying this power in a certain class of cases is unconstitutional, would have been incredible, if it had not come to pass. One decision in one State does not bulk large. But in its revelation of the possibilities of contemporary appellate aberration it is an enormity. Practice and custom have already gone far in reducing our trial judges to the position of mere umpires; but for the judiciary to confirm this result irremediably by invoking the Constitution, thus to seal their own abdication of inherent and essential powers, is an event of disquieting omen.

(2) That the trial judge has the power to elicit evidence by *questions to a witness*, has also never (apparently) been doubted in law.<sup>1</sup> But in practice our appellate Courts are constantly rebuking our trial Courts for putting such questions. The ostensible ground for this is the infringement of the (bad and unhistoric) statutory rule against the judge's expression of an opinion on the weight of evidence. But this enforcement of the latter rule would never have been carried so far if the appellate Courts had been possessed of a proper respect for the trial judge's power to elicit evidence. The appellate Courts would have seen to it that this power duly held its own against the encroachments of the other rule.

So that in this field there is much lost ground to be regained. The means, however, must be more a change of appellate temper than a change of rule.

2. *The Burden of Proof between the Parties.* So far as theory goes, the old confusion here reigning promises soon to be dissipated. The enlightening influence of Professor Thayer's writings can be seen breaking through in many quarters of the judicial heavens. An improvement of terminology would ultimately be indispensable. But we could be satisfied to see the general enlightenment impending.

Nevertheless, in practice, the specific rules for burden of proof make upon us the impression of vain logical verbalities, — on the whole. They are, inherently, artificial methods of controlling the mind's operations. And when applied by a judge in a form of words which the jury is supposed to put to use in the privacy of its chamber, they are unlikely to have the supposed effect, — or indeed any effect, when they are more than the simplest rules of thumb. Comparing the amount of judicial thought expended upon them, they are probably the least worth while part of the rules of evidence.

And yet they have a necessary place, and they are intrinsically sound enough. What to do with them, is a hard question. But it would be interesting to test them empirically, *i.e.* by asking one hundred trial judges whether they have ever observed that these rules had their designed effect upon the jurymen's decisions.

<sup>1</sup> § 784 in this Treatise.

## PREFACE

The foregoing dubitative remarks do not apply to these rules as rules for the judge, *i.e.* in so far as the judge rules as matter of law, *e.g.* against a plaintiff for insufficient evidence, etc. Here there seems no reason to doubt the excellence and efficacy of the present system. No doubt the same general need of liberalization is found in this field as elsewhere.

**Book III. To whom Evidence must be Presented.** Here the main place for improvement is the statutory rule against the judge's charge on the evidence. Enough has already been said as to this bad feature of our modern procedure (*ante*, p. xxi). But much more will have to be said, in many quarters, before our profession can be awakened from their delusion in its favor, and induced to abandon it.

**Book IV. Of what Facts no Evidence need be Presented.** Judicial Notice and Judicial Admissions are the two titles of rules under this head. Both of them are beneficent devices, and the prime need is that they shall be expanded in rule and used oftenér in practice. Something is said elsewhere to illustrate this (*post*, §§ 2571, 2597). The newly-minded judiciary, when it develops, will find these to be two of the most useful tools in our system.

In closing this critique of our present system, let the following serve as suggestions collateral to the whole of it:

1. General denunciations against the system, and general denunciations against denunciations, will do little service either way. A great national and racial system cannot be easily set aside; and its historic growth indicates that it has at least some right to exist, as it is and where it is. What is needed rather is detailed study and concrete criticism. The specific rules must be tested, in their original purpose, their workings, their fitness to survive under present conditions. Complete and long-continued discussion, by men of varied experience, along the lines here sketched in this Preface, would ultimately bring an intelligent consensus as to the parts to be preserved or emphasized and the parts to be modified or cast off.

2. In any proposals of improvement, the proposer must sooner or later come down to a draft of words. And until he has tried to frame the words for his proposal, he cannot be sure that he has himself grasped it either in its extent or in its practicability. To see poor results around us, and to assume publicly the attitude of reform, may signify both intelligence and courage. But it does not signify what is to be the tenor of the proposed reform. And until that tenor is revealed, we cannot say whether it is either desirable or feasible. All who have had experience with proposed legislation are aware of this. And their experience has taught them that there is often a large and sometimes impassable chasm between the abstract idea of a reform and the concrete words which must enact it. — These comments are offered to those who have in mind the reform of any substantial part of our system of Evidence.

3. No reform of rules of Evidence will ever of itself, *i.e.* as an improved

## PREFACE

rule of law, accomplish *much* in promoting actual justice. It may remove an intellectual error from our records. And it may of its own force effect some good for some time. But on the whole its effect must depend upon its surrounding conditions and *their* coincident advancement. The administration of justice, being a human affair, is not very unlike the human body. The perfect operation of any one organ is dependent more or less on the general conditions of the rest of the body. And the system of Evidence is dependent upon procedure in general, upon the organization of courts, upon the personnel of the judiciary and of the bar, upon the human nature of witnesses, upon the grade of services rendered by juries, and upon the temper of the community in wanting and supporting a high and intelligent standard of justice.

Let us therefore expect that the system of Evidence, on the whole, will most readily improve when the men who administer it also improve and the system of justice as a whole advances. Sound rules of Evidence, in short, are as much a symptom as a cause of better Justice.

J. H. W.

NORTHWESTERN UNIVERSITY LAW SCHOOL,  
CHICAGO,

March 4, 1915.



# CONTENTS

	Page
PREFACE . . . . .	v
LIST OF LATEST STATUTES AND REPORTS CONSULTED . . . .	xliii
SUPPLEMENTARY CITATIONS OF STATUTES AND JUDICIAL DECISIONS (1904-1915) . . . . .	1
TABLE OF STATUTES CITED . . . . .	683
TABLE OF CASES CITED . . . . .	707
CONSOLIDATED INDEX TO THE ORIGINAL TREATISE AND THIS SUPPLE- MENT, BY HARVEY C. VOORHEES . . . . .	789



## LIST OF LATEST REPORTS AND STATUTES CONSULTED

### I. STATUTES

The titles and dates of the compilations of statutes referred to in this Supplement, and the years of the latest session laws consulted in its preparation, are shown in the table below. In several jurisdictions new official revised compilations have been made during the period covered by this Supplement, but the usual (and culpable) lack of a table of cross-references in the new revisions to the former numbering has made it impracticable in this work to use them; for North Carolina, however (where a perfect table is published), the citations to the revisions of 1905 were added in the first Edition.

In the following Table are shown, for convenience of reference, the dates of both the latest statutes consulted for this Supplement and of those consulted for the original work:

JURISDICTION	TITLE AND DATE OF COMPILATION USED	DATE OF LATEST SESSION LAWS EXAMINED	
		For the Original Work	For this Supplement
ENGLAND . . . . .		1903	1913
CANADA :			
<i>Dominion</i> . . . . .	Revised Statutes 1886 . . . . .	1902	1914
<i>Alberta</i> . . . . .			1913
<i>British Columbia</i> . . . . .	Revised Statutes 1897 . . . . .	1903	1914
<i>Manitoba</i> . . . . .	Revised Statutes 1902 . . . . .	1903	1913
<i>New Brunswick</i> . . . . .	Consolidated Statutes 1877 . . . . .	1903	1914
<i>Newfoundland</i> . . . . .	Consolidated Statutes 1892 . . . . .	1903	1914
<i>Northwest Territories</i> <sup>1</sup> . . . . .	Consolidated Ordinances 1898 . . . . .	1903	1904
<i>Nova Scotia</i> . . . . .	Revised Statutes 1900 . . . . .	1903	1914
<i>Ontario</i> . . . . .	Revised Statutes 1897 . . . . .	1903	1914
<i>Prince Edward Island</i> . . . . .		1902	1913
<i>Saskatchewan</i> . . . . .			1913
<i>Yukon</i> . . . . .	Consolidated Ordinances 1902 . . . . .		1913
UNITED STATES :			
<i>Alabama</i> <sup>2</sup> . . . . .	Code 1897 . . . . .	1901	1911
<i>Alaska</i> . . . . .	Carter's Laws of Alaska 1900 (U. S. St. 1900, March 3 and June 6) . . . . .	1903	1913
<i>Arizona</i> . . . . .	Revised Statutes 1887; Penal Code 1887 . . . . .	1903	1913
<i>Arkansas</i> . . . . .	Sandels and Hill's Digest of Statutes 1894 . . . . .	1903	1913
<i>California</i> . . . . .	Codes 1872; Deering's Supplements 1889, Pomeroy's edition of 1901 . . . . .	1902	1913
<i>Colorado</i> . . . . .	Mills, Annotated Statutes 1891, Supplement 1896, and Code of Civil Procedure 1896 . . . . .	1902	1913
<i>Columbia (District)</i> . . . . .	Abert and Lovejoy's Compiled Statutes 1894; Code 1901 (U. S. St. 1901, c. 854) . . . . .	1903	1913
<i>Connecticut</i> . . . . .	General Statutes 1887 . . . . .	1903	1913
<i>Delaware</i> . . . . .	Revised Statutes 1893 . . . . .	1903	1913

<sup>1</sup> The legislation for this region is continued, since 1902 and 1904, in the newly organised Provinces of Alberta, Saskatchewan, and Yukon.

<sup>2</sup> The Legislature meets regularly in Alabama every fourth year only.

# LIST OF LATEST REPORTS AND STATUTES CONSULTED

JURISDICTION	TITLE AND DATE OF COMPILATION USED	DATE OF LATEST SESSION LAWS EXAMINED	
		For the Original Work	For this Supplement
UNITED STATES:			
<i>Florida</i> . . . .	Revised Statutes 1892 . . . . .	1903	1913
<i>Georgia</i> . . . .	Code 1895; Van Epps' Supplement 1900 . . . .	1903	1914
<i>Hawaii</i> . . . .	Penal laws 1897; Revised Civil Laws 1897 . . . .	1901	1913
<i>Idaho</i> . . . . .	Revised Statutes 1887; Constitution 1899 . . . .	1903	1913
<i>Illinois</i> . . . .	Revised Statutes 1874, Hurd's edition of 1898 . . . .	1903	1913
<i>Indiana</i> . . . .	Thornton's Revised Statutes 1897 . . . . .	1903	1913
<i>Iowa</i> . . . . .	McClain's Annotated Code 1897 . . . . .	1902	1913
<i>Kansas</i> <sup>1</sup> . . . .	Webb's General Statutes 1897 . . . . .	1903	1913
<i>Kentucky</i> . . . .	Carroll's Statutes 1899, and Codes of Civil and Criminal Procedure 1895, edition of 1900 . . . .	1902	1914
<i>Louisiana</i> . . . .	Saunders' Revised Civil Code 1888; Garland's Revised Code of Practice 1894 and Supplement 1900; Wolf's Revised Laws 1897; Constitution 1898 . . . . .	1902	1912
<i>Maine</i> . . . . .	Public Statutes 1883, Supplement 1895 . . . . .	1903	1913
<i>Maryland</i> . . . .	Poe's Public General Laws 1888; Supplement 1900 . . . .	1902	1914
<i>Massachusetts</i> . . . .	Public Statutes 1882; Revised Laws 1902 . . . .	1903	1914
<i>Michigan</i> . . . .	Miller's Compiled Laws 1897 . . . . .	1903	1913
<i>Minnesota</i> . . . .	Wenzell, Lane, and Tiffany's General Statutes 1894 . . . .	1903	1913
<i>Mississippi</i> . . . .	Thompson, Dillard, and Campbell's Annotated Code 1892 . . . . .	1902	1914
<i>Missouri</i> . . . .	Revised Statutes 1899 . . . . .	1903	1913
<i>Montana</i> . . . .	Sanders' Codes and Statutes 1895 . . . . .	1903	1913
<i>Nebraska</i> . . . .	Brown and Wheeler's Compiled Statutes 1899 . . . .	1903	1913
<i>Nevada</i> . . . . .	Baily and Hammond's General Statutes 1885 . . . .	1903	1913
<i>New Hampshire</i> . . . .	Public Statutes 1891 . . . . .	1903	1913
<i>New Jersey</i> . . . .	General Statutes 1896 . . . . .	1903	1913
<i>New Mexico</i> . . . .	Compiled Laws 1897 . . . . .	1903	1913
<i>New York</i> . . . .	Birdseye's Revised Statutes 1896 . . . . .	1903	1914
<i>North Carolina</i> . . . .	Code 1883; Long and Lawrence's Amendments 1897 . . . .	1903	1913
<i>North Dakota</i> . . . .	Revised Codes 1895 . . . . .	1903	1913
<i>Ohio</i> . . . . .	Bates' Annotated Revised Statutes 1898 . . . . .	1902	1914
<i>Oklahoma</i> . . . .	Statutes 1893 . . . . .	1903	1913
<i>Oregon</i> . . . . .	Hill's Codes and General Laws 1892 . . . . .	1903	1913
<i>Pennsylvania</i> . . . .	Pepper and Lewis' Digest 1896 . . . . .	1903	1913
<i>Rhode Island</i> . . . .	General Laws 1896 . . . . .	1903	1913
<i>South Carolina</i> . . . .	Revised Statutes 1893; Code 1902 . . . . .	1903	1914
<i>South Dakota</i> . . . .	Grantham's Statutes 1899 . . . . .	1903	1913
<i>Tennessee</i> . . . .	Shannon's Annotated Code 1896 . . . . .	1903	1913
<i>Texas</i> . . . . .	Revised Civil Statutes 1895; Penal Code 1895; Code of Criminal Procedure 1895 . . . . .	1903	1913
<i>United States</i> . . . .	Revised Statutes 1878, Supplements 1891, 1895 . . . .	1903	1913 <sup>2</sup>
<i>Utah</i> . . . . .	Revised Statutes 1898 . . . . .	1903	1913
<i>Vermont</i> . . . . .	Statutes 1894 . . . . .	1902	1912
<i>Virginia</i> . . . . .	Code 1897, Supplement 1898 . . . . .	1903	1914
<i>Washington</i> . . . .	Ballinger's Annotated Codes and Statutes 1897 . . . .	1903	1913
<i>West Virginia</i> . . . .	Code 1891, third edition . . . . .	1903	1913
<i>Wisconsin</i> . . . .	Sanborn and Berryman's Statutes 1898 . . . . .	1903	1913
<i>Wyoming</i> . . . . .	Revised Statutes 1887 . . . . .	1903	1913

<sup>1</sup> For the judicial status of this compilation, see *State v. Carter*, 74 Kan. 156, 86 Pac. 138 (1906).

<sup>2</sup> Sixty-third Congress, first Session.

No citations have been given for the "Proposed Bill to Codify, Revise and Amend the Laws relating to the Judiciary," being part of the Report (dated April 13, 1914) to accompany H. R. 15578 of the Committee on Revision of the Laws (63d Congress, 2d sess., H. Rep. 521, parts 1 and 2). The sections affecting the rules of evidence are changed in only a few slight respects in this draft; the numberings will be different.

## LIST OF LATEST REPORTS AND STATUTES CONSULTED

### II. REPORTS OF DECISIONS

The printing of this Supplement began in November, 1914, and occupied four months; it was therefore desirable to set a definite point of time for the ending of citations (instead of inserting current late cases in the latter portions of the book only), in order that those who use the book may know where to begin in bringing the later citations down to the date of their consultation. The point taken was therefore that volume of the different National Reporters which ended nearest to July 1, 1914; this ranged (dating by the weekly issues) between May, 1914 and September, 1914. Substantially, then, the citations come down to the beginning of August, 1914. The latest volumes of Reports consulted were as follows:

JURISDICTION OF LATEST REPORTS EXAMINED		FOR THE ORIGINAL WORK	FOR THIS SUPPLEMENT
		Vol.	Vol.
<i>National Reporter System:</i>	Atlantic Reporter . . . . .	55	8
	Federal Reporter . . . . .	125	212
	Northeastern Reporter . . . . .	68	105 <sup>1</sup>
	Northwestern Reporter . . . . .	96	146
	Pacific Reporter . . . . .	73	140
	Southern Reporter . . . . .	35	64
	Southeastern Reporter . . . . .	45	80
	Southwestern Reporter . . . . .	76	166
	Supreme Court Reporter . . . . .	23	34
<i>Official Reports</i> (not covered by the National Reporter System):	District of Columbia Appeals . . . . .	21	41
	Hawaiian Reports . . . . .	13	21
<i>British Reports:</i>	England:		
	Law Reports . . . . .	1903	1913 <sup>2</sup>
	Cox's Criminal Cases . . . . .	18	20
	Criminal Appeals . . . . .	—	1-9
	Ireland: Law Reports . . . . .	—	1894-1913
	Canada:		
	Dominion Supreme Court . . . . .	32	45
	Alberta . . . . .	—	1-4
	British Columbia . . . . .	10, pt. 1	16
	Manitoba . . . . .	12	21
	New Brunswick . . . . .	34	40
	Newfoundland . . . . .	5	6
	Northwest Territories <sup>3</sup> . . . . .	5, pt. 2	5
	Nova Scotia . . . . .	35	45
	Ontario: Law Reports . . . . .	5	25
	Prince Edward Island . . . . .	2	2
	Saskatchewan . . . . .	—	1-4
	Yukon . . . . .	—	—
	Dominion Law Reports <sup>4</sup> . . . . .	—	1-14

<sup>1</sup> With a few cases from vol. 106.

<sup>2</sup> And also the K. B. Division for 1914, vol. 1.

<sup>3</sup> Now replaced by Alberta, Saskatchewan, and Yukon.

<sup>4</sup> These Reports cover all Canadian Appellate Courts. They begin in 1912, and for decisions since that date have been consulted instead of the separate series for the respective Canadian jurisdictions.

The reports of the Appellate (intermediate) Courts in California, Colorado, Georgia, Illinois, Indiana, Kansas, New York (Supreme Court), and Texas have not been cited, except on interesting matters for which there is scanty authority; partly because their rulings are not final, and partly because in some jurisdictions they are expressly made not binding as precedents. The trial rulings of Federal District and Circuit Courts have also been left unnoticed to a similar extent.

### III. CITATION OF THIS TREATISE

Citations of other parts of this treatise are made herein by number of section (§) and number of note. The notes are numbered continuously within each section.



# EVIDENCE

IN

## TRIALS AT COMMON LAW

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### SUPPLEMENTARY VOLUME—SECOND EDITION

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#### § 4. Distinction between *Ex parte* and Responsory Proceedings.

[*Note 6; add:*]

1906, *Goodwin v. Blanchard*, 73 N. H. 550, 64 Atl. 22 (the trial judge has discretion to refuse oral examination of jurors who have made affidavits, on a motion for a new trial). *Contra*: 1906, *Kipp v. Clinger*, 97 Minn. 135, 106 N. W. 108 (affidavit on motion to open a judgment; rule of personal knowledge applied).

#### § 5. Conflict of Laws, in general.

[*Note 1; add, at the end:*]

It should be added that the *lex loci acti*, or law of the place of the act to be proved, has been proposed as the rule, by the Institute of International Law (*Annuaire de l'Institut*, 1878, pp. 44, 50), at least as regards admissibility and weight. But this solution seems both unsound and unpractical. It finds favor in France and Italy, as well as in South America; but it is not accepted in Germany nor in the majority of countries of Continental Europe (*Weiss, Traité de droit international privé*, Tome V, 1905, p. 475, and references). Moreover, this French rule has been forcibly dissented from by Professor de Vareilles-Sommières, of Lille (*Clunet, Journal du droit int. privé*, 1900, XXVII, 258, 287). The rule for conflict of laws as to the *form of acts*, *i. e.* whether a legal transaction must be in writing, etc., was made a part of the programme for the first Hague Conference on Private International Law in 1893, but was apparently not regulated by any of the enactments of that body in any of its conferences hitherto (*Actes de la Conférence*, etc., 1893, p. 18; *Conférence of 1904*, p. 205). A list of articles on the subject may be found in the *Tables Générales* to *Clunet's Journal du droit int. privé*, vol. I, p. 770.

[*Note 2; add, under Accord:*]

1906, *Re Wogan*, 103 Mo. App. 146, 77 S. W. 490 (a deposition taken in Missouri for use in a trial in Oklahoma; the latter's law as to notice, held to apply).

1907, *Malcolm Sav. Bank v. Cronin*, 80 Nebr. 228, 114 N. W. 158 (affidavit taken in Iowa but illegally under Nebraska law, excluded).

1905, *Supreme Lodge v. Meyer*, 198 U. S. 508, 25 Sup. 754 (New York insurance contract). 1905, *Doll v. Equitable Life Ass. Soc'y*, 138 Fed. 705, 710, C. C. A. (the New York rule as to a physician's privilege, held not applicable in a trial in the Federal court in New Jersey, though the parties' contract made the law of New York the rule of the contract; "the law of the forum, and not of the place of the contract, must govern").

[*Note 3; add, under Contra:*]

1906, *Kaufman v. Barbour*, 98 Minn. 158, 107 N. W. 1128 (agreement between makers of a Missouri note that some should be sureties only; Minnesota law applied).

[*Note 3; add, at the end:*]

A careful opinion on the rule applicable to the *interpretation* of a will by a testator domiciled abroad but devising lands in the forum is the following:

1907, *Peet v. Peet*, 229 Ill. 341, 82 N. E. 376.

## § 6. Conflict of Laws; Federal and State Jurisdictions in the United States and Canada.

[*Note 2; add:*]

U. S. Rev. St. 1878, § 862 ("The mode of proof in causes of equity and of admiralty and maritime jurisdiction shall be according to rules now or hereafter prescribed by the Supreme Court, except as herein specially provided").

[*Text, line 3; after "State rules," add a new note 4a:*]

1913, *The Titanic*, D. C. S. D. New York, 206 Fed. 500 (in admiralty under Rule 6 of the District Court of Jan. 6, 1912 supplanting old Rule 119, and under U. S. Rev. St. 1878, §§ 913, 918, and Rule 46, U. S. S. C., a deposition by commission in perpetuum memoriam may be on oral interrogatories conforming to New York practice, in spite of U. S. Rev. St. 1878, § 866, providing that it shall be taken according to "common usage").

[*Note 5; add:*]

1904, *Balliet v. U. S.*, 129 Fed. 510, 515, 16 Sup. 62 (the Iowa statute for indorsing witnesses; whether it obtained in place of the Federal statute, *post*, § 1851, not decided).

1903, *Hanks Dental Ass'n v. Tooth Crown Co.*, 194 U. S. 303, 24 Sup. 700 (refusing to apply N. Y. C. C. P. § 870, as to discovery before trial).

1906, *Smith v. Au Gres Tp.*, 80 C. C. A. 145, 150 Fed. 257, 260 (U. S. Rev. St. § 858, as to survivor's disqualification, held to supersede the Michigan statute).

1907, *Miller v. Steele*, 6th C. C. A., 153 Fed. 714, 720 (Rev. St. § 858 held exclusive as to the disqualification of a survivor in a transaction with a deceased person).

1907, *Smith v. International Mercantile Co.*, C. C. N. J., 154 Fed. 786 (following *Hanks Dental Ass'n v. Tooth Crown Co.*, as to N. J. Pub. L. 1903, § 140, p. 537).

On the question of *depositions* under Federal statutes, compare the citations *post*, §§ 1381, n. 3, 1856, n. 10.

[*Note 6; add:*]

1905, *Toledo Traction Co. v. Cameron*, 137 Fed. 48, 66, C. C. A. (U. S. Rev. St. 1878, § 861 and Ohio Annot. Rev. St. 1898, § 5242a, relating to the use of testimony at a former trial held not to be in conflict, and the latter followed).

[*Note 7, l. 6 from below; add:*]

1904, *Manhattan L. Ins. Co. v. Albro*, 127 Fed. 281, 284, C. C. A. (adopting the Massachusetts Court's interpretation of a Massachusetts statute as to parol evidence).

[*Note 8; add:*]

1909, *Chicago & N. W. R. Co. v. Kendall*, 8th C. C. A., 167 Fed. 62 (personal injury; the plaintiff showed his knees to the jury voluntarily, on cross-examination and at a juror's suggestion; the defendant then asked him to submit it to medical inspection, but he refused, and the trial Court declined to order it, on the ground that the trial was in Iowa, that the Iowa law

## [Note 8 — continued]

empowering inspection was declared by common law judicial decision and not by statute, and that U. S. R. S. §§ 721, 858 did not empower the Federal Court to apply a State common-law rule; reversed, on the ground (1) unanimously held, that the plaintiff by showing his knee waived the privilege as to further inspection by medical men; (2) per Sanborn, J., that U. S. R. S. § 721 empowered the Federal Court to follow any State rule however declared; but (3) per Amidon, J., that the trial Court ruled correctly if the rule involved were a rule of evidence).

## [Note 9; add:]

1904, *Lang v. U. S.*, 133 Fed. 201, C. C. A. (cross-examination to the witness' record of conviction, allowed, contrary to the Illinois rule; no authority cited).

## [Note 10; add:]

1904, *Withaup v. U. S.*, 127 Fed. 530, 533, C. C. A. (following *Logan v. U. S.*; the common-law rule, and not the Colorado statute of 1893, as to comparison of handwriting, applied, because "the common law, by reason of the territorial act of 1861, was the law of Colorado when it was admitted into the Union as a State").

1913, *Maxey v. U. S.*, 8th C. C. A., 207 Fed. 327 (conviction of crime; the common law rule applied to a trial held in Arkansas).

Thus, the rule for *discovery of witnesses* by the prosecution to the defendant, is the Federal statute, not the State statute:

1908, *Jones v. U. S.*, 9th C. C. A., 162 Fed. 417 (collecting prior rulings).

## [Text, l. 4 on p. 19; add a new paragraph (d), and new note 10a:]

(d) In *all civil actions*, the foregoing distinctions are now subject to be modified by the statute of 1906, which applies uniformly the *lex fori territorialis*.<sup>10a</sup> Just how far this statute will be construed to overthrow the hitherto settled distinctions, and how far § 721 of the Revised Statutes can be harmonized with it, remains to be seen. In the pending Revision, now in the hands of a Committee of Congress, these unavoidable problems should be solved in advance, if possible.

<sup>10a</sup> St. 1906, June 29, § 3608, Stat. L. vol. 34, p. 618 (U. S. Rev. St. 1878, § 858, is amended so as to read as follows: "The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held").

1913, *In re Felts*, Iowa N. D., 205 Fed. 983 (whether § 27a of the U. S. Bankruptcy Act prevails over the Iowa Code, as to a wife's privilege, not decided).

## [Note 11; add, at the end:]

A similar conflict, however, may arise in regard to the Federal executive regulation forbidding disclosure of *liquor-tax receipts* by revenue collectors; this rule of privilege has been recognized by the Federal Courts; but if the State Courts do not recognize such a privilege in their own law, there is no reason why they should not compel disclosure from a Federal official within their jurisdiction; the practice may be seen from the citations, *post*, § 2375.

## [Note 14, at the end, add:]

But the following case seems *contra*: 1903, *Cockerill v. Harrison*, 14 Man. 366 (Eng. St. 1869, 32 & 33 Vict. c. 68, § 2, quoted *post*, § 2061, relating to actions for breach of promise, held applicable to Manitoba, and not impliedly repealed by Manitoba Evidence Act, 57 Vict. c. 11).

[Note 15; *add.*:]

By Ont. Rev. St. 1897, c. 111, § 1, St. 1910, 10 Edw. VII, c. 45, § 2 ("all matters relative to testimony and legal proof in the investigation of fact and the forms thereof in the Courts of Ontario shall be regulated by the rules of evidence established in England on Oct. 15, 1792" except so far as altered by Imperial, Dominion, or Ontario statute).

[Note 21; *add.*:]

1904, *Attorney-General v. Toronto J. R. Club*, 7 Ont. L. R. 248 (Can. St. 1893, c. 31, quoted *post*, § 2252, relating to the privilege against self-crimination, held not applicable in Ontario, upon claim of privilege by a witness in a civil proceeding for revoking a corporate charter).

1906, *Chambers v. Jaffray*, 12 Ont. L. R. 377 (claim of privilege on a civil trial; the trial judge treated Can. St. 1893, c. 31, *supra*, as applicable; but on appeal the judge disposed of the claim under Ont. St. 1904, c. 10, § 21, quoted *post*, § 2281).

### § 7. Constitutional Rules; *Ex post facto* Laws.

[Note 7, par. 1; *add.*:]

1906, *People v. Johnson*, 185 N. Y. 219, 77 N. E. 1164 (dispensing with the oath for children).

[Note 9; *add.*, under *Accord.*:]

1905, *Wester v. State*, 142 Ala. 56, 38 So. 1010 (St. 1903, No. 32, allowing the wife to testify against the husband in certain cases, is not unconstitutional as *ex post facto*).

1909, *Patterson's Estate*, 155 Cal. 626, 102 Pac. 941 (C. C. P. § 1339 as amended by St. 1907, c. 100, p. 122, Mar. 6, permitting probate of a will destroyed by public calamity, held to permit proof of a will destroyed before passage of the act). 1909, *James v. Oakland Traction Co.*, 10 Cal. App. 785, 103 Pac. 1082 *semble* (statute limiting speed of cars is not a rule of evidence).

1907, *Campbell v. Skinner Mfg. Co.*, 53 Fla. 632, 43 So. 875 ("a right to have one's controversies determined by existing rules of evidence is not a vested right"; said of a statute enabling proof of lost deeds).

1907, *State v. Dunn*, 13 Ida. 9, 88 Pac. 235 (St. 1905, Mar. 7, p. 352, excluding parol evidence of the ownership of a recorded brand, held applicable to a brand on an animal sold before the statute).

1906, *Hall v. Reinherz*, 192 Mass. 52, 77 N. E. 880 (declarations made before the statute of 1898, quoted *post*, § 1576, and admissible only by virtue thereof, received). 1907, *Woodvine v. Dean*, 194 Mass. 40, 79 N. E. 882 (a statute enacting a rule of evidence "general in form . . . and having reference only to civil cases, must be regarded as applicable to any future trial, whether or not in a case pending at the time it took effect"; here, a rule of St. 1905, c. 288, making the land court's report *prima facie* evidence).

1914, *People v. Qualey*, 210 N. Y. 202, 104 N. E. 138 (Laws 1912, c. 390, Apr. 15, adding § 221b, C. Cr. P., for the admission of the official stenographic report of testimony before a magistrate is not invalid for admitting such testimony at a trial for an offence occurring before the statute was passed).

1904, *McKinstry v. Collins*, 76 Vt. 221, 56 Atl. 985 (a statute having limited the admissibility of certificates of death, since the first trial of the case, the certificate admitted on the first trial was held inadmissible on the second).

1906, *Samuel & Jessie Kenney P. Home v. Kenney*, 45 Wash. 106, 88 Pac. 108 (a statute of 1890 held applicable to prior evidential utterances; "there appears to be no vested right to any rule of evidence").

[Note 9; *add.*, under *Contra.*:]

1903, *State v. Wenzel*, 72 N. H. 396, 56 Atl. 918 (admission of an illegal keeping of liquor, as a misdemeanor, in December, not admitted to prove intent in April, a statute having meanwhile made the act a felony; obscure theory).

[*Note 9; add, under Distinguish:*]

1913, *Cameron v. U. S.*, 231 U. S. 710, 34 Sup. 244 (the repeal by St. 1910, May 7, of U. S. Rev. St. 1878, § 860, giving immunity from prosecution when a witness has criminated himself, does not take away immunity once gained by testimony given while U. S. R. S. § 860 was in force).

[*Note 10; add:*]

1909, *Downs v. Blount*, 5th C. C. A., 170 Fed. 15, 19 (Tex. Rev. St. 1895, § 2312, as amended by St. 1907, Apr. 12, c. 165 providing that an instrument recorded for ten years may be evidenced by certified copy without other evidence of execution concerns a rule of evidence which may be changed by statute, and not a vested right).

[*Text, p. 23, l. 8:*]

For "property deprivations," read "penal measures."

**§ 9. The Two Axioms of Admissibility; I, None but Facts having Rational Probative Value are Admissible.**

[*Note 6; add:*]

Trial by battle occurs in Shakspeare: *Henry VI*, Pt. II, II, 3 (Horner and Peter battle to determine whether Horner is a traitor).

[*Note 8; add:*]

In *The Athenian Mercury*, a periodical printed between 1690 and 1697 (selections reprinted as *The Athenian Oracle*, re-edited by J. Underhill, 1892, in the Camelot Series) appeared a paragraph on corpse-bleeding, as to which the editors assert: "Legislators have thought fit to authorise it and use this trial as an argument at least to frighten, though 'tis no conclusive one to condemn them. Yet we grant that many murders have been found out by it" (p. 108). In another passage, after an account of some trials for witchcraft in 1692, where the cold-water test was used, the correspondent queries (p. 123), "Is it lawful to attempt the discovery of witches by swimming, and how far is it an evidence against them?" To which the editor answers that "such sort of examination by swimming etc. is utterly unlawful, and a breach of the fifth commandment." Evidently the law and the custom were just coming to be heterodox in this period.

**§ 13. Multiple Admissibility.**

[*Note 2; add, under Accord:*]

1913, *Cooper v. Seaboard A. L. R. Co.*, 163 N. C. 150, 79 S. E. 418 (applying Court Rule 27). 1908, *State v. Greene*, 33 Utah 497, 94 Pac. 987.

**§ 15. Curative Admissibility; Prior Introduction of Inadmissible Evidence as Estopping from Subsequent Objection.**

[*Note 1; add:*]

1913, *R. v. Cargill*, 2 K. B. 271 (virginity of the girl in rape under age). 1913, *People v. Newman*, 261 Ill. 11, 103 N. E. 589 (a co-indictee having testified to police persecution as the motive for the charge, and having denied former crimes, the prosecution was not allowed to prove one of the crimes to rebut the testimony to police malice).

[*Note 2, par. 1; add:*]

1903, *R. v. Noel*, 6 Ont. L. R. 385 ("Even if inadmissible matters are introduced in cross-examination, the right to re-examine remains; . . . if it was desired to avoid re-examination upon it, it should have been expunged"; *Blewett v. Tregonning* followed).

[Note 2 — continued]

1905, Louisville & N. R. Co. v. Quinn, 145 Ala. 657, 39 So. 616 (carrier putting off a passenger before reaching destination).

1905, German-Amer. Ins. Co. v. Brown, 75 Ark. 251, 87 S. W. 135 (opinion testimony).

1904, See v. Wabash R. Co., 123 Ia. 443, 99 N. W. 106 (repairs at a crossing, contradiction allowed).

1905, Warren L. S. Co. v. Farr, 142 Fed. 116, C. C. A. (conversion). 1906, Ball v. U. S., 741 Fed. 32, 41, C. C. A. (conviction of crime, offered to discredit the accused as witness).

Compare the rules for *re-examination* (post, § 1896) and *rebuttal* (post, § 1873).

[Note 3, par. 1; add:]

1911, Denver City T. Co. v. Hills, 50 Colo. 328, 116 Pac. 125, *semble* (street-car accident).

1904, Chicago City R. Co. v. Bundy, 210 Ill. 39, 71 N. E. 28 (a party introducing the opponent's admission during an offer of compromise by the former was not allowed to exclude the opponent's evidence in explanation).

1906, Mash v. People, 220 Ill. 86, 77 N. E. 92 (rule applied to justify the counsel's allusion to the defendant wife's failure to testify).

[Note 3, par. 2; add:]

So, too, the trial Court's discretion in *admitting* it will not be disturbed: 1906, Bennett v. Susser, 191 Mass. 329, 77 N. E. 884.

## § 16. Judicial Discretion.

[Note 4; add:]

1906, State v. Monich, 74 N. J. L. 522, 64 Atl. 1016.

[Note 5, par. 2; add:]

1905, Indianapolis & M. R. T. Co. v. Hall, 165 Ind. 557, 76 N. E. 242 ("There must be a question asked which is calculated to elicit the testimony excluded").

1904, Schilling v. Curran, 30 Mont. 370, 76 Pac. 998 (the counsel "now makes formal offer to prove that S. knew of this transaction," etc., held insufficient without calling the witness or affirmatively showing that the offer is made in good faith, etc.).

[Note 8; add:]

1905, Indianapolis & M. R. T. Co. v. Hall, 165 Ind. 557, 76 N. E. 242.

[Note 10; add:]

*Accord*: 1905, Deitrich v. Kettering, 212 Pa. 356, 61 Atl. 927.

*Contra*, but unsound:

1904, State v. Charles, 111 La. 933, 36 So. 29 (homicide; certain declarations of the deceased, offered improperly as dying declarations and *res gestæ*, admitted, being properly receivable as self-contradictions of other declarations of the deceased; no authority cited).

## § 17. The Offer of Evidence.

[Note 5, par. 1; add:]

1910, National Citizens' Bank v. Thro, 110 Minn. 169, 124 N. W. 965 (here two judges dissented because the colloquy at the trial showed sufficiently that the evidence ready to be offered, but not formally offered, was material).

1910, Seibel-Suessdorf C. & I. M. Co. v. Manufacturers R. Co., 230 Mo. 59, 130 S. W. 288 (a "mere expression of a desire to introduce evidence" is not enough).

1909, Butterfield v. Beaver City, 84 Nebr. 417, 121 N. W. 592 (questions were excluded, but the expected answer was not formally offered; held insufficient).

[*Note 5 — continued*]

1907, *Madson v. Rutten*, 16 N. D. 281, 113 N. W. 872 (questions asked and rejected, but not followed by an "offer of proof," held inadequate).  
1909, *Missouri Pac. R. Co. v. Castle*, 8th C. C. A., 172 Fed. 841 (a witness being called and a certain question being excluded, the counsel offered to prove certain other facts, without asking the appropriate questions; held sufficient).

[*Note 8; add:*]

*Contra*: 1910, *Finch & Co. v. Zenith Furnace Co.*, 245 Ill. 586, 92 N. E. 521 ("We cannot adopt a view so narrow").

[*Text*, p. 52, par. b (1); at the end of the sentence, after note 7, *add*:]

A common application of this rule is found where on objection the trial Court excludes an indefinite question (*e. g.*, "What did he say?") whose answer might or might not contain irrelevant or otherwise objectionable matters. In other words, the Court and the opponent are entitled to an offer *specific enough* to permit of intelligent objection and ruling; whether the offering party need specify precisely the expected answer or only the general objective of the question, and whether he needs to volunteer this or may wait until the Court requests it, and whether the context of the testimony may suffice for the purpose, — these must depend much upon the case in hand.<sup>7a</sup>

<sup>7a</sup> 1912, *Birmingham R. L. & P. Co. v. Barrett*, — Ala. —, 60 So. 262 (rehearsing prior cases in this State). 1905, *Marshall v. Marshall*, 71 Kan. 313, 80 Pac. 629 (citing cases; good opinion by Mason, J.).

This question, however, tends often to merge into that of § 20, *post* (embodying the answer in a bill of exceptions) and that of § 1871, *post* (whether there was an implied offer to prove other facts making the offer relevant), and Courts tend not to distinguish.

[*Text*, p. 52, end of § ; *add*:]

*c. Finality of the Offer.* Evidence once offered and admitted cannot ordinarily be *withdrawn* by the offering party, even by allowance of the Court, without consent of the opponent, — at least, merely because the offering party changes his mind about using it.<sup>11</sup> But where an offer of evidence has been objected to and nevertheless admitted, the Court overruling the objection, the offering party may later, it would seem, with the Court's consent, withdraw the evidence with a view to obviating the possibility of an error of ruling; in such a case, the question then becomes one of a revocation of the ruling (*post*, § 19).

<sup>11</sup> 1908, *Alabama Great S. R. Co. v. Hardy*, 131 Ga. 238, 62 S. E. 71.

## § 18. The Objection.

[*Text*, p. 53, l. 4; after "evidence," *add* a new note 1a:]

<sup>1a</sup> In *Baltimore & O. R. Co. v. State*, 107 Md. 642, 69 Atl. 439 (1908), the above passage is quoted, and is stated not to be "in complete harmony with other writers." Nevertheless it is the only sound rule; *i. e.* for purposes of *trial*, the Court is free to act without waiting for an objection; but for purposes of *appeal*, a party not objecting has no standing. In the

[*Note 18 — continued*]

above case, this principle was satisfied, for the appealing party did object, his objection happened to be to a ruling of the Court made on its own motion; if the other party had appealed, in the above case, the principle would have prevented him from taking any benefit.

[*Text*, p. 53, l. 7; *insert*:]

1833, *Shaw, C. J.*, in *Cady v. Norton*, 14 Pick. 236: "The right to except [*i. e.* object] is a privilege, which the party may waive; and if the ground of exception is known and not seasonably taken, by implication of law it is waived. This proceeds upon two grounds; one, that if the exception is intended to be relied on, and is seasonably taken, the omission may be supplied, or the error corrected, and the rights of all parties saved. The other is, that it is not consistent with the purposes of justice for a party, knowing of a secret defect, to proceed and take his chance for a favorable verdict, with the power and intent to annul it as erroneous and void, if it should be against him."

[*Note 1*, par. 1, l. 9; *add*:]

1905, *Tutwiler C. C. & I. Co. v. Nichols*, 145 Ala. 666, 39 So. 762.  
 1906, *Patton v. Bank*, 124 Ga. 965, 53 S. E. 664.  
 1904, *People v. Scalapiero*, 143 Cal. 343, 76 Pac. 1098. 1907, *Short v. Frink*, 151 Cal. 83, 90 Pac. 200.  
 1904, *Macfeat v. Phila. W. & B. R. Co.*, 5 Del. Penn. 52, 62 Atl. 898.  
 1905, *State v. Castigno*, 71 Kan. 851, 80 Pac. 630.  
 1907, *Dick v. State*, 107 Md. 11, 68 Atl. 286. 1908, *Baltimore & O. R. Co. v. State*, 107 Md. 642, 69 Atl. 439 (leading questions).  
 1905, *State v. Crawford*, 96 Minn. 95, 104 N. W. 822.  
 1913, *State v. Reilly*, 25 N. D. 339, 141 N. W. 720 (hypothetical question).  
 1905, *Davidson S. S. Co. v. U. S.*, 142 Fed. 315, C. C. A.  
 1905, *Shandrew v. Chicago St. P. M. & O. R. Co.*, 142 Fed. 320, C. C. A. ("immaterial, incompetent, and irrelevant").  
 1909, *Walston v. Allen*, 82 Vt. 549, 74 Atl. 225.

Of course, where the objection could have been made at the time of the question, a later motion to strike out need not be granted; this seems elementary logic:

1906, *State v. Forsha*, 190 Mo. 296, 88 S. W. 746.  
 1913, *Sanger v. Bacon*, — Ind. —, 101 N. E. 1001 (no objection being made at the time of question or to answer, a later motion to strike out is too late).

This rule, as sometimes stated, is given a supplement, namely, that where objection is not made, to an obviously improper question, *until the answer of the witness has been given*, then the trial Court's discretion in not striking out the answer will be conclusive unless abused: 1906, *State v. Hummer*, 73 N. J. L. 714, 65 Atl. 249. This qualification is too loose; if counsel does not make timely objection, that should be an absolute end of any prohibitory rule of evidence that might have been involved. The ruling in *People v. Scattura*, 238 Ill. 313, 87 N. E. 332 (1909), that upon an irrelevant non-responsive answer a motion to strike out, not made till the close of argument, suffices, is totally unjustifiable.

For the effect of a motion to strike out, see *post*, § 19, par. (2), and *infra*, this section, n. 17.

[*Text*, p. 54, *insert* before par. (2):]

Where the tenor of the question is not objectionable, but is answered with inadmissible matter *not responsive* to the question, the objection is seasonable; its form here is a motion to strike out the answer.<sup>1b</sup>

<sup>1b</sup> 1913, *Marinoni v. State*, — Ariz. —, 136 Pac. 626 (collecting cases).

Distinguish the doctrine of *non-responsive* answers in chancery (*post*, § 785).

[Note 3, l. 8; add:]

1911, *Hutchinson v. Bambas*, 249 Ill. 624, 94 N. E. 987 (questions as to letters not produced).  
 1912, *Bjork v. Glos*, 256 Ill. 447, 100 N. E. 233 (objections to abstracts of title, made at the time of an application for registration before a title-examiner, held insufficient, because not specifying at the time certain grounds of objection which could have been obviated).

[Note 4, par. 1; add:]

1908, *King v. Green*, 7 Cal. App. 473, 94 Pac. 777.  
 1905, *White v. Southern R. Co.*, 123 Ga. 353, 51 S. E. 411 (applying Code § 5314).  
 1911, *Essex v. Ksensky*, 90 Nebr. 437, 133 N. W. 868.  
 1912, *Eldridge v. Compton*, 30 Okl. 173, 119 Pac. 1121 (defect in notary's certificate).  
 1906, *Columbus R. Co. v. Patterson*, 143 Fed. 245, C. C. A.  
 1908, *Groot v. Oregon Short Line*, 34 Utah 152, 96 Pac. 1019 (witness not reading over the deposition).

[Note 6; add:]

1912, *Standard Talking M. Co. v. Matthews S. Co.*, 6 Ala. App. 188, 60 So. 481 (reviewing the cases).

[Note 7; add:]

1909, *Floral Creamery Co. v. Dillon*, 83 Conn. 65, 75 Atl. 82.  
 1904, *Cudlip v. Journal Pub. Co.*, 180 N. Y. 85, 72 N. E. 925 (under C. C. P. § 911, since objections to a deposition need not be noted at the taking, the cross-examiner may on the trial object to parts of his cross-examination when offered by the opponent after the former's refusal to offer them).

[Note 8; add:]

1909, *People v. Hogan*, 11 Cal. App. 599, 105 Pac. 938.  
 1903, *Bair v. Struck*, 29 Mont. 45, 74 Pac. 69.  
 1904, *Mease v. United T. Co.*, 208 Pa. 434, 57 Atl. 820.  
 1904, *Stickney v. Hughes*, 12 Wyo. 397, 75 Pac. 945.

[Note 9; add:]

1908, *Putnal v. State*, 56 Fla. 86, 47 So. 864.

[Note 10; add:]

An objection to a *deposition* on the ground that the witness is present in the court need not be made till then; but special circumstances affect the time of making this objection (*post*, § 1415).

[Note 13; add:]

1910, *Belskis v. Dering Coal Co.*, 246 Ill. 62, 92 N. E. 575 (failure to object to a spontaneous exclamation does not bar objection at the second trial).  
 1904, *Meekins v. Norfolk & S. R. Co.*, 136 N. C. 1, 48 S. E. 501 (former testimony of one deceased between the trials; a certain hearsay part of his testimony excluded, although not objected to at the former trial).

[Note 14; add, as a new paragraph:]

There is, however, a rule of general application to *infants*, as a part of which the Court will rule in their favor on points upon which no exception was taken on their behalf:

1904, *Parker v. Safford*, 48 Fla. 290, 37 So. 567. Compare § 1076, notes 7, 8, *post*, and § 1063, note 1.

[Note 15; *add.*:]

1906, *Benton v. State*, 78 Ark. 284, 94 S. W. 688 (an objection "to all evidence of actions, conversations, etc., after the commission of the offence," does not avail for subsequent testimony of the sort, unless by consent).

[Note 17; *add.*:]

The term "*motion to strike out evidence*" is used in some localities to represent a form of objection. It is, however, an ambiguous and unsatisfactory term, because the things signified by it are otherwise better known in orthodox practice. The following uses of the term are to be distinguished:

(1) A motion to strike out a piece of evidence which *ought to have been objected to* at the time of its offer is merely another term for an *objection*, and is governed by the rules as to the time of an objection (*supra*, par. a, notes 1-14).

(2) A motion to strike out evidence which was admitted *conditionally on the subsequent supplying of other evidence* is a mode of taking advantage of the doctrine of *conditional admissibility* (*ante*, § 14, *post*, § 1871).

(3) A motion to strike out a certain class of testimony which is required by law to be *corroborated* in order to be legally effective may be a proper method of taking advantage of such rules (*post*, §§ 2030-2091).

(4) A motion to strike out a *document* which in the course of the evidence turns out not to be properly authenticated may be a proper method of excluding it (*post*, §§ 2129-2169).

(5) A motion to strike out *any mass of evidence* which at the close of a case appears insufficient for the particular issue may serve to eliminate it; but more usually the same purpose will be better attained by a motion to take the case from the jury or by an instruction to the jury (*post*, §§ 2494-2496).

(6) Where the answer to an unobjectionable question is inadmissible and *non-responsive*, a motion to strike out the answer is the proper form (*supra*, n. 1a). But here the point is simply that the rule requiring an objection to be made *before* the answer is uttered does not on principle apply; and the tardy motion to strike out is justified, not merely because the answer is non-responsive, but because it is *inadmissible* in its tenor. An unfounded notion is often seen that a non-responsive answer is in itself improper; this fallacy is examined more fully, *post*, § 6785.

An example of the failure to distinguish carefully these different uses will be seen in *Walker v. Lee*, 51 Fla. 360, 40 So. 881 (1906).

[Note 18, par. 1; *add.*:]

1904, *Weaver v. State*, 139 Ala. 130, 36 So. 717. 1907, *Sanders v. Davis*, 153 Ala. 375, 44 So. 979.

1904, *Illinois C. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435 (qualified rule). 1907, *Merchants' & F. State Bank v. Dawdy*, 230 Ill. 199, 82 N. E. 606 (deed).

1905, *Hicks v. State*, 165 Ind. 440, 75 N. E. 641.

1907, *Williams v. State*, 168 Ind. 87, 79 N. E. 1079 (irrelevant and immaterial).

1907, *Goss v. Goss*, 102 Minn. 346, 113 N. W. 690 (warning as to prior self-contradictions).

1904, *Longan v. Weltmer*, 180 Mo. 322, 79 S. W. 655 (hypothetical question).

1904, *Weatherford v. Union P. R. Co.*, — Nebr. —, 98 N. W. 1089.

1903, *State v. Hendrick*, 70 N. J. L. 41, 56 Atl. 247 (pointing out special modes of curing the defect).

1905, *Willet v. Morse*, — N. J. L. —, 60 Atl. 362.

1913, *People v. Cummins*, 209 N. Y. 283, 103 N. E. 169 (equally for criminal cases).

1908, *Buchanan v. Minneapolis T. M. Co.*, 17 N. D. 343, 116 N. W. 335. 1909, *Flora v. Mathwig*, 19 N. D. 4, 121 N. W. 63.

1904, *Enid & A. R. Co. v. Wiley*, 14 Okl. 310, 78 Pac. 96.

1906, *Newcomb v. State*, 49 Tex. Cr. 550, 95 S. W. 1048 (irrelevant and immaterial).

1904, *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. 24.

[Note 18 — *continued*]

1905, *State v. Nelson*, 39 Wash. 221, 81 Pac. 721.

For the same reason, an objection may not be *in gross* to a mass of unspecified testimony. 1905, *O'Brien v. Knotts*, 165 Ind. 308, 75 N. E. 582 (motion to strike out all testimony on a certain subject, insufficient).

[Note 19; *add*:]

1905, *Braham v. State*, 143 Ala. 28, 38 So. 919.

1903, *Roche v. Llewellyn I. Co.*, 140 Cal. 563, 74 Pac. 147.

1905, *Humphrey v. Pope*, 1 Cal. App. 374, 82 Pac. 223 (marital communications).

1907, *Chicago R. I. & P. R. Co. v. Rathneau*, 225 Ill. 278, 80 N. E. 119.

1913, *Dowell v. State*, — Ind. —, 101 N. E. 815 (conversation in absence of accused).

1906, *Sparks v. Terr.*, 146 Fed. 371, C. C. A. ("when the reason for the objection is readily discernible").

1913, *State v. Shaw*, 75 Wash. 326, 135 Pac. 20.

On the principle of Multiple Admissibility (*ante*, § 13), it follows that where the opponent, without objecting, desires to restrict the evidence to its sole legitimate purpose, he must *ask an instruction* from the Court, otherwise he cannot complain of the possibility of the jury's having misapplied it to other and improper purposes: Cases cited *ante*, § 13, n. 2.

[Text, p. 59; rewrite the paragraph beginning "But when a general objection" so as to read:]

But when a general objection is *sustained* by the trial Court, it may be presumed that some valid ground was apparent to the judge without express statement; and as the exception is here to be taken by the proponent of the evidence, it is fair to insist that he should have asked for the specific ground of objection, if he did not perceive it, or should have made an offer to obviate it, if he did perceive it, or should have stated clearly the precise basis of his claim for admissibility, etc.

[Note 20; *add*:]

1904, *Matthews v. Farrell*, 140 Ala. 298, 37 So. 325 (but here the Court puts its decision on inappropriate grounds).

1907, *Short v. Frink*, 151 Cal. 83, 90 Pac. 200.

1903, *Spohr v. Chicago*, 206 Ill. 441, 69 N. E. 515.

1904, *State v. Leuhrman*, 123 Ia. 476, 99 N. W. 140.

1906, *Luckenbach v. Sciple*, 72 N. J. L. 476, 63 Atl. 244 (good opinion by Garrison, J.).

1911, *Rosenberg v. Sheahan*, 148 Wis. 92, 133 N. W. 645.

*Contra*, on the facts: 1906, *Hicks v. Hicks*, 142 N. C. 231, 55 S. E. 106 (here the unusual suggestion is made that "the judge could have called upon the counsel to state what he expected to prove"; but why could not the counsel himself speak up, without waiting to be prodded?).

[Note 21; *add*:]

1904, *Parrish v. State*, 139 Ala. 16, 36 So. 1012 (but otherwise where the nature of the answer may be presumed).

1908, *Ferry v. Henderson*, 32 D. C. App. 41.

1907, *Sims v. State*, 54 Fla. 100, 44 So. 737 (judgment in a civil case, offered on a charge of embezzlement).

1903, *Illinois C. R. Co. v. Wade*, 206 Ill. 523, 69 N. E. 565 (witness' contradiction).

1904, *Ewen v. Wilbor*, 208 Ill. 492, 70 N. E. 575.

1906, *O'Donnell v. People*, 224 Ill. 218, 79 N. E. 639 (conviction of crime to impeach a wit-

[Note 21 — *continued*]

ness; the objection that a copy of the record should be used was not allowed to be raised on appeal). 1913, *Chicago v. Gilsdorff*, 258 Ill. 212, 101 N. E. 546 (objection to a deed's tenor as not giving title, held unavailable to raise an objection to the certified copy's lack of signature).

1910, *Pulley v. State*, 174 Ind. 542, 92 N. E. 550 (rape complaint). 1913, *Shilling v. Varner*, — Ind. —, 103 N. E. 404 (drainage assessment).

1913, *Seckerson v. Sinclair*, — Ia. —, 140 N. W. 239 (extent of specification for objections to a hypothetical question, considered).

1906, *Magnolia M. Co. v. Gale*, 191 Mass. 487, 78 N. E. 128.

1903, *Weeks v. Hutchinson*, 135 Mich. 160, 97 N. W. 695.

1905, *Bragg v. Metropolitan St. R. Co.*, 192 Mo. 331, 91 S. W. 527 (hypothetical questions; pungent opinion by Lamm, J.).

1907, *Hildebrand v. United Artizans*, 50 Or. 159, 91 Pac. 542 (hypothetical question).

[Note 23; *add*.:]

*Contra, semble*, where the tenable one could have been obviated at the trial: 1908, *Arcola v. Wilkinson*, 233 Ill. 250, 84 N. E. 264.

The following ruling seems erroneous: 1904, *People v. Albers*, 137 Mich. 678, 100 N. W. 908 (perjury; offer of the defendant's good character for veracity, admissible for him as defendant, but not admissible for him as witness because he did not testify; an objection to it was sustained; held erroneous, though the offering counsel did not state the specific purpose).

[Note 24; *add*.:]

1904, *Kirby v. State*, 139 Ala. 87, 36 So. 721.

1904, *Markey v. State*, 47 Fla. 38, 37 So. 53.

1903, *Hoodless v. Jernigan*, 46 Fla. 213, 35 So. 656.

1906, *Johnson v. State*, 125 Ga. 243, 54 S. E. 184.

1906, *State v. Crump*, 116 La. 978, 41 So. 229 (dying declaration).

1905, *Thornton-Thomas M. Co. v. Bretherton*, 32 Mont. 80, 80 Pac. 10 (series of documents).

1911, *State v. Smith*, 33 Nev. 438, 117 Pac. 19.

1908, *Chicago Gt. Western R. Co. v. McDonough*, 8th C. C. A., 161 Fed. 657, 671 (offer defendant's conduct in making certain repairs; motion to strike out all, held not available on appeal, because a part of the evidence was not objectionable).

The following case is peculiar:

1908, *Cooper v. Bower*, 78 Kan. 156, 164, 96 Pac. 59, 794 (breach of marriage promise; plaintiff's question to a witness concerning the plaintiff's admissions, "what she said about any agreement with Mr. C. to marry, and his conduct in relation thereto," was admitted, overruling defendant's general objection; held that the rule requiring the objection to specify the part objected to was not applicable where the offer contained in a single oral question two or more pieces of testimony one of which was objectionable; careful opinion, by Mason, J.; but with deference it is suggested that the opinion does not adequately distinguish the respective bearings of the present principle and of that of § 18, par. b, n. 8, *ante*; the spirit of the present principle is to force an objector to be specific; the aim of the other principle is to force an offeror to separate his offer so that no more than their due effect will be given to objections; the other principle does not come to bear until the present one has been fulfilled; now in the case in hand the objector had not done his full duty, hence the offeror was not yet bound to do his, viz. separate the objectionable part to make his offer valid).

[Note 25; *add*.:]

1904, *Rhodes v. State*, 141 Ala. 66, 37 So. 365.

1905, *Spencer's Appeal*, 77 Conn. 638, 60 Atl. 289.

1904, *Alford v. State*, 47 Fla. 1, 36 So. 436.

[*Note 25 — continued*]

- 1905, *Freeman v. State*, 50 Fla. 38, 39 So. 785.  
 1906, *Hoodless v. Jernigan*, 51 Fla. 211, 41 So. 194 (several documents).  
 1906, *Mash v. People*, 220 Ill. 86, 77 N. E. 92.  
 1906, *State v. Simmons*, 74 Kan. 799, 88 Pac. 57 (deposition).  
 1904, *Wilson v. Pritchett*, 99 Md. 583, 58 Atl. 360. 1911, *Russell v. Carman*, 114 Md. 25, 78 Atl. 903.  
 1908, *State v. Dahlquist*, 17 N. D. 40, 115 N. W. 81 (freight records).  
 1906, *Metz v. Willitts*, 14 Wyo. 511, 85 Pac. 380.

[*Text*, p. 61, l. 14; *add* a new par. :]

Moreover, where a *question* is objected to, and the objection is properly overruled, but the *answer* which follows contains improper evidence, the objection to the question is of no avail; a new objection must be made specifically to the answer; because the answer contains new matter, and the nature of the alleged impropriety cannot be known until the opponent specifies it. Here the form of the objection is a motion to strike out.<sup>25a</sup>

- <sup>25a</sup> 1877, *Gould v. Day*, 94 U. S. 405.  
 1911, *Henderson v. Coleman*, 19 Wyo. 183, 115 Pac. 439.

[*Note 26*, l. 6 from below; *add* :]

- 1913, *Lockridge v. Brown*, — Ala. —, 63 So. 524 (asking in rebuttal the same improper question already asked by the objector, held not the subject of complaint on appeal).  
 1908, *St. Louis I. M. & S. R. Co. v. Flinn*, 88 Ark. 505, 115 S. W. 142 (opinion testimony).  
 1912, *Franklin v. U. S., C. C. A.*, 193 Fed. 334 (handwriting testimony).  
 1906, *Southern R. Co. v. Blanford's Adm'rs*, 105 Va. 373, 54 S. E. 1 (custom as to switch-lights on other railroads).

[*Note 26*, at the end; *add* :]

- 1907, *Short v. Frink*, 151 Cal. 83, 90 Pac. 200.  
 1904, *Chicago City R. Co. v. Uhter*, 212 Ill. 174, 72 N. E. 195 (personal injuries; the plaintiff having introduced against objection hearsay evidence negating prior injuries received, the defendant was held not to waive by afterwards rebutting with similar hearsay affirming the injuries).  
 1900, *Richardson v. Webster City*, 111 Ia. 426, 430, 82 N. W. 921 (objection to opinion evidence of damage, not waived by subsequent similar evidence).  
 1909, *United R. & E. Co. v. Corbin*, 109 Md. 442, 72 Atl. 606 (the mere cross-examination of the witness on the subject is not a waiver).  
 1906, *State v. Beckner*, 194 Mo. 281, 91 S. W. 892 (murder; the prosecution having erroneously introduced the defendant's bad character for violence, his rebuttal by evidence of good character held not a waiver).  
 1907, *Cheney's Estate*, 78 Nebr. 274, 110 N. W. 731 (opinion evidence).  
 1900, *Horres v. Chemical Co.*, 57 S. C. 192, 35 S. E. 500 (objection to improper opinion of speculative damages, held not waived by subsequent similar evidence).

Compare the rule for *curative admissibility* (*ante*, § 15).

[*Note 27*, l. 4; *add* :]

- 1905, *Schutz v. Union R. Co.*, 181 N. Y. 33, 73 N. E. 491 ("where an objection has once been distinctly raised and overruled, it need not be repeated to the same class of evidence").  
 1904, *Southern L. & T. Co. v. Benbow*, 135 N. C. 303, 47 S. E. 435 (an offer of a part of former testimony was rejected as being too fragmentary; the whole was then offered and admitted; this was held a waiver of the exception).  
 1904, *Cheek v. Oak G. L. Co.*, 134 id. 225, 46 S. E. 488 (similar).

[Note 27, at the end; *add.*:]

The tender by an objector of an *instruction limiting the evidential effect* of evidence admitted against the objection is not a waiver of the objection to that ruling:

1904, *Myers v. Manlove*, 164 Ind. 128, 71 N. E. 893.

A *failure to object to a document* will extend, not only to the genuineness of it, but also to an agent's authority to execute, yet not to its legal sufficiency (*post*, § 2132).

Usually, a failure to renew an offer, after the opponent's *withdrawal of an objection improperly sustained*, would be a waiver of the error; but not always: 1905, *Main v. Radney*, — Ala. —, 39 So. 981.

It is common learning that a party obtaining a *responsive answer* (*post*, § 785) to a *question asked by himself* has waived objection by the very asking: 1905, *O'Brien v. Knotts*, 105 Ind. 308, 75 N. E. 582. Thus the only question usually can be as to responsiveness; compare *ante*, n. 13, par. (6). An example of a poor ruling on this subject is seen in *Bishop v. Bishop*, 124 Ga. 293, 52 S. E. 743 (1905).

### § 19. The Ruling.

[Note 1, at the end; *add.*:]

Compare the following case: 1906, *Stitt v. Rat Portage L. Co.*, 98 Minn. 52, 107 N. W. 824 (collecting prior rulings in this jurisdiction).

Compare the following, said of a trial in chancery: 1904, *Asbury v. Hicklin*, 181 Mo. 658, 81 S. W. 390 ("The practice . . . of reserving the ruling until the decision of the case is erroneous").

But the reservation of a ruling on evidence *admitted* may well require that the opponent should formally except later for failure to rule, in order to raise the point on appeal: 1904, *Naas v. Welter*, 92 Minn. 404, 100 N. W. 211.

[Note 3, par. 1; *add.*:]

1904, *De Yampert v. State*, 139 Ala. 53, 36 So. 772.

1907, *People v. Solani*, 6 Cal. App. 103, 91 Pac. 654.

1905, *Johnson v. People*, 33 Colo. 224, 80 Pac. 133.

1906, *Illinois C. R. Co. v. Bailey*, 222 Ill. 480, 78 N. E. 833.

1906, *State v. Moran*, 131 Ia. 645, 109 N. W. 187 (confession). 1907, *Brown Land Co. v. Lehman*, 134 Ia. 712, 112 N. W. 185. 1907, *State v. Scott*, 136 Ia. 152, 113 N. W. 758.

1907, *Gulliford v. McQuillan*, 75 Kan. 454, 89 Pac. 927.

1904, *Allen v. Com.*, — Ky. —, 82 S. W. 589.

1905, *White v. Com.*, 120 Ky. 178, 85 S. W. 753.

1905, *Baumgartner v. Eigenbrot*, 100 Md. 508, 60 Atl. 601.

1912, *Allen v. Boston Elevated R. Co.*, 212 Mass. 191, 98 N. E. 618 (medical books improperly quoted).

1904, *McNaughton v. Smith*, 136 Mich. 368, 99 N. W. 382.

1910, *State v. Martin*, 229 Mo. 620, 129 S. W. 881.

1910, *Fuller v. Robinson*, 230 Mo. 22, 130 S. W. 343.

1910, *State v. Rees*, 40 Mont. 571, 107 Pac. 893.

1909, *Connecticut River Power Co. v. Dickinson*, 75 N. H. 353, 74 Atl. 585.

1906, *Morgan v. Terr.*, 16 Okl. 530, 85 Pac. 718.

1904, *State v. Eggleston*, 45 Or. 346, 77 Pac. 738.

1910, *Darnell v. State*, 58 Tex. Cr. 585, 126 S. W. 1122.

1909, *Chicago M. v. St. P. R. Co. & Newsome*, 8th C. C. A., 174 Fed. 394.

1909, *Turner & American Security v. T. Co.*, 213 U. S. 257, 29 Sup. 420 ("the general rule is that the admission of incompetent evidence is not reversible error if it subsequently is distinctly withdrawn from the consideration of the jury"; this seems an incorrect mode of statement, for in strictness the revocation of the ruling removes the original ruling and its error).

1908, *Loafbourov v. Utah L. & R. Co.*, 33 Utah 477, 94 Pac. 980.

[*Note 3; add, in a new paragraph:*]

So, also, an erroneous exclusion of evidence may be cured by *subsequently admitting it*: 1904, *Post v. Leland*, 184 Mass. 601, 69 N. E. 361.

Distinguish the question whether the *party objecting* is entitled to do so by a *motion to strike out* or an *instruction to disregard*, made later in the cause; here, on the principle of § 18, par. a, *ante*, the motion or instruction comes too late, if the ground of it was knowable at the time of the offer of the testimony: 1904, *Harbour v. State*, 140 Ala. 103, 37 So. 330.

## § 20. The Exception.

[*Note 2; add:*]

1903, *Cady v. Cady*, 91 Minn. 137, 97 N. W. 580.

1905, *State v. Bailey*, 190 Mo. 257, 88 S. W. 733. 1911, *Harding v. Missouri Pacific R. Co.*, 232 Mo. 444, 134 S. W. 641 (noting that herein the procedure for opposing an instruction of the court and an offer of evidence is different, in that no objection is needed for the former; overruling *Sheets v. Ins. Co.*, 226 Mo. 613, 126 S. W. 413; *Woodson, J.*, diss.; careful opinions).

1904, *Alden v. Supreme Tent*, 178 N. Y. 535, 71 N. E. 104 (applying special Code provisions). 1913, *Stroberg v. Merrill*, — Or. —, 135 Pac. 335 (rule applied to findings by court without jury).

1906, *Morgan v. Lehigh V. C. Co.*, 215 Pa. 443, 64 Atl. 633 (referee).

1907, *Thomas v. Com.*, 106 Va. 855, 56 S. E. 705.

The following seems peculiar: 1905, *Close v. Chicago*, 217 Ill. 216, 75 N. E. 479 (whether a city ordinance is void on its face does not need an exception, otherwise where the objection is to the insufficiency of description, etc.).

[*Text*, p. 66, in par. (2), at the end of the second quotation, *add a new note 3a:*]

<sup>2a</sup> The practice as to bills of exception, certificates, etc., depends largely on local rules of court; compare the following: 1906, *State v. Rodriguez*, 115 La. 1004, 40 So. 438 (practice in criminal cases, under St. 1896, no. 113).

1906, *Lemmert v. Lemmert*, 103 Md. 57, 63 Atl. 380.

1904, *Hillier v. Farrell*, 185 Mass. 434, 70 N. E. 424 (before a master, under chancery rules 31 and 32).

[*Note 4; add, under Evidence Admitted:*]

1905, *Starke v. State*, 49 Fla. 41, 37 So. 850.

1905, *Caldwell v. State*, 50 Fla. 4, 39 So. 188 (here the objection to the question was useless, because the question was not shown, and no objection to the answer as such was made by a motion to strike out).

1906, *Hoodless v. Jernigan*, 46 Fla. 213, 35 So. 656, 51 Fla. 211, 41 So. 194.

1904, *Dunn v. State*, 162 Ind. 174, 70 N. E. 521.

1903, *State v. Booth*, 121 Ia. 710, 97 N. W. 74.

1904, *State v. Lewis*, 112 La. 872, 36 So. 788.

1906, *Purinton v. Purinton*, 101 Me. 250, 63 Atl. 925.

1905, *Robinson v. Old Colony St. R. Co.*, 189 Mass. 594, 76 N. E. 190.

[*Note 4; add, under Questions Excluded:*]

1904, *Ross v. State*, 139 Ala. 144, 36 So. 718. 1909, *Harris v. Basden*, 162 Ala. 367, 50 So. 321. 1912, *Birmingham R. L. & P. Co. v. Barrett*, — Ala. —, 60 So. 262 (reviewing prior cases in this State).

1907, *Riddle v. Gibson*, 29 D. C. App. 237, 248.

1905, *Macon v. Humphries*, — Ga. —, 50 S. E. 986.

1904, *Georgia N. R. Co. v. Hutchins*, 119 Ga. 504, 46 S. E. 659.

[*Note 4 — continued*]

- 1904, *Com. v. Bavarian B. Co.*, — Ky. —, 80 S. W. 772.  
 1908, *Cook v. Enterprise Transp. Co.*, 197 Mass. 7, 83 N. E. 325.  
 1908, *State v. Page*, 212 Mo. 224, 110 S. W. 1057.  
 1908, *Milwaukee G. E. Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995 (mining claims).  
 1904, *South Omaha v. Sutcliffe*, 72 Nebr. 746, 101 N. W. 797.  
 1913, *Smith's Will*, 163 N. C. 464, 79 S. E. 977.  
 1911, *Warren v. State*, 6 Okl. Cr. 1, 115 Pac. 812.  
 1910, *State v. Goodager*, 56 Or. 198, 106 Pac. 638 (noting some exceptions to the rule, *s. g.* on cross-examination).  
 1905, *Union R. Co. v. Hunton*, 114 Tenn. 609, 88 S. W. 182 (stating the rule's limitations).  
 1911, *Harris v. Brown*, C. C. A., 187 Fed. 6 (stating the modified Federal form of the rule).  
 1904, *Richmond & P. E. R. Co. v. Rubin*, 102 Va. 809, 77 S. E. 834.  
 1904, *Williams v. Belmont C. & C. Co.*, 55 W. Va. 84, 46 S. E. 802.

[*Note 7; add:*]

Campbell says of Lord Mansfield (*Lives of the Chief Justices*, III, 293): "In all his time, there was never a bill of exceptions tendered to his direction." It is worth noting that the old reason, namely, distrust of the judge's accuracy, which led to the original English statute, produced recently in Louisiana, in consequence of the overt-act doctrine for a deceased's threats in homicide, a statute stiffening the practice as to the immediate recording of the evidence leading to the exception (*post*, § 246, n. 13).

[*Note 8, par. 1; add, under Accord:*]

- 1905, *McClintock v. Frohlich*, 75 Ark. 111, 86 S. W. 1001.  
 1905, *Spring Valley Coal Co. v. Chiaventone*, 214 Ill. 314, 73 N. E. 420.  
 1905, *Storer v. Markley*, 164 Ind. 535, 73 N. E. 1081.  
 1903, *Glaser v. Glaser*, 13 Okl. 389, 74 Pac. 944.  
 1911, *James v. Jackson*, 30 Okl. 190, 120 Pac. 288.  
 1904, *Schouweiler v. McCaull*, 18 S. D. 70, 99 N. W. 95. 1905, *Foss v. Van Wagenen*, 20 S. D. 39, 104 N. W. 605.

See also the following: 1904, *Chicago & E. I. R. Co. v. Schmitz*, 211 Ill. 446, 71 N. E. 1050 (motion overruled must be excepted to, etc.).

So, too, in any other form of carrying the case higher, the specific errors relied upon must be mentioned: 1905, *Barker v. State*, 73 Nebr. 469, 103 N. W. 71 (petition of error).

[*Note 8; under Contra, add:*]

1908, *Yarber v. Chicago & A. R. Co.*, 235 Ill. 589, 85 N. E. 928 (overruling the above cases; Dunn, J., in a learned opinion, reviews the history of the Illinois practice, distinguishing and repudiating various cases, and codifying the declared rule as follows: "[1] Decisions of the Court made . . . upon instructions, objections to evidence, or other matters of law arising in the cause, which have been incorporated in a bill of exceptions, may be assigned for error and reviewed by an appellate court *without any motion for a new trial*. [2] They are not waived by making a motion for a new trial if such motion is submitted *without any points stated in writing*. [3] But if a motion is made for a new trial and the grounds thereof are stated in writing, the party is *limited to those reasons*, and all other errors are deemed to have been waived. . . . [4] The exceptions taken to the decision of the Court in these particulars . . . are available to the appellant, *whether exception was taken to the order overruling the motion for a new trial or not*").

## § 21. New Trial for Erroneous Ruling.

[*Note 5; add, at the end:*]

- 1905, *McClelland v. Bullis*, 34 Colo. 69, 81 Pac. 771 (opinion by Bailey, J., collecting the authorities).

[*Note 5 — continued*]

1904, *Heyman v. Heyman*, 210 Ill. 524, 71 N. E. 591.

1904, *Young v. Valentine*, 177 N. Y. 347, 69 N. E. 643.

1909, *Walston v. Allen*, 82 Vt. 549, 74 Atl. 225.

So, too, for a judge *sitting without a jury*: 1905, *Kreiling v. Northrup*, 215 Ill. 195, 74 N. E. 123 ("The rule is that no improper or immaterial evidence will be presumed to have influenced the Court in reaching a decision, where there is sufficient proper evidence to justify the judgment").

1907, *McCready v. Crane*, 74 Kan. 710, 88 Pac. 748.

1904, *Mankato Mills Co. v. Willard*, 94 Minn. 160, 102 N. W. 202.

1904, *Dennison v. Christian*, 72 Nebr. 703, 101 N. W. 1045.

1905, *State v. Harris*, 14 N. D. 501, 105 N. W. 621.

1904, *Godfrey v. Faust*, 18 S. D. 567, 101 N. W. 718. 1905, *Godfrey v. Faust*, 20 S. D. 203, 105 N. W. 460 (local rule revised in statement).

[*Note 10; add:*]

In the following opinions good statements of the rule are found; it remains only for these Courts to be consistent with themselves in constantly observing the spirit of these rulings:

*Connecticut*: 1903, *Munroe v. Hartford St. R. Co.*, 76 Conn. 201, 56 Atl. 498, per *Hamersley, J.*

*Idaho*: 1904, *State v. Levy*, 9 Ida. 483, 75 Pac. 227.

*Illinois*: 1908, *Greinke v. Chicago City R. Co.*, 234 Ill. 564, 85 N. E., 327 (declines to disturb a verdict which had been "clearly established by other competent evidence").

*Indiana*: 1907, *Sanderson v. State*, 169 Ind. 301, 82 N. E. 525.

*Iowa*: 1906, *Wiltsey's Will*, 135 Ia. 430, 109 N. W. 776 ("We are not justified in reversing a case because of the improper admission of evidence, where the result could not have been different had such evidence been excluded").

*Maryland*: 1904, *Joseph Bros. Co. v. Schonthal I. & S. Co.*, 99 Md. 382, 58 Atl. 205 (good statement by *McSherry, C. J.*).

*Michigan*: 1891, *People v. Neumann*, 85 Mich. 98, 48 N. W. 290.

*Minnesota*: 1903, *State v. Nelson*, 91 Minn. 143, 97 N. W. 652.

1905, *State v. Crawford*, 96 Minn. 95, 104 N. W. 822 (in which *Jaggard, J.*, for the Court, fully and emphatically proclaims the adherence of this Court to the orthodox and enlightened rule). 1905, *State v. Williams*, 96 id. 351, 105 N. W. 265 (*Start, C. J.*, explaining the rule laid down in the preceding cases).

*Missouri*: 1905, *Swope v. Ward*, 185 Mo. 316, 84 S. W. 895 (under Rev. St. 1899, § 865). 1906, *State v. Barrington*, 198 Mo. 23, 95 S. W. 235 (showing a healthy attitude on this subject).

1906, *State v. Feeley*, 194 id. 300, 92 S. W. 663.

1904, *Alexander v. Wade*, 106 Mo. App. 141, 80 S. W. 19 (*Bland, P. J.*: "Whether or not there was error committed in the admission of evidence, the error will not avail appellant, for the reason that under the competent evidence, . . . the judgment is clearly for the right party and should not be reversed").

1904, *Hanna v. Orient Ins. Co.*, 109 id. 152, 82 S. W. 1115.

*Montana*: 1906, *State v. Fuller*, 34 Mont. 12, 85 Pac. 369.

*Nevada*: *State v. Williams*, 28 Nev. 395, 82 Pac. 353.

*North Dakota*: 1910, *State v. Staber*, 20 N. D. 545, 129 N. W. 104 (different phrasings considered).

*Rhode Island*: One of the broadest and best statements of the rule is as follows: "Where the evidence is such that a new trial would be of no avail, it will be denied, although there may have been error in the trial"; per *Stiness, C. J.*, in *Clarke v. N. Y. N. H. & H. R. Co.*, 26 R. I. 59, 58 Atl. 245.

*South Dakota*: 1904, *Fowler v. Iowa Land Co.*, 18 S. D. 131, 99 N. W. 1095 ("Where there is sufficient evidence to sustain the judgment, independently of the evidence

[*Note 10 — continued*]

objected to and admitted, the admission of such evidence does not constitute reversible error").

*Tennessee*: The following phrasing of the rule, under Tenn. Code, § 6351, would be the ideal one, if the last two clauses were omitted:

1904, *Pennsylvania R. Co. v. Naive*, 112 Tenn. 239, 79 S. W. 124 (Neil, J.: "The rule has been laid down by this Court that there can be no reversal for error in the charge of the Court below, where we can clearly see that a correct result was reached by the jury, and that another trial with a proper charge could not change that result. The same rule must obtain where evidence was improperly excluded in the Court below, if it be perfectly apparent to this Court that the result was the correct one, that the excluded evidence could not have changed the result, and that upon a new trial . . . the jury could not fail to reach the same conclusion").

*West Virginia*: 1905, *Tucker v. Colonial F. Ins. Co.*, 58 W. Va. 30, 51 S. E. 86 ("If it appear to the Court on the whole matter that the verdict ought to be affirmed," no new trial will be granted).

The soundest formula of decision, as Courts might as well concede, is the following, phrased by the greatest living American criminal judge, Furman, P. J.: "As the verdict rendered is the only one which could have been rendered by the jury, we cannot say that the appellant has been deprived of any substantial right to his injury" (1912, *Mitchell v. State*, 7 Okl. Cr. 563, 124 Pac. 1112).

[*Note 12; add:*]

The following rulings are to be numbered among those which still look backward: that some of these Courts have in the meantime improved their attitude is quite possible.

*Alabama*: 1904, *Southern R. Co. v. Morris*, 149 Ala. 672, 42 So. 19 (on several exceptions, the only one sustained was that, upon a proper question to a witness as to the defendant's payment of his expenses, the witness' answer showed that no more had been paid than was due; solely for failing to strike out this answer, the verdict for the plaintiff was reversed and a new trial ordered; this was a plain failure of justice).

1905, *Shelton v. State*, *ib.*, 42 So. 30 (murder; out of two dozen exceptions, the verdict was set aside solely because of a charge upon confessions, the defendant's statement being finically construed not to be a confession).

1905, *Smith v. State*, 142 Ala. 14, 39 So. 329 (on some thirty exceptions, and twenty refused charges, the judgment was reversed solely because of an error in refusing to admit the details of the deceased's intoxication).

1906, *Jacobs v. State*, — Ala. —, 42 So. 70 (murder; out of a dozen exceptions, the only one sustained was to a casual phrase of the judge amounting to a charge upon the evidence; and for this the verdict was set aside).

*California*: 1903, *Rulofson v. Billings*, 140 Cal. 452, 74 Pac. 35 ("A party cannot, after insisting upon the admission of improper evidence, over an objection to its admissibility, defend his course by contending that the error was harmless. . . . This Court in such cases sits only as a Court for the correction of errors. The judgment upon the facts, to which every litigant is entitled as of right absolute, is the judgment of the trial Court." Here is indeed frankly the Trilog of Technicalism, which may be thus restated: "1. It is a crime to violate by mistake the rules of evidence; the penalty is the forfeiture of one's just rights and estates. 2. The Supreme Court is not a real Court of Justice, but only a Referee to decide Bets on Rules of Evidence. 3. Every person has an Absolute Right to profit unjustly by the trial Court's mistakes in deciding such Bets").

1904, *People v. Creeks*, 141 Cal. 532, 75 Pac. 101.

The new Court of Appeal seemed to be making a better start in enforcing the rational doctrine: 1905, *Greene v. Murdock*, 1 Cal. App. 136, 81 Pac. 993; and a marked turn for the better was for a while observable in the Supreme Court, in *People v. Weber*, 86 Cal. 671, 86 Pac. 671 (1906); *Dolbeer's Estate*, *ib.*, 86 Pac. 695 (1906).

[Note 12 — *continued*]

Then came a relapse, illustrated by the following case :

1911, *People v. Coffey*, 161 Cal. 433, 119 Pac. 901 (another of the Ruef-Gallagher trolley-system bribery cases; the reversal was grounded on the lack of corroboration of an accomplice; the definition of an accomplice was expounded learnedly and lengthily, and a very pretty and scientific distinction was laid down, which however was not the one used by the trial judge; thus was fatal error committed; in other words, the credibility, man to man, on all the circumstances of the case, of this witness and thus the safety of the verdict as founded on fact, was made to turn on a subtle discussion of criminal theory; it might just as well have been made to turn on the authenticity of the Pentateuch).

Then came retribution, in the shape of a Constitutional Amendment of 1911 (Art. 6, § 4½), a humiliating rebuke to all Courts of Justice, forbidding new trials except for "miscarriage of justice."

Slowly but manfully and sincerely this Court is now accepting the spirit of the Amendment :

1913, *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042 (here the Court, speaking through Sloss, J., call attention to the constitutional amendment of 1911 forbidding new trials for errors, etc., unless involving "miscarriage of justice"; affirm that it was meant to remedy the unsatisfactory doctrine of "reversible error"; and proceed to apply it wholeheartedly and sensibly, on the canon, "If it appears to our satisfaction that the result was just, and that it would have been reached if the error had not been committed, a new trial is not to be ordered"; three judges, in a minority opinion, show a hesitation, erroneously believing that a constitutional principle was involved).

1913, *People v. Fleming*, 166 Cal. 357, 136 Pac. 291 (the majority ordered a new trial, for erroneous use of evidence, "in the interests of justice"; but Chief Justice Beatty, non-concurring, very properly pointed out that the term "miscarriage of justice" (Const. Art. 6, § 4½, recently added) can mean, "only the correlation of such miscarriage in cases of acquittal, viz. the conviction of a person who is innocent."

See the article by Professor A. M. Kidd, "Criminal Law : Miscarriage of Justice : Constitutional Amendment" (California Law Review, I, 375).

*Florida* : 1910, *White v. State*, 59 Fla. 53, 52 So. 805 (typical case to show modern quibbling spirit of lawyers trying the case).

*Georgia* : 1906, *Young v. State*, 125 Ga. 584, 54 S. E. 82 (third conviction for murder; the first two were set aside for minor technicalities; this third was set aside by a majority, because the trial judge erroneously assumed that the defendant did not dispute the death of the deceased; in fact, the victim assaulted was riddled with shot "from about the middle," and at the time of this ruling his corpse had been putrefying in the graveyard for two years; yet the trial Court, in withdrawing that issue from the consideration of the jury, is deemed to have committed a fatal error; this kind of ruling is itself a putrefaction of justice).

*Illinois* : 1913, *People v. Newman*, 261 Ill. 11, 103 N. E. 589 (here the Court relapses to the mechanical theory; character-evidence erroneously admitted leads to a reversal, regardless of "what we may think of the guilt or innocence of the plaintiff in error").

*Iowa* : A rich piece of judicial artificiality, as it contrasts with natural justice, is found in *State v. Wheeler*, 129 Ia. 100, 105 N. W. 374 (1905), and *State v. Brown*, 106 N. W. 379 (1906); in the former case, a verdict of guilty was found against one Wheeler, for throwing acid in the eyes of Mrs. R., but the verdict was set aside for improper evidence; in the latter case, the jury found one Brown guilty of instigating the criminal act of Wheeler as above, and this verdict was affirmed by the Supreme Court, with the incidental statement that "there is ample evidence in the case to establish Wheeler's guilt." *I. e.* Wheeler was not guilty when he was himself tried, yet he was guilty when Brown was tried ! Of course there is a legal twist of thought by which this can be easily explained. But the fact remains that Justice was bungled here, and that it was bungled because the judges are slaves of a machine-like method and are not bold enough as Justiciars to put two such cases together and solve them rationally and sensibly.

[*Note 12 — continued*]

*Kansas*: 1905, *State v. Miller*, 71 Kan. 200, 80 Pac. 51 (rape under age; the Court overruled three exceptions, but sustained the fourth and granted a new trial solely because at the trial was admitted a priest's copy, brought over by the family from Russia, of an extract of the parish-register showing the girl's age; the girl herself and both her parents having testified to her age, and the certificate being merely cumulative; the excuse is made, "How much weight may have been given by the jury, we are unable to say, etc."). 1906, *Federal B. Co. v. Reeves*, 73 Kan. 107, 84 Pac. 560 (among numerous alleged errors, the Court declared many of the objections "frivolous," and found only one error, and even this was by the better rule not an error; without the slightest consideration whether it could or should have affected the verdict, a new trial was ordered).

*Kentucky*: 1904, *Marks v. Hardy's Adm'r*, 117 Ky. 663, 78 S. W. 864, 1105. 1905, *Whitt v. Com.*, — Ky. —, 84 S. W. 340 (reversed for a single error in evidence).

*Louisiana*: 1906, *State v. Rugero*, 117 La. 1040, 42 So. 495 (verdict of manslaughter set aside solely because, on the defendant having read his affidavit for continuance on account of a witness whom he could secure "in due time for trial at this term," the prosecuting attorney read the sheriff's return for the witness as not found because out of the State in Texas; the defendant's affidavit being by fiction of law deemed conclusive, this return of the sheriff was treated as reflecting fatally upon the defendant's veracity; the prosecution having argued that this error was trivial, the Supreme Court warmly retorts, "Why jeopardize the result of a trial by insisting on evidence so utterly insignificant?")

*Michigan*: 1905, *Seymour v. Bruske*, 140 Mich. 644, 103 N. W. 613 (there was one error in the admission of evidence; reversed; "The testimony . . . impresses us with the idea that the jury was not in fact prejudiced by this evidence. We cannot say, however, that it was not prejudicial. We can say that it was incompetent." And the plain-minded observer can say that such language is that of the helpless slave of a legal treadmill, not that of an administrator of justice).

*Missouri*: 1904, *State v. Schnettler*, 181 Mo. 173, 79 S. W. 1123 (St. Louis bribery case; reversed on a technicality).

The preposterously illogical result of the heresy often is that the greater the probative value of the erroneously admitted evidence, the more necessary to order a new trial; *e. g.*, in *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1, 84 S. W. 26, the Court, having declared a conductor's statement, made just after the accident, to have been erroneously admitted, proceeds: "Coming as it did from the conductor of the train, it was *calculated to carry conviction* that the cause of the accident was, etc.," and therefore "the admission of this evidence was reversible error." A system of proof pretending to call itself rational should not be found employing such a parody on reasoning. In the above opinion, the new trial was ordered for that error alone.

*Nebraska*: 1906, *McCook v. McAdams*, 76 Nebr. 1, 106 N. W. 988 (a very pretty piece of machine-made justice; after two trials, a verdict for the plaintiff was reversed solely because of testimony to the total damage to the goods, the objections being, first, that it was an opinion, and secondly that it was based in part on cost price).

*New Hampshire*: 1903, *Pattee v. Whitcomb*, 72 N. H. 249, 56 Atl. 459 (new trial for a single error, in excluding cumulative opinion in evidence). 1912, *Holman v. Boston & M. R. Co.*, 76 N. H. 496, 84 Atl. 979 (this opinion shows that no Court, even in the State once honored by the tradition of the great Charles Doe, is to-day advanced enough not to need censure for the present fault).

*North Carolina*: 1904, *State v. Parker*, 134 N. C. 209, 46 S. E. 511 (corroborating a child under ten in rape, by her prior statements; the judge's failure to charge as to the precise nature of the corroboration, though no request was made of him by defendant's counsel, and no objection taken, held ground for a new trial; a second trial also having been already ordered for a mere technicality; Clark, C. J., diss.).

*Oklahoma*: 1912, *Landon v. Morehead*, 34 Okl. 701, 126 Pac. 1027 (this is an extreme example of the sporting theory of litigation; a document being proved by copy, and the

[*Note 12 — continued*]

evidence of opponent's possession etc. being inadequate, an affidavit filed after verdict and showing the needed fact, was held not to obviate a reversal; for "the making of this subsequent affidavit *could not cure the Court's error* committed at the trial"; thus the Supreme Court rules exactly as if it were a question of *whist*).

*Oregon*: 1904, *Carter v. Wakeman*, 45 Or. 427, 78 Pac. 362 ("When it is manifest that an error has been committed, prejudice will be presumed").

*Pennsylvania*: 1908, *Com. v. Cate*, 220 Pa. 138, 69 Atl. 322 (judgment set aside solely because of a slight verbal inaccuracy in a charge on good character; "we cannot say no harm was done appellant in this respect, although the case in other respects was tried with exemplary care, and the rulings of the learned judge were fair and impartial"; here the rules of the game must be obeyed strictly, on penalty of "tries over again").

*South Carolina*: 1906, *State v. Rowell*, 75 S. C. 494, 56 S. E. 23 (murder; out of twelve errors, only one was sustained, and that was a quibble over the trial judge's wording of his instruction as to self-defence; for this alone a new trial was ordered, though the jury had only condemned him to five years' imprisonment for manslaughter on facts which made this a paltry penalty).

*Texas*: 1903, *Holloway v. State*, 45 Tex. Cr. 303, 77 S. W. 14.

1906, *Chancey v. State*, 50 Tex. Cr. 85, 96 S. W. 12 (the judge remarked, excluding evidence of a witness' intoxication, that if he was drunk his testimony "would not amount to much"; it was held that this *might* apply to the defendant, who was also drunk, and on this ground alone the judgment was set aside!).

1905, *Watkins L. M. Co. v. Campbell*, 98 Tex. 372, 84 S. W. 424 (reversed for a single error in admitting cumulative evidence; the same pitiable *non possumus* recurs, "It cannot be known that the jury was not influenced, etc.").

1903, *Texas & P. R. Co. v. Goggin*, 33 Tex. Civ. App. 667, 77 S. W. 1053.

*United States*: 1905, *Sanborn, J., in Union Pacific R. Co. v. Field*, 137 Fed. 14, C. C. A.; 1905, *National Biscuit Co. v. Nolan*, 138 Fed. 6, C. C. A. (Philips, J.: "Error presumptively works a prejudice to the party against whom it was committed").

1906, *Sparks v. Terr.*, 146 Fed. 371, C. C. A. (the admission of irrelevant evidence "is a violation of a legal right, and it constitutes fatal error").

*Utah*: The following series of rulings in this State is commended to the judgment of the profession; whether the author's comments seem justifiable will of course depend somewhat upon the standard of attainable justice applied by the reader; but the Oklahoma Court of Criminal Appeal has shown that the standard attainable is very high:

1905, *State v. Shockley*, 29 Utah 25, 80 Pac. 865 (this is perhaps the most glaring example of our modern failures of justice to be found in the records of a decade; the defendant, who had in July, 1903, three times robbed street cars in Salt Lake City, was charged with the murder of two passengers in a fourth attempted robbery of a car in January, 1904; the defendant took the stand and confessed all the facts, endeavoring to make exculpation by declaring that he had only intended "to try to hit his arm"; the verdict was reversed by the majority, solely on two erroneous rulings of evidence, first, because the claim of witness' privilege was required to be made by the defendant himself and not his counsel, and secondly, because of improper cross-examination to past misconduct; not only were the trial Court's rulings easily supportable on orthodox principles, but the Supreme Court majority opinion gave not even one word's consideration to the question whether the alleged errors should have affected the verdict; on a perusal of the testimony of the defendant, full of the self-justifying ethics of a reckless desperado, it is hard to say whether one is more aghast at the cold-bloodedness of the robber in taking the lives of his innocent victims, or the cold-bloodedness of the Supreme Court in mechanically grinding out a reversal without a regard to the demands of justice).

1910, *State v. Vance*, 38 Utah 1, 110 Pac. 434 (strict muzzling rule here applied, to limit cross-examination to matters testified to on the direct examination; the Shockley case reviewed and approved; the above criticism on that case, as well as the further criticism, *post*, § 2276,

[*Note 12 — continued*]

n. 5, noticed and replied to; the Court's reply points out the exaggeration in the statement, *post*, § 2276, n. 5, that the Shockley decision "helped to set free a self-confessed villain," inasmuch as the defendant was on the ensuing trial found guilty and sentenced to life imprisonment, the learned Court evidently believing that all's well that ends well; the present writer regrets that his criticisms should have seemed to carry a personal reflection, which was not and could not have been intended, upon the able jurists of this Court, and the honor done by their notice of the comment is fully appreciated; the same critic will only re-join, respectfully, (1) that his comments were assuredly not "insincere," as the learned Court alleges; (2) that he still believes that the rule of cross-examination laid down was too strict and impractical; (3) that, considering the details of the crime in question, the opinion's calm self-restraint on the subject is still deemed to be "cold-blooded," if we measure it by the ideal qualities of a supreme judge set on high to see that the wicked are punished and the innocent are protected; (4) in so far as the learned Court's reply attributes to the present critic the supposedly absurd view that "when one accused of crime in effect confesses the acts constituting the offence, no error [in the admission of evidence], however gross, can be prejudicial in his case," it must be confessed that this is indeed what the present writer maintains and will ever maintain; (5) but in so far as the learned Court's reply intimates that the "intemperate" tenor of the criticism is due to the fact that such writers "revel in mere abstract theories," this explanation is respectfully doubted; and as a specimen of similar language from the pen of a chief justice of an eminent and contemporary court of criminal appeal, ruling upon a similar point, the following may serve to show that the theoretical writers are not intemperately ahead of the times as interpreted by other than Utah judges: "To reverse a conviction where a defendant is clearly guilty, upon a mere technical error of the trial Court, which could not have injured the defendant, would be a prostitution of reason, an outrage upon justice, and an act of treason to the law-abiding people of the State": *Furman, P. J., in White v. State*, 1910, 4 Okl. Cr. App. 143, 111 Pac. 1010).

1911, *State v. Thorne*, 39 Utah 208, 117 Pac. 58 (this is another "cold-blooded" case; the defendant was charged with murder while burglarizing; he fully admitted the burglary and the killing and even by his own story the most to be said for him was that while the deceased, the owner of the store, was backing away with his hands up as commanded, the defendant "poked" or "punched" him in the ribs, and the gun "went off," and that he did not intend to kill the man; the Court's opinion expressly concedes that "upon the undisputed evidence in the case he is shown guilty of murder in the first degree," but reverses the judgment because, partly, of an erroneous cross-examination of the accused to former crimes (which crimes we here may believe to have been committed, inasmuch as the defendant did not deny them but claimed the privilege against self-incrimination); and since this cross-examination "had a tendency" to deter the jury from the recommendation to life imprisonment, which they might have made, hence the reversal; the result then is that a professional thug who came to a peaceable citizen's store to rob the till, and on the citizen's submission meanly killed him, is tenderly protected by the Court because the jury *might* have recommended him to mercy, but the interests of the peaceable citizen and his bereaved family, to whom the thug showed no mercy, are not regarded as at all affecting criminal law administration; as for the opinion's further ground of reversal, viz. the erroneous language of the trial Court when informing the jury of their power to recommend life imprisonment instead of death, — that piece of weird logomachy, to be appreciated, needs to be perused in full; we confess we simply cannot understand the mental attitude which produces it; ah! well, "thou little thinkest," said the great lawyer John Selden, "what a little foolery governs the world"; but after all, it is perhaps only an example of Nature's inexorable law of compensation, as Emerson expounded it; for if in England, till a century ago, a man was hanged for stealing five shillings to buy food for his family, so now in Utah, for a space, a man *cannot* be hanged even for the most cowardly and contemptible murder).

1912, *State v. Romeo*, — Utah —, 128 Pac. 530 (in this opinion, the attitude toward the present question shows a change; the case was another one of brutal and cruel murder

[Note 12 — continued]

with robbery; there was an error in the phraseology of the trial judge's charge upon the jury's power to recommend less than the death penalty; the opinion terms the error "more technical than substantial," and proceeds: "A charge with the objectionable features eliminated would not have produced a different result".

*Vermont*: 1908, *Holman v. Edson*, 81 Vt. 49, 69 Atl. 143 ("an improper answer by a witness to a proper question is not ground of error if given without fault of the Court or examining counsel," and when a party is the witness, "fault" is presumed; here is the perverted notion that a trial is to be had over again as a "penalty" for a "fault," — just as a misdeal in cards vitiates the hand; here a new trial was granted solely because the plaintiff when testifying made one answer based on hearsay).

*Washington*: 1912, *State v. Stone*, 66 Wash. 625, 120 Pac. 76 (a vicious instance of the party being entitled to exact an observance of the minutest rules of the game, regardless of his guilt).

[Note 13; add:]

*Jaggard, J.*, in *State v. Crawford*, 96 Minn. 95, 104 N. W. 822.

[Note 15, p. 76; add:]

*New York*. In this State there has been vacillating progress towards liberalism. In criminal cases (*e. g.* 1904, *People v. Bonier*, 179 N. Y. 315, 72 N. E. 226) the Court had observed the old rule that "a presumption of injury *conclusively arises* whenever it is apparent that the erroneous ruling *may have* affected the verdict"; yet in an opinion filed on the very same day (*People v. Davey*, Nov. 15, 1904, 179 id. 345, 72 N. E. 244) the same Court asserted that "it has become one of the accepted maxims of our jurisprudence that appellate courts will not be astute to find mere technical errors upon which to reverse judgments"; in the *Davey* case, the opinion does not make a pretence of considering whether the conviction was actually just upon the evidence; its own condemnation is furnished by the language of the same Court in an opinion written by the very same judge, filed one month later (*People v. Rimieri*, 180 N. Y. 163, 72 N. E. 1002), and ruling the opposite way upon almost precisely the same facts (cited *post*, § 1157, n. 3), in which the proper criticism is made that "to hold that a jury, sitting in judgment in a case involving a human life, would be influenced by such an incident to render a verdict not warranted by the evidence, would be an unjust imputation on the system").

1906, *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287 (the phrase "reversible error" repeated). Mr. (Assistant District Attorney) Arthur Train, in his valuable book "The Prisoner at the Bar" (1906, p. 339), while taking an optimistic view of the present practice in the New York Court of Appeals, adds his weighty opinion as to the harm done by reversals, however rare, on trivial technicalities.

In civil cases the Court promulgates an enlightened principle: 1906, *Hindley v. Manhattan R. Co.*, 185 N. Y. 335, 78 N. E. 276 ("If no reasonable view of all the evidence in the record would permit a conclusion favorable to the defendants on that issue, it is clear that the erroneous rulings [of admission for the plaintiffs], did no harm, and that the judgment [for the plaintiffs] should be affirmed"; this is by the same judge who wrote the opinion in *People v. Cascone*, *supra*).

In criminal cases, a turn for the good has been observable. 1908, *People v. Gillette*, 191 N. Y. 107, 83 N. E. 680 (murder).

[Note 16; add:]

This statute seems to have been followed by an improvement: 1904, *State v. Simon*, 71 N. J. L. 142, 58 Atl. 107.

So too in *Canada*: The majority of the Supreme Court of Canada still wear the shackles of the Exchequer rule; not even the legislative fiat of *Crim. Code* § 1019 has yet been able to free them: 1911, *Allen v. The King*, 440 Can. Sup. 331 (Fitzpatrick, C. J., Duff, and Anglin,

[*Note 16 — continued*]

J. J., representing that attitude, as against Davies and Iddington, J. J., diss.; in this case, "an acquittal . . . would have shocked every sensible man who had heard the evidence," and yet for one trifling error in admitting evidence the judgment was set aside).

For *California*, see *Note 12, ante*.

Of the various statutes, the Ohio phrasing seems the best:

Fla. St. 1911, c. 6223, p. 193, May 26 (no new trial for erroneous rulings except for "a miscarriage of justice").

Oh. St. 1911, p. 132, May 18 (upon review of a judgment, the Court shall certify "whether or not in its opinion substantial justice has been done to the party complaining, as shown by the record of the proceedings and judgment under review." If certifying in the affirmative, all errors shall be "deemed not prejudicial to the party complaining," and judgment shall be affirmed, or modified "if in the opinion of such reviewing court a modification thereof will do more complete justice to the party complaining.")

[*Note 17; add:*]

the Code provision continues to be liberally construed in this State:

1909, *Hargis v. Com.*, — Ky. —, 123 S. W. 239.

[*Note 18; add:*]

1912, *Young v. Corrigan*, D. C. N. D. Oh., 208 Fed. 431 (above text approved by Killita, J.).

## § 26. Circumstantial and Testimonial Evidence; Relative Value.

[*Note 11; add:*]

1910, *State v. Marren*, 17 Ia. 766, 107 Pac. 993 (propriety of giving a charge on this subject).

1905, *State v. Foster*, 14 N. D. 561, 105 N. W. 938 (whether an instruction must be given).

1909, *Spick v. State*, 140 Wis. 104, 121 N. W. 664 (excellent opinion by Marshall, J.).

The exposition of this subject which has now become the classical one is that of Furman, P. J., in *Ex parte Jeffries*, 1912, 7 Okl. Cr. 544, 124 Pac. 924. All laymen would profit by reading it.

## § 29. Relevancy, distinguished from Weight.

[*Note 1; add:*]

1905, *McSherry, C. J.*, in *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 1084 (supplementary opinion).

## § 38. Circumstantial Evidence; Degree of Probative Value required.

[*Note 1; add:*]

1906, *Johnson v. Atlantic C. L. R. Co.*, 140 N. C. 574, 53 S. E. 362 (good illustration).

1906, *United States F. & G. Co. v. Des Moines Nat'l Bank*, 145 Fed. 273, 279, C. C. A.

## § 41. Circumstantial Evidence proved by the same Kind.

[*Note 2; add:*]

1904, *State v. Kelly*, 77 Conn. 266, 58 Atl. 705 (murder; deceased's despondency, as evidence of a plan of suicide, excluded).

1911, *Roberts v. State*, 2 Boyce Del. 385, 79 Atl. 396 (not decided).

1906, *Kevern v. People*, 224 Ill. 170, 79 N. E. 574 (rape).

1913, *Dowell v. State*, — Ind. —, 101 N. E. 815 (an absurd instance of applying this doctrine to a case in which the only real doubt was whether the witness told the truth;

## [Note 2 — continued]

bottles of whiskey alleged to have been sold illegally by the defendant to A, who delivered them to B, who produced them on the trial).

1909, *Swearingen v. Wabash R. Co.*, 221 Mo. 644, 120 S. W. 773.

1912, *People v. Raszewicz*, 206 N. Y. 249, 99 N. E. 557 (murder by a bomb, the present theory applied to an inference from the prior explosion of another bomb to the defendant's use of explosives; but the Court also states its attitude in the correct form that "it is unsafe to rely upon that fact as the controlling fact to establish the defendant's guilt").

1910, *State v. Lem Woon*, 57 Or. 482, 112 Pac. 427, per King, J., diss.

1904, *Taylor v. General Acc. Ins. Co.*, 208 Pa. 439, 57 Atl. 830.

1903, *East Tennessee & W. N. C. R. Co. v. Lindamood*, 111 Tenn. 457, 78 S. W. 99.

1903, *Cunard S. S. Co. v. Kelley*, 126 Fed. 610, 614, C. C. A. (U. S. v. Ross followed; here, as to an inference of knowledge of marks on goods).

1914, *Fadden v. McKinney*, — Vt. —, 89 Atl. 351 (trespass).

1909, *Wilkie v. Chehalis Co. L. & T. Co.*, 55 Wash. 324, 104 Pac. 616 (an instance of another horse's fright at a pile of raw meat, excluded, by some fancied connection with the present principle).

1911, *State v. Brache*, 63 Wash. 396, 115 Pac. 853, *semble*.

Another variety of the fallacy is the following: Or. Ballinger & C.'s Compilation, § 785 ("An inference must be founded on a fact legally proved").

1909, *State v. Hembree*, 54 Or. 463, 103 Pac. 1008 (wife-murder; the wife's discovery of the defendant's incest with the daughter being alleged as the motive, and the testimony to the incest not being "proved" to the Court's satisfaction, the motive-inference was held improper and hence the incest-testimony; unsound, (1) because the Court concedes that motive-proof is not indispensable, (2) because the Code provision merely means that the inference must be based on an evidenced fact as distinguished from a fact merely guessed at.

## [Note 4; add:]

1913, *State v. Fiore*, — N. J. L. —, 88 Atl. 1039 (citing the text above).

For an acute analysis of this fallacy, and a demonstration of its unsoundness, with citations of additional rulings involving it, see an article "Presumptions built on Presumptions," by Professor Wm. Trickett, of the Dickinson School of Law, in *The Forum*, X, 123, March, 1906 (Carlisle, Pa.).

## § 42. Irrelevancy and Multifariousness, distinguished.

[Text, p. 114; add, after the other quotations:]

1881, *Ruffin, J.*, in *State v. Brantley*, 84 N. C. 766: "Amongst other hazards and inconveniences, it was found that to allow evidence to be given touching every collateral matter that could be supposed, however remotely, to throw any light upon the main fact sought to be established, had the effect to render trials complicated, and to confuse and mislead, rather than enlighten, the juries, and at the same time to surprise the party on trial, who could not come prepared to disprove every possible circumstance, but only such as he might suppose to be germane and material. And therefore the main rule was adopted of restricting the inquiry to such facts as, though collateral to the matter at issue, had a visible, reasonable connection with it; not such a connection as would go to show that the two facts, the collateral one and the main one, sometimes — or, indeed, often — go together, but such as would show that they most usually do so."

1842, *Edgar Poe*, "The Mystery of Marie Roget." "I would here observe that very much of what is rejected as evidence by a Court is the very best of evidence to the intellect. For the Court, guided itself by the general principles of Evidence — the recognized and booked principles — is averse from swerving at particular instances. And this steadfast adherence to principle, with rigorous disregard of the conflicting exception, is a sure mode of attaining

[Text, p. 114 — *continued*]

the maximum of attainable truth, in any long sequence of time. The practice, *in mass*, is therefore philosophical. But it is not the less certain that it engenders vast individual error."

**§ 56. Defendant's Good Character, admissible.**

[Note 1; *add.*]

1904, *Maston v. State*, 83 Miss. 647, 36 So. 70.

1906, *Powers v. State*, 117 Tenn. 363, 97 S. W. 815 (and upon all parts of the defendant's conduct).

[Note 2; *add.*]

1904, *Maston v. State*, 83 Miss. 647, 36 So. 70.

[Note 3; *add.*]

1909, *Dickenson v. State*, 3 Okl. Cr. 151, 104 Pac. 923.

[Note 4; *add.*]

1910, *State v. Alderman*, 83 Conn. 597, 78 Atl. 331.

1911, *State v. Brauneis*, 84 Conn. 222, 79 Atl. 70.

1905, *Nelms v. State*, 123 Ga. 575, 51 S. E. 588.

1913, *Taylor v. State*, — Ga. App. —, 79 S. E. 924.

1907, *Miller v. People*, 229 Ill. 376, 82 N. E. 391.

1910, *Hundley v. State*, — Ind. —, 91 N. E. 225 (here also to be considered in mitigation).

1904, *People v. Bonier*, 179 N. Y. 315, 72 N. E. 226.

1911, *People v. Conrow*, 200 N. Y. 356, 93 N. E. 943 (word-juggling).

1913, *State v. Hare*, 87 Oh. 204, 100 N. E. 825.

1908, *Com. v. Cate*, 220 Pa. 138, 69. Atl. 322. 1910, *Com. v. Aston*, 227 Pa. 106, 75 Atl. 1017.

1910, *Searway v. U. S.*, 8th C. C. A., 184 Fed. 716.

1911, *State v. Brown*, — Utah —, 115 Pac. 994 (collecting cases; three separate opinions filed; the impression is that, as said above, the discussion of this subject, however learned and interesting as a logical pursuit, is profitless; for the subtleties of the instruction are lost on the jury).

1905, *Schutz v. State*, 125 Wis. 452, 104 N. W. 90.

The following shrewd observation comes down to us from yore: 1664, *Turner's Trial*, 6 How. St. Tr. 565, 613: L. C. J. Hyde: "The witnesses he called in point of reputation, — that I must leave to you [the jury]. I have been here many a fair time. Few men that come to be questioned but shall have some come and say, 'He is a very honest man, I never knew any hurt by him.' But is this anything against the evidence of the fact?"

[Note 6; *add.*]

1904, *Maston v. State*, 83 Miss. 647, 36 So. 70 (even where insanity is the defence).

1913, *Gilbert v. State*, 8 Okl. Cr. 543, 128 Pac. 1100 (manslaughter; held erroneous to reject defendant's good character until defendant had testified or had offered some evidence of self-defence).

Whether the accused's good character should be *presumed* is noticed *post*, § 290.

**§ 58. Same: Prosecution may Rebut.**

[Note 1; *add.*]

1908, *People v. Hinksman*, 192 N. Y. 421, 85 N. E. 676 (defendant voluntarily took the stand, and after stating that he was once convicted of larceny, said, "I have been a good boy ever

[*Note 1 — continued*]

since "; held that testimony of his bad reputation was not thereby made admissible in rebuttal; this is decidedly over-strict; Gray, J., diss.).

[*Note 2; add a new par.:*]

Under the Criminal Evidence Act, 1898 (61-2 Vict. c. 36, §1), the question constantly arises whether the accused who testifies has permitted the prosecution to evidence his bad character. But the cases are more conveniently considered *post*, § 196 and § 2276, n. 5.

### § 59. Kind of Character of Accused.

[*Note 1; add, under Accord:*]

1905, *Smith v. State*, 142 Ala. 14, 39 So. 329 (homicide; defendant's character for honesty excluded).

1914, *Frank v. State*, — Ga. —, 80 S. E. 1016 (murder while attempting rape; the defendant having put in his general good character, his bad character for lasciviousness was then shown by the prosecution).

1913, *State v. Allen*, 23 Ida. 772, 131 Pac. 1112 (but deprecating theoretical strictness in applying the principle).

1905, *Wistrand v. People*, 218 Ill. 323, 75 N. E. 891 (rape; character as a "peaceable and quiet citizen," excluded).

1907, *Harper v. U. S.*, 7 Ind. Terr. 437, 104 S. W. 673 (false entries; reputation for "morality and sobriety," held properly excluded).

1905, *State v. Bessa*, 115 La. 259, 38 So. 985 (assault with intent; character for honesty and industry, excluded).

1906, *State v. Griggsby*, 117 La. 1046, 42 So. 497 (murder; defendant's character for honesty and trustworthiness, excluded).

1904, *Maston v. State*, 83 Miss. 647, 36 So. 70 (murder; character for "peace or violence," and a "peaceable and law-abiding citizen," admitted).

1905, *Horton v. State*, 84 Miss. 473, 36 So. 1033 (rape; character for peace or violence, admissible).

1904, *State v. Brady*, 71 N. J. L. 360, 59 Atl. 6 (rape; defendant's general reputation, excluded).

1911, *Terr. v. Pierce*, 16 N. W. 10, 113 Pac. 591 (assault; character for truth and veracity, excluded).

1907, *People v. Van Gaasbeck*, 189 N. Y. 408, 82 N. E. 718 (homicide).

1907, *Saye v. State*, 50 Tex. Cr. 569, 99 S. W. 551 (negligent homicide by a deputy sheriff; defendant's character as a cautious and prudent officer, admitted).

1913, *Bishop v. State*, — Tex. Cr. —, 160 S. W. 705 (seduction; defendant's general character as a peaceable, law-abiding citizen, not merely as a moral and chaste person, admissible).

1905, *State v. Moyer*, 58 W. Va. 146, 52 S. E. 30 (embezzlement; character for honesty, admissible).

1909, *Harper v. U. S.*, 8th C. C. A., 170 Fed. 385, 390 (false entry in a bank report; the defendant's character for "morality and sobriety," excluded).

[*Note 1, at the end; add:*]

Thus, the prosecution's *rebutting* repute may be of the specific trait, even though the defendant's evidence was of general character.

1910, *Com. v. Maddocks*, 207 Mass. 152, 93 N. E. 253 (illegal sale of liquor; after the defendant's evidence of general reputation, held proper for the prosecution to introduce "his reputation as to being a law-abiding person in relation to the liquor law," but only to rebut the defendant's reputation-evidence; citing the text above).

1898, *State v. Hairston*, 121 N. C. 582, 28 S. E. 493 (only general character may be offered;

[*Note 1—continued*]

but the opponent on cross-examination may ask as to the specific trait; a peculiar little quirk, which must add interest to the game of law as here played).

1912, *State v. Wilson*, 158 N. C. 599, 73 S. E. 812 (*State v. Hairston* approved).

1907, *Schultz v. State*, 133 Wis. 215, 113 N. W. 428 (whether on a charge of bribery the character inquired into may be, not merely the general trait of integrity, but also the specific one of being a corruptionist, not decided; careful opinion by Winslow, J.).

[*Note 2; add:*]

and the cases cited *post*, § 1981, n. 3.

[*Text*, p. 129; at the end of l. 4, *add* a new note 3:]

<sup>3</sup> 1905, *State v. Bessa*, 115 La. 259, 38 So. 985 ("Do you believe that a man like him would commit, etc.?" excluded).

## § 62. Character of Complainant in Rape.

[*Note 1; add, under Accord:*]

1907, *People v. Ryno*, 148 Mich. 137, 111 N. W. 740.

1907, *Lake v. Com.*, — Ky. —, 104 S. W. 1003.

1906, *State v. Detwiler*, — W. Va. —, 55 S. E. 654.

[*Note 2*, l. 13 from below; *add:*]

N. D.: 1913, *State v. Apley*, — N. D. —, 141 N. W. 740 (general unchastity, and resort to houses of prostitution, admitted).

[*Note 3; add:*]

It should apply also in a *civil action for rape: Contra:*

1908, *Harris v. Neal*, 153 Mich. 57, 116 N. W. 535 (civil action for rape; the plaintiff's bad reputation for chastity, excluded, following the general rule for civil cases; yet the unsoundness of that rule as an inflexible one is here illustrated, for nobody has doubted that in a criminal prosecution the same evidence would be regarded as useful).

[*Note 4; add:*]

1911, *People v. Gray*, 251 Ill. 431, 96 N. E. 268.

1907, *State v. Blackburn*, — Ia. —, 110 N. W. 275, *semble*.

Here the girl's *good* character is inadmissible also, except as supporting her testimonial character.

1908, *Leedom v. State*, 81 Nebr. 585, 116 N. W. 496.

[*Note 5; add:*]

*Admitted:* 1912, *State v. Diple*, 242 Mo. 461, 147 S. W. 111 (assault with intent to rape; admitted, on the principle of § 1106, and strangely ignoring the present principle).

The following case is peculiar: 1906, *State v. Romero*, 117 La. 1003, 42 So. 482 (carnal intercourse with consent; the prosecutrix' unchaste character, not admitted for defendant).

## § 63. Character of Deceased in Homicide.

[*Note 1; add, in columns 1, 2, and 3:*]

1914, *State v. Jones*, — Mont. —, 139 Pac. 441.

1907, *State v. Barber*, 13 Ida. 65, 88 Pac. 418 (not admitted where there was "no question as to who was the aggressor").

1905, *Osburn v. State*, 164 Ind. 262, 73 N. E. 601 (excluded, where the defendant was the aggressor on uncontradicted evidence).

[*Notes 1 — continued*]

1907, *State v. Rutledge*, 135 Ia. 581, 113 N. W. 461.  
 1906, *State v. Feeley*, 194 Mo. 300, 92 S. W. 663 (deceased's reputed character, admissible on the present principle; repudiating *State v. Kennade*, 121 Mo. 405, 26 S. W. 347).  
 1912, *State v. Barrett*, 240 Mo. 161, 144 S. W. 485 (*State v. Kennade* reinstated, and the present doctrine repudiated; it is strange that the Court is unable to see the point).  
 1904, *People v. Rodawald*, 177 N. Y. 408, 70 N. E. 1 (excluded).  
 1905, *State v. Exum*, 138 N. C. 599, 50 S. E. 283 (rule of *State v. Turpin* applied).  
 1913, *State v. Blackwell*, 162 N. C. 672, 78 S. E. 316 (admissible "when the evidence is wholly circumstantial and the character of the encounter is in doubt"; former cases summed up; query whether the opinion means "or" for "and." Hoke, J., concurring, in repudiation of the first limitation).  
 1905, *Sovereign Camp v. Welch*, 16 Okl. 188, 83 Pac. 547 (see the citation *post*, § 64, n. 3).  
 1907, *State v. Thompson*, 49 Or. 46, 88 Pac. 583 (admissible).  
 1909, *State v. Raice*, 24 S. D. 111, 123 N. W. 708 (excluded, where self-defence was not in issue).

[*Note 1*, col. 4, at the end; as to *peaceable character*, *add*, as *Accord*:]

1905, *Bloomer v. State*, 75 Ark. 297, 87 S. W. 438.  
 1885, *Davis v. People*, 114 Ill. 86, 29 N. E. 192.  
 1907, *Kelly v. People*, 229 Ill. 81, 82 N. E. 198 (Hand, C. J., diss. on the facts).  
 1874, *State v. Potter*, 13 Kan. 414. 1911, *State v. Truskett*, 85 Kan. 804, 118 Pac. 1047.  
 1906, *State v. Feeley*, 194 Mo. 300, 92 S. W. 663 (but the State may use character for peaceableness in general, in rebuttal, even though the defendant has offered only the deceased's character for quarrelsomeness when in liquor). 1913, *State v. Reed*, 250 Mo. 379, 157 S. W. 316 (murder; the defendant testified that the deceased was trying to rob him; the State then offered the good repute of the deceased for peace and quietness; excluded; *State v. Feeley*, *supra*, distinguished; the opinion clearly perceives the relevancy of the evidence, but weakly invokes a dread of "making a precedent which would open up a Pandora's box of collateral issues"; "there are always many collateral issues that resourceful attorneys could inject into all kind of suits;" is it not a pity that these resourceful attorneys are not matched by resourceful judges? And is it the law's fault that the resourceful judge is not permitted to checkmate the chicanery of the resourceful attorney?).  
 1911, *State v. Vacos*, — Utah —, 120 Pac. 497.

The rule in *Texas* on this point rests on the statute, P. C. 1895, § 713, quoted *post*, § 246, n. 13; and its singular interpretation is noticed in the citations *ib.* note 12.

The same question may arise where the homicide is said to have been provoked by some *other immoral act* of the deceased:

1904, *Melton v. State*, 47 Tex. Cr. 451, 83 S. W. 822 (defendant killed deceased for insulting his wife; the prosecution was not allowed to introduce the deceased's character for courtesy to ladies).

1904, *Orange v. State*, 47 Tex. Cr. 337, 83 S. W. 385 (defendant killed deceased for incest with his daughter the wife of defendant; deceased's character for unchastity, admitted to show the probability of the incest).

1906, *Gregory v. State*, 50 Tex. Cr. 73, 94 S. W. 1041 (murder; the State alleged that the motive was a quarrel over rents; the defendant alleged that it was his discovery of the deceased in intended adultery with his wife; after evidence of the latter fact, the State was not allowed to show the deceased's good reputed character for chastity and virtue, such evidence being admissible only if the defendant had offered the deceased's reputed bad character for chastity; of such a rule, all that can be said is that it would be regarded as abominable, in any other community; apparently, the innocent dead are to receive no right to defend themselves in this court).

Compare the interesting point, raised in the *Thaw Case*, as to contradicting the truth of the provocation in such an issue (*post*, § 262).

## § 64. Character of Civil Parties, in general.

[Note 1; add:]

1911, *McKane v. Howard*, 202 N. Y. 181, 95 N. E. 642 (breach of promise of marriage; plea, fornication before promise; the plaintiff's good reputation for chastity not admitted to show the improbability of her doing such acts; but the opinion carelessly makes the broad but incorrect statement that this "has been the law from the earliest period").

[Note 3; add:]

1907, *Van Horn v. Van Horn*, 5 Cal. App. 719, 91 Pac. 250 (divorce for adultery; respondent's good character not admitted, under C. C. P. § 2053).

1909, *McClure v. State Banking Co.*, 6 Ga. App. 303, 65 S. E. 33 (plea of *non est factum* to a note; payee's reputation for bad character as a forger, admitted; good opinion).

1913, *Phelps v. Chicago R. I. & P. R. Co.*, — Ia. —, 143 N. W. 853 (battery by a railroad conductor on a passenger, the conductor being deceased at the time of the trial; the conductor's character for peaceableness held not admissible).

1892, *Evans v. Evans*, 93 Ky. 510, 20 S. W. 605 (divorce; "in civil actions, evidence of general reputation is not admissible, except when directly in issue").

1905, *Mattingly v. Shortell*, 120 Ky. 52, 85 S. W. 215 (plea of payment; the party's character for honesty, not admitted).

1914, *Gould v. Bebee*, 134 La. —, 63 So. 848 (destruction of timber; defendant's character for honesty and honor, excluded).

1908, *Harris v. Neal*, 153 Mich. 57, 116 N. W. 535 (civil action for rape; the plaintiff's bad repute for chastity, excluded).

1909, *Collister v. Ritzhaupt*, 83 Nebr. 794, 120 N. W. 489 (bastardy; defendant's character for chastity, excluded).

1912, *Rittenhofer v. Cutter*, 83 N. J. L. 613, 83 Atl. 873 (battery in an arrest for a trespass; the defendant's peaceful and law-abiding disposition, excluded, no immoral or malicious motive being in issue).

1912, *Noonan v. Luther*, 206 N. Y. 105, 99 N. E. 178 (assault and battery; defendant pleaded that plaintiff was disorderly while on his premises; her prior good habits, not admitted for plaintiff).

1905, *Sovereign Camp v. Welch*, 16 Okl. 188, 83 Pac. 547 (whether the deceased insured, killed by E., was killed while "in violation of the law" under the policy; the deceased's character as a peaceful law-abiding citizen admitted; following *Scott v. Fletcher*, Tenn., *infra*).

1905, *Coruth v. Jones*, 77 Vt. 441, 60 Atl. 814 (assault and battery; defendant's character as a peaceable man, excluded).

## § 65. Character in Negligence Issues.

[Note 2; add:]

1907, *St. Louis I. M. & S. R. Co. v. Inman*, 81 Ark. 591, 99 S. W. 832 (contributory negligence; deceased's character as a "cautious, careful, and prudent man," excluded).

1911, *Carr v. Stern*, 17 Cal. App. 397, 120 Pac. 35 (defendant's driver's character for skill and efficiency, excluded).

1913, *Denbeigh v. Oregon-Washington R. & Nav. Co.*, 23 Ida. 663, 132 Pac. 112 (engineer's reputation for care and prudence, excluded).

1904, *Illinois C. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435 (engineer killed by the explosion of his locomotive boiler; there being no eye-witness of his conduct, his character, for carefulness was admitted). 1906, *Chicago & A. R. Co. v. Wilson*, 225 Ill. 50, 80 N. E. 56 (death on a railroad track; no eye-witness of the actual moment of injury having testified, the "careful habits of the deceased" were admitted). 1909, *Collison v. Illinois Central R. Co.*, 239 Ill. 532, 88 N. E. 251 (admissible, *semble*). 1914, *Newell v. Cleveland*

[*Note 2 — continued*]

C. C. & St. L. R. Co., 261 Ill. 505, 104 N. E. 223 (where there are no eye-witnesses, the deceased's habits of care, etc., are admissible).

1911, *Saunders v. Atchison T. & S. F. R. Co.*, 86 Kan. 56, 119 Pac. 255 (defendant's engineer's character for carefulness, not admissible as evidence of being careful on a given occasion).

1913, *Fike v. Atchison T. & S. F. R. Co.*, 90 Kan. 409, 133 Pac. 871 (whether the deceased, in using the railroad crossing, "always drove carefully watching for dangers"; there were no eye-witnesses of the deceased's conduct at the time of the injury; point not decided).

1885, *Chase v. Maine Central R. Co.*, 77 Me. 262 (deceased's general character for carefulness, excluded, though there were no eye-witnesses).

1906, *American Straw B. Co. v. Smith*, 94 Md. 19, 50 Atl. 414 (defendant's driver's competence as a driver, excluded). 1908, *Baltimore & O. R. Co. v. State*, 107 Md. 642, 69 Atl. 439 (deceased's habits as a careful driver, excluded, though there were no eye-witnesses).

1913, *Greenwood v. Boston & M. R. Co.*, — N. H. —, 88 Atl. 217 (deceased's character for carefulness, excluded, though there were no eye-witnesses).

1903, *Reeves v. Southern R. Co.*, 68 S. C. 89, 46 S. E. 543 (train running past a signal; engineer's testimony that he had never done it, excluded; improperly treated as a question of character). 1904, *Bedenbaugh v. Southern R. Co.*, 69 S. C. 1, 48 S. E. 53 (injury of a person on a railroad track; the plaintiff's general intoxicated habits excluded, there being direct testimony of his condition at the time; erroneous).

1913, *Arizona & N. M. R. Co. v. Clark*, 9th C. C. A., 207 Fed. 817, 823 (whether plaintiff was a careful or negligent engineer, excluded; the opinion shows ignorance of the different principles involved).

1913, *Southern R. Co. v. Rice's Adm'r*, 115 Va. 235, 78 S. E. 592 (that the engineer was a "fast runner," excluded).

For *habits of intemperance*, see also *post*, §§ 85, 96.

#### § 66. Character of Plaintiff in Defamation, to prove his Innocence.

[*Note 1; add:*]

1913, *Stearns v. Long*, 215 Mass. 152, 102 N. E. 326 (undecided; here excluded, because no crime was charged, and because the character-trait offered was not relevant).

#### § 67. Character of Defendant in Malpractice.

[*Note 1; add:*]

The following statute belongs here:

Conn. St. 1907, c. 192, p. 740, July 8 ("general character, reputation, and professional standing" of an attorney to be admissible in a proceeding for his removal, etc.).

#### § 68. Character of Third Persons.

[*Note 1; add:*]

*Accord*: 1904, *Kennington v. Catoe*, 68 S. C. 370, 47 S. E. 719 (title depending on legitimacy of a son born eleven months after marriage; character of the mother for chastity about the time of gestation, but not otherwise, admitted against the son).

*Contra*, as to particular acts: 1903, *State v. Hendrick*, 70 N. J. L. 41, 56 Atl. 247 (conspiracy between two men and a woman to obtain an inheritance from B. by fraudulently pretending a marriage between B. and the woman and producing a child as B.'s heir; acts of criminal intimacy between the woman and certain third persons, excluded, as against the two men; erroneous; this was good evidence of her likelihood to defraud in the manner alleged, and was also admissible under the principle of § 133, *post*).

Compare the citations *post*, § 134.

[*Text*, p. 144, l. 6; after "received," add a note 1a:]

<sup>1a</sup> In the following case it was of course not relevant: 1905, *Toliver v. State*, 142 Ala. 3, 38 So. 801 (robbery; character of H., with whom defendant was at the time, excluded).

[*Note 2; add:*]

*Accord*: 1906, *Sutton v. State*, 124 Ga. 815, 53 S. E. 381 (fornication with A.; reputation of A. as a prostitute, and of her house as a bawdy-house, admitted).

1913, *State v. Nieburg*, 86 Vt. 392, 85 Atl. 769 (adultery with X; X's unchaste repute, admitted). 1913, *State v. Snyder*, 86 Vt. 449, 85 Atl. 984 (same).

*Contra*: 1907, *Van Horn v. Van Horn*, 5 Cal. App. 719, 91 Pac. 250 (divorce for adultery; respondent's good character, not admitted under C. C. P. § 2053).

The character of an *accomplice* or *co-conspirator* is hardly to be deemed relevant, except for or against himself when tried jointly.

1907, *Schultz v. State*, 133 Wis. 215, 113 N. W. 428 (bribery; good character of an alleged co-conspirator, excluded).

[*Note 3; add:*]

*Contra*: 1904, *People v. Wilson*, 136 Mich. 298, 99 N. W. 6 (bastardy; the woman's repute for unchastity about the time of begetting, excluded). Compare the citations in § 133, *post*.

[*Note 4, par. 1; add:*]

*Accord*: 1906, *Ford v. Ford*, 27 D. C. App. 401, 411 (good repute of a notary certifying to an acknowledgment alleged to be false).

1906, *Hannah v. Anderson*, 125 Ga. 407, 54 S. E. 131 (caveators alleged fraud and threats by the propounder of a will; his good character admitted).

*Contra*: 1905, *West v. Houston Oil Co.*, 136 Fed. 343, 348, C. C. A. (alleged forgery of a certificate of acknowledgment; the notary's reputation as a forger, excluded; unsound). 1910, *Quinalty v. Temple*, 5th C.C. A., 176 Fed. 67 (title to land; the plaintiff's title turned on whether Q. died seised; defendant traced title through a deed of 1837 from F., reciting a deed to him from Q., but no deed from Q. to F. was found; the recital in F.'s deed being admitted in evidence, the defendant offered to show (1) F.'s character for honesty, and (2) Q.'s character as a spendthrift, to evidence the probable deed from Q. to F., and the correctness of F.'s recital; excluded; reason, the old starched and stilted doctrines about character-evidence; one of them became here particularly ludicrous, viz. that character-evidence "would greatly increase the expense and delay of litigation," for here the Court ordered the whole pack of cards to be dealt over again by ordering a new trial solely for this error, and thus "greatly increased the expense and delay of litigation," by years of time and bags of money, to punish the defendant for wasting one hour at the original trial; the case was one of the really obvious opportunities for breaking through a rule of thumb and letting in the evidence; it was precisely the kind where common sense would welcome the evidence).

[*Note 4, par. 2; add:*]

and for character as a *motive for murder* (*post*, § 390, n. 1).

## § 70. Character Mitigating Damages in Defamation.

[*Text*, p. 147, l. 10 from below, in the quotation from *Jones v. Stevens*; insert, after "character":]

"is not admissible."

## § 73. Mitigating Damages, etc.; State of the Law.

[*Note 1; add:*]

*Canada*, (1): *Newf. St.* 1904, c. 3, Rules of Court 32, par. 22. (like Ont. Rule 488, with two days' notice).

## [Note 1 — continued]

*Ill.* (1): 1905, *Dowie v. Priddle*, 216 Ill. 553, 75 N. E. 243 (excluded).  
*Kan.*: 1912, *Wood v. Custer*, 86 Kan. 387, 121 Pac. 355 (slander charging cattle-stealing; reputation as to integrity and also as to being a cattle-thief, admitted).  
*N. J.*: (1) and (2); General bad character is admissible: 1855, *Sayre v. Sayre*, 25 N. J. L. 235 (exhaustive opinion by Green, C. J.).  
*Wis.* (2): 1906, *Earley v. Winn*, 129 Wis. 291, 109 N. W. 633 (slander that plaintiff whipped her mother; reputation as to ill-treating her mother, admitted; the rule being that the reputation is confined to "the fault or trait of character involved in the offence charged," citing some of the above cases as authority for this).  
 1877, *Kimball v. Fernandez*, 41 id. 329 (habit of evil conduct charged; single instances allowed to be proved; whether in justification only or on general issue, not decided).  
 In *Texas* a peculiar rule applies to criminal libel by defaming a woman's chastity; by Penal Code 1895, § 751, "the general reputation for chastity of the female alleged to have been slandered may be inquired into"; this is held to mean that on proof of the woman's bad repute for chastity the defendant is entitled to acquittal.  
 1909, *Dobbs v. State*, 55 Tex. Cr. 483, 117 S. W. 799.

## § 74. Rumors as Affecting Reputation.

## [Note 1; add:]

1913, *Meeker v. Post P. & P. Co.*, — Colo. —, 135 Pac. 457 (rumors, etc., excluded, no issue of mitigation of damages being made under the pleading).  
 1873, *Strader v. Snyder*, 67 Ill. 404, 410 (general repute as to the fact charged, excluded).  
 1912, *Mills v. Flynn*, — Ia. —, 137 N. W. 1082 (*Hanners v. McClelland* followed).  
 1913, *Ott v. Murphy*, — Ia. —, 141 N. W. 463 (rumors excluded).  
 1910, *Morgan v. Lexington Herald Co.*, 138 Ky. 637, 128 S. W. 1064 (admitted).  
 1906, *Earley v. Winn*, 129 Wis. 290, 109 N. W. 633 (slander that plaintiff whipped her mother; *Haskins v. Lumsden* followed).

## § 75. Character in Mitigation of Damages in Other Actions.

## [Note 1; add:]

1904, *Wyman v. Lynde*, 93 Minn. 257, 101 N. W. 163 (assault and criminal abuse; the daughter's subsequent character, excluded).

Compare also the rulings on *character as a motive* (*post*, § 390, n. 1).

## [Note 2; add:]

1906, *Hardwick v. Hardwick*, 130 Ia. 230, 106 N. W. 639 (loss of consortium; plaintiff's bad moral character, admitted).

Compare also the cases cited *post*, § 390, n. 1.

## [Note 4; add:]

1912, *Young v. Corrigan*, D. C. N. D. Ohio, 208 Fed. 431.

## [Note 6; add:]

1907, *Emory v. Egan*, 75 Kan. 82, 88 Pac. 740.

1907, *Conklin v. Consolidated R. Co.*, 196 Mass. 302, 82 N. E. 23 (assault, arrest, and malicious prosecution).

## § 76. Plaintiff's Good Character as affecting Damages.

[Note 1; add, under *Defamation, Excluded*:]

1906, *Burkhart v. North American Co.*, 214 Pa. 39, 63 Atl. 410 (*Clark v. North American Co.* followed).

*Not decided*: 1913, *Stearns v. Long*, 215 Mass. 152, 102 N. E. 326.

[*Note 1; add, under Seduction, Excluded:*]

1907, *Colburn v. Marble*, 196 Mass. 376, 82 N. E. 28 (particular acts of unchastity do not constitute such an attack).

**§ 77. Plaintiff's Bad Character as an Excuse, etc.; Breach of Promise of Marriage.**

[*Note 2; add:*]

1907, *Colburn v. Marble*, 196 Mass. 376, 82 N. E. 28 (collecting the cases as to the various excuses of this sort).

But if *actual unchastity* is the defence, reputed chastity is not material in rebuttal. 1911, *McKane v. Howard*, 202 N. Y. 181, 95 N. E. 642 (on a plea of the plaintiff's prior fornication, in defence to an action for breach of promise, the plaintiff's good repute for chastity is inadmissible).

**§ 78. Character of a House of Ill-fame.**

[*Note 1; add:*]

1909, *State v. Anderson*, 82 Conn. 111, 72 Atl. 648 (but if the actual character is disputed, then the reputation becomes merely evidential, and the actual character must be found). 1913, *Massee v. Williams*, 6th C. C. A., 207 Fed. 222 (undecided).

[*Note 1, at the end; add:*]

Whether *knowledge* may be shown by *reputation*, is noticed *post*, § 254.

[*Note 3, part 1; add:*]

1906, *State v. Hoyle*, 98 Minn. 254, 107 N. W. 1130.

The same issues might arise on a charge of keeping a house for illegal *gaming*; but usually the statute does not make repute a part of the issue, and the question of *knowledge* (*post*, § 254) or *intent* (*post*, § 367) is the important one.

**§ 79. Seduction, Criminal Prosecution or Statutory Action.**

[*Text*, p. 160, l. 6; *add:*]

Another question is whether the chastity is *presumed*, so that the burden of producing evidence of unchastity is on the defendant (*post*, § 2528).

**§ 80. Character of an Employee.**

[*Note 2; add:*]

1904, *Gould v. Magnolia Metal Co.*, 207 Ill. 172, 69 N. E. 896 (discharge of an employee for moral misconduct; the reputation for unchastity of his women associates, held material). 1911, *Saunders v. Atchinson T. & S. F. R. Co.*, 86 Kan. 56, 119 Pac. 552 (fire set by locomotives; engineer's character for care and skill, admissible as a part of the facts rebutting the presumption of negligence).

**§ 84. Strength.**

[*Note 1; add:*]

The inference from *heredity* belongs under this principle. Its propriety has been conceded, with certain limitations, as evidence of *insanity* (*post*, § 232) and of *long life* (*post*, § 223).

§ 85. **Intoxication.**[Note 1; *add*, at the end:]Compare also the cases dealing with intemperance as a question of *negligence* (*ante*, § 65).§ 87. **Skill, Technical Knowledge.**[Note 3; *add*, under *Accord*.:]

1220, *Richard, Prior v. Moses*, Riggs' Select Pleas, etc., of the Jewish Exchequer (Selden Soc. XV, 1905, p. 4; forgery of a deed of debt purporting to be signed by Thomas, Prior of a convent; the plaintiff "says that the said Prior Thomas was a good and discreet and excellent clerk, and not the man to make a charter containing bad Latin as this charter does"). 1886, *Scott v. Crerar*, 11 Ont. 541, 553, 562, 14 Ont. App. 152 (libel in anonymous type-written circulars sent to lawyers, imputing to the plaintiff improper professional conduct; the similarity of phrases therein to phrases recently used by the defendant in conversation, held admissible; but not the opinion of a witness, based on the style of expressions, that the defendant was the author; Rose, J., diss. on the latter point, in a sensible opinion; on appeal, the ruling below was held erroneous in excluding evidence, though the language of the opinion shows no essential difference of views; the report's failure to state precisely the evidence offered leaves the ruling obscure).

1906, *Atkins v. Best*, 27 D. C. App. 148, 153 (that a testatrix was "an unskilled person, . . . unlearned in the law," considered, in interpreting the will).

1903, *Thurston's Adm'r v. Prather*, — Ky. —, 77 S. W. 354 (execution of a will; that the testator "was a learned lawyer," considered).

Compare here the cases cited *post*, §§ 270, 2024, 2148, 2149.

§ 89. **Possession or Lack of Money as affecting the Probability of a Loan, etc.**[Note 1; *add*, under *Accord*.:]

1905, *Henderson v. Henderson*, 165 Ind. 666, 75 N. E. 269 (whether B. had deposited \$1300; her lack of money at the alleged time, admitted).

[Note 1; *add*, under *Accord*.:]

1886, *State v. Henderson*, 29 W. Va. 147, 164, 1 S. E. 225 (forgery of a receipt; that the party whose name was receipted was in embarrassed circumstances and unable to pay such a sum, admitted).

1904, *Rickman v. Williamsburg C. F. Ins. Co.*, 120 Wis. 655, 98 N. W. 960 (over-insurance; the insured's financial condition, admitted to show the improbability of carrying a large stock of goods).

§ 93. **Habit; Miscellaneous Instances.**[Note 1; *add*.:]

1905, *Carwile v. State*, — Ala. —, 39 So. 220 (deceased's habit as to carrying a billbook, admitted).

1913, *Moffitt v. Connecticut Co.*, 86 Conn. 527, 86 Atl. 16 (whether a car stopped at a corner and plaintiff boarded it; invariable custom of the cars to stop at another and not that corner, admitted).

1912, *Frederickson v. Iowa C. R. Co.*, — Ia. —, 135 N. W. 12 (deceased's habit at a railway crossing, admitted).

1908, *Rogers v. Clark Iron Co.*, 104 Minn. 198, 116 N. W. 739 (custom as to use of forms for soldiers' homestead scrip, admitted).

1904, *Wright v. Davis*, 72 N. H. 448, 57 Atl. 335 (making of a loan; the alleged borrower's

[Note 1 — *continued*]

habit of depositing at a bank, admitted). 1905, *Tucker v. B. & M. R. Co.*, 73 id. 132, 59 Atl. 943 (deceased's habit to stop and look at a crossing; *Smith v. R. Co.*, followed). 1909, *Bourassa v. Grand Trunk R. Co.*, — N. H. —, 74 Atl. 591 (like *Smith v. R. Co.*). 1906, *Barrott v. Atlantic & N. C. R. Co.*, 140 N. C. 548, 53 S. E. 432 (expulsion from a car for lack of a ticket; conductor's habit as to taking tickets, admitted). 1904, *Nelson v. Grondahl*, 12 N. D. 130, 100 N. W. 1093 (notary's habit to present notes for payment at the place where payable, admitted). 1905, *Custer v. Fidelity M. A. Ass'n*, 211 Pa. 257, 60 Atl. 776 (custom to attach a copy of the application to an insurance policy, excluded, as not sufficient of itself, on the theory of *Schoneman v. Fegley*, *supra*). 1907, *Chitwood v. U. S.*, 8th C. C. A., 153 Fed. 551 (stealing contents of mail; the defendant contended that the letter was open when it arrived; evidence of the habitual arrival of torn mail packages during two months prior was held admissible). 1909, *Security Mutual L. I. Co. v. Klentsch*, 8th C. C. A., 169 Fed. 104 (whether a premium had been paid; insured's custom as to paying by cash or by check, admitted). For a habit of intoxication, see *ante*, §§ 65, 85, *post*, § 96.

## § 95. Course of the Mail and Telegraph.

[Note 1; *add*.:]

1904, *Planters' Mut. I. Ass'n v. Green*, 72 Ark. 305, 80 S. W. 151.  
 1905, *Merchants' Exch. Co. v. Sanders*, 74 id. 16, 84 S. W. 786.  
 1904, *National Bldg. Ass'n v. Quin*, 120 Ga. 358, 47 S. E. 962.  
 1906, *Burch v. Americus G. Co.*, 125 Ga. 153, 53 S. E. 1008.  
 1906, *Clark v. People*, 224 Ill. 554, 79 N. E. 941.  
 1904, *Bloom v. Wanner*, — Ky. —, 77 S. W. 931 (notice).  
 1909, *Continental Ins. Co. v. Hargrove*, 131 Ky. 837, 116 S. W. 256.  
 1906, *Long Bell L. Co. v. Nyman*, 145 Mich. 477, 108 N. W. 1019.  
 1912, *Omaha v. Yancey*, 91 Nebr. 261, 135 N. W. 1044.  
 1913, *Feder Silberberg Co. v. McNeil*, — N. W. —, 133 Pac. 975 (mere mailing, without proof of proper address, insufficient).  
 1905, *Sherrod v. Farmers' M. F. I. Ass'n*, 139 N. C. 167, 51 S. E. 910 (insurance notice).  
 1905, *Neubert v. Armstrong W. Co.*, 211 Pa. 582, 61 Atl. 123 (demand-letter).  
 1906, *Beeman v. Supreme Lodge*, 215 Pa. 627, 64 Atl. 792 (the due mailing, etc., at 9 A.M. in Philadelphia is evidence of delivery to destination in the same city on the same day).  
 1905, *Davidson S. S. Co. v. U. S.*, 142 Fed. 315, 318, C. C. A.  
*Contra*: 1913, *Com. v. O'Bryan, U. & Co.*, 153 Ky. 406, 155 S. W. 1126 (failure to file a statement in a public office; the mere mailing of the statement without other evidence, held inadmissible; unsound).

[Note 4; *add*.:]

1906, *Burch v. Americus G. Co.*, 125 Ga. 153, 53 S. E. 1008 (business habit as to using only government-stamped envelopes, admitted to show that a particular letter was stamped). 1910, *Gardam & Son v. Batterson*, 198 N. Y. 175, 91 N. E. 371 (whether certain letters of the defendant had been mailed; the defendant himself testified that he was the head of a company, that he put all letters on a desk-tray to be mailed by an employee; that a clerk "periodically through the day" gathered up the mail and posted it; held, purporting to follow *Hetherington v. Kemp*, that the evidence was insufficient, because it was essential to call the clerk, whose duty it was to collect and mail, and obtain his testimony that "he had invariably collected the letters upon the defendant's desk and had posted them"; "there was the gap in the proof." Having regard to the habits of commercial houses, does not this smack of Carlyle's "owl-eyed pedantry"?).

§ 96. *Habit of Intemperance.*[*Note 1; add.*]

1910, *Com. v. Rivet*, 205 Mass. 464, 91 N. E. 877 (murder; deceased being found dead alone, his frequent custom of intoxication and of getting into a fight when drunk, offered for defendant to evidence that deceased "came to his death by having got into a fight when drunk," excluded; this ruling might have been correct on the principle of § 142, *post*, but the Court justifies it with the preposterous assertion that "the fact that a person's *habits* or character are such that he would be apt to do an act is not competent evidence that he did the act"; it is apparently hard to dislodge some shibboleths).

§ 97. *Habit of Negligence.*[*Note 1; add.*]

1913, *Hodges v. Hill*, 175 Mo. App. 441, 161 S. W. 633 (collision between plaintiff's mare and defendant's buggy; that plaintiff's son, riding the mare, was in the habit of riding there at high speed, admitted; careful opinion by Sturgis, J.).

1909, *Bourassa v. Grand Trunk R. Co.*, 75 N. H. 359, 74 Atl. 590 (like *State v. M. & L. R. Co.*).

1912, *Zucker v. Whitridge*, 205 N. Y. 50, 98 N. E. 209 (injury by a street-car at a crossing; the habit of the plaintiff in taking precautions when approaching a railway track, held not admissible where there were four eye-witnesses).

§ 98. *Habit as a Substitute for Recollection.*[*Note 1; add.*]

1909, *State v. Day*, 108 Minn. 121, 121 N. W. 611 (custom in administering an oath).

[*Note 1, l. 4 from the end; add.*]

also the cases cited under the attesting-witness rule (*post*, § 1302).

§ 104. *Plan, Design; Miscellaneous Instances.*[*Note 1; add.*]

1905, *The San Rafael*, 141 Fed. 270, 278, C. C. A. (whether a person was lost at sea on a certain vessel and trip; his expression of intent to travel thither at that time, etc., admitted).  
 1908, *Barker v. Western Union Tel. Co.*, 134 Wis. 147, 114 N. W. 439 (damage by loss of patronage; a patron's intention to accept the plaintiff's services is evidence that the services would have been accepted).

§ 105. *Threats of one Charged with Crime.*[*Note 1, col. 1; add.*]

1911, *Allen v. King*, 44 Can. Sup. 331 (cross-examination of accused to threats as testified to by a witness at the police court, not now called, held improper).

1904, *Pitts v. State*, 140 Ala. 70, 37 So. 101.

1905, *State v. Thompson*, 127 Ia. 440, 103 N. W. 377 (assault with intent).

1905, *Johnson v. State*, 85 Miss. 572, 37 So. 926 (threats, and an attempt to secure help in the intended killing, admitted).

1905, *Sinclair v. State*, 87 Miss. 330, 39 So. 522.

1905, *State v. Atkins*, 77 Vt. 215, 59 Atl. 826 (breach of the peace by driving a wagon into collision).

[*Note 1, col. 2, at the end; add.*]

1906, *State v. Quen*, 48 Or. 347, 86 Pac. 791 (threats of a third person, in the accused's presence, with no evidence of conspiracy, excluded).

*[Note 1 — continued]*

The following cases are peculiar: 1905, *Schroeder v. Blum*, 74 Nebr. 60, 103 N. W. 1073 (malicious prosecution on a charge of assault with a gun; threats of the now plaintiff, made before the alleged assault, but not communicated to the now defendant until after the prosecution, and therefore inadmissible if offered on the principle of § 258, n. 2, *post*, held admissible on the present principle).

**§ 106. Generic Threats.***[Note 1; add:]*

1904, *Pitts v. State*, 140 Ala. 70, 37 So. 101 (merely asking for a pistol is no more than a general threat). 1904, *Harbour v. State*, 140 Ala. 103, 37 So. 330 ("I will stamp the life out of somebody," excluded).  
 1904, *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093 (threats against D. and A., admitted, the deceased F. having been killed while preventing the execution of these threats).  
 1905, *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1 (threats against the father of the children killed, admitted).  
 1912, *Helms v. State*, 138 Ga. 826, 76 S. E. 353 (murder).  
 1910, *Porter v. State*, 173 Ind. 694, 91 N. E. 340 (wife-murder; the defendant's statement that "there was nothing too low down for him to do," excluded, as involving his character).  
 1910, *Miller v. State*, 174 Ind. 255, 91 N. E. 930 (after arrest, "when I get out of this, I will get even with some of them," excluded).  
 1906, *State v. Yates*, 99 Minn. 461, 109 N. W. 1070 (arson for insurance; the defendant's statement, about a year before, to a friend who had a stock of goods, "Why don't you get everything you have got here insured for \$800 or \$1000 and in four or five days after you get the insurance all right set them afire?" excluded, though the opinion concedes that it "tended to characterize her as an incendiary, willing to burn property for the purpose of procuring the insurance thereon"; this is one of the most depressing rulings in our records).  
 1909, *State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035 ("I am coming back and drive all you old-timers out of the camp," admitted).  
 1906, *State v. Feeley*, 194 Mo. 300, 92 S. W. 663 (a threat showing "general malice" and a disposition "to an act which was criminal" is admissible).  
 1906, *People v. Johnson*, 185 N. Y. 219, 77 N. E. 1164 (threats five months before, repeated, admitted).  
 1912, *McDaniel v. State*, 8 Okl. Cr. 209, 127 Pac. 358.  
 1914, *Hiles v. State*, — Tex. Cr. —, 163 S. W. 717 (murder).  
 1911, *State v. Vacos*, — Utah —, 120 Pac. 497 ("I will get him to-night," admitted).  
 1910, *Hardy v. Com.*, 110 Va. 910, 67 S. E. 522.  
 Compare, with the above cases, those cited *post*, §§ 363, 396, where other principles may lead to different results.

**§ 107. Conditional Threats.***[Note 1; add:]*

1911, *State v. Averill*, 85 Vt. 115, 81 Atl. 461 (murder).  
 1910, *Hardy v. Com.*, 110 Va. 910, 67 S. E. 522.

**§ 108. Time of Threats.***[Note 1; add:]*

1905, *State v. Coleman*, 186 M. 151, 84 S. W. 978 (threats eighteen months before, admitted).  
 1905, *State v. Exum*, 138 N. C. 599, 50 S. E. 283 (threats nine months before, admitted).

## § 111. Decedent's Threats.

[Note 6; add:]

1904, *Lee v. State*, 72 Ark. 436, 81 S. W. 385.1906, *People v. Lamar*, 148 Cal. 564, 83 Pac. 993.1905, *State v. Powell*, 5 Penn. Del. 24, 61 Atl. 966 (murder with a knife; the deceased's admissions that she had poisoned the defendant's coffee, and was going to kill the defendant, admitted).1904, *McKinney v. Carmack*, 119 Ga. 467, 46 S. E. 719 (rule applied).1906, *Warrick v. State*, 125 Ga. 133, 53 S. E. 1027 (prior cases reviewed, and the ruling in *McKinney v. Carmack* approved "as stating both the general rule . . . and the exceptional instance"). 1910, *Rouse v. State*, 135 Ga. 227, 69 S. E. 180.1907, *Neathery v. People*, 227 Ill. 110, 81 N. E. 16 (admitted).1908, *Duncan v. State*, 171 Ind. 444, 86 N. E. 641 (but here excluded because evidenced by hearsay only).1905, *Burroughs v. U. S.*, 6 Ind. T. 164, 90 S. W. 8 (decedent's threats admissible, even where the issue is provocation to manslaughter, and not self-defence).1907, *State v. Blee*, 133 Ia. 725, 111 N. W. 19 (admissible; "the precise question is now before this Court for the first [!] time").1887, *Hart v. Com.*, 85 Ky. 77, 2 S. W. 673 (uncommunicated threats, admitted).1905, *Wheeler v. Com.*, 120 Ky. 697, 87 S. W. 1106 (*Young v. Com.* followed). 1907, *Com. v. Thomas*, — Ky. —, 104 S. W. 326 (generic threats, admitted).1906, *Brown v. State*, 88 Miss. 166, 40 So. 737 (prior threats, and details of prior quarrels, admissible, following *Holly's Case*, *supra*; the majority opinion, however, errs on another point, noted *post*, § 396). 1911, *Echols v. State*, 99 Miss. 683, 55 So. 485.1907, *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470 (admissible). 1910, *State v. Sovern*, 225 Mo. 580, 125 S. W. 769 (instructions discussed).1907, *State v. Scaduto*, 74 N. J. L. 289, 65 Atl. 908 (uncommunicated threats held admissible if "there was an overt act of attack" and "the defendant at the time of the collision was in imminent danger"; the latter clause is hardly required; *State v. Zellers* practically repudiated, though not cited).1911, *Terr. v. Trapp*, 16 N. M. 700, 120 Pac. 702 (there must be other evidence of aggression).1911, *State v. Baldwin*, 155 N. C. 494, 71 S. E. 212 (admitted).1910, *Saunders v. State*, 4 Okl. Cr. 264, 111 Pac. 965 (above doctrine approved).1907, *State v. Thompson*, 49 Or. 46, 88 Pac. 583 (uncommunicated threats, admissible).1907, *State v. Emerson*, 78 S. C. 83, 58 S. E. 974 (murder of a woman's father; whether the deceased knew of illicit relations between defendant and the woman, excluded).1906, *State v. Trail*, 59 W. Va. 175, 53 S. E. 17 (murder of B.; B.'s prior declaration that he was going to defendant's to debauch his daughter if he could get defendant drunk, excluded, not being communicated to defendant; *Sanders, J.*, diss. and properly).

[Note 6, par. 2, p. 186; add:]

1904, *Taylor v. State*, 121 Ga. 348, 49 S. E. 303.The threats of a *third person* may also be admitted, where it is desired to show that he, and not the accused, was the aggressor:1905, *State v. Gaylord*, 70 S. C. 415, 50 S. E. 20; and compare the cases cited *post*, § 140.In *other issues* in which the *aggression* of the plaintiff or prosecuting witness is material, his threats are admissible on the foregoing principles:1905, *State v. Atkins*, 77 Vt. 215, 59 Atl. 826 (breach of the peace by intentional collision; the prosecuting witness' threats of running into the defendant, admitted, to show aggression).

## § 112. Testamentary Plans.

[Note 1; add:]

1905, *Spencer's Appeal*, 77 Conn. 638, 60 Atl. 289 (revocation; general principle stated).  
 1913, *Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487 (intent to revoke; compare the citations *post*, § 1737, n. 3).

1910, *State v. Ready*, 78 N. J. L. 599, 75 Atl. 564 ("whether a person's intention to make a will, or to make a will of a particular purport, can be shown by his antecedent declarations of that intention," answered in the affirmative, "when not too remote to be material").

The only case ever intimating the contrary seems to be *Throckmorton v. Holt*, U. S., cited *post*, § 1734, n. 2. In *State v. Ready*, *supra*, the learned chief justice's statement that on this rule "judicial sentiment is altogether out of harmony" and "courts are divided," is comprehensible only as an expression of delicate consideration for the Federal Supreme Court's lonesome decision of *Throckmorton v. Holt*; for the fact seems to be that *Throckmorton v. Holt* is the *only* case ever decided to the contrary; and the present opinion itself points out the inadequacy of the citations in *Throckmorton v. Holt* to sustain its decision.

## § 118. Motive not Essential.

[Note 1; add:]

It is sometimes said that the Court must charge that the absence of any apparent motive is evidence for the defendant: 1910, *Porter v. State*, 173 Ind. 694, 91 N. E. 340. But all such detailed charges are poor policy.

[Note 2; add:]

1904, *Robinson v. State*, 71 Nebr. 142, 98 N. W. 694 (murder).

1904, *State v. Jagers*, 71 N. J. L. 281, 58 Atl. 1014 (murder).

1903, *Cupps v. State*, 120 Wis. 504, 97 N. W. 210.

[Note 4; add:]

1913, *People v. Cummins*, — N. Y. —, 103 N. E. 169 (not decided).

Compare the doctrine as to *Judicial Admissions* (*post*, § 2591).

## § 133. Bastardy, Seduction, Rape; Other Intercourse, etc.

[Note 1; add:]

1910, *Adams v. State*, 93 Ark. 260, 124 S. W. 766 (seduction; admitted, but only on the principle of § 1007, *post*). 1910, *Belford v. State*, 96 Ark. 274, 131 S. W. 953 (here admitted when appropriate to the time of conception).

1910, *Gird's Estate*, 157 Cal. 534, 108 Pac. 499.

1905, *Walker v. State*, 165 Ind. 94, 74 N. E. 614 (bastardy; admitted).

1906, *Kesselring v. Hummer*, 130 Ia. 145, 106 N. W. 501 (seduction, with birth of a child as aggravation; intercourse with a third person within the period, admitted).

1914, *Koepke v. Delfs*, — Nebr. —, 146 N. W. 962.

1906, *Busse v. State*, 129 Wis. 171, 108 N. W. 64.

Compare § 68, *ante*.

The following case is peculiar:

1910, *R. v. McNulty*, 22 Ont. L. R. 350 (murder by defendant man of illegitimate child of M. by him; the paternity being in issue as a motive, defendant's calling of third persons to prove their intercourse with M., who on cross-examination had denied it, excluded; grounds obscure; unsound).

[Note 2; *add*, under *Accord*.:]

1890, *Maynard v. People*, 135 Ill. 416, 433, 25 N. E. 740 (bastardy; that the woman was "out late at night with men and boys" about the time in question, admissible).  
1905, *Walker v. State*, 165 Ind. 94, 74 N. E. 614 (with other evidence).

[Note 4; *add*.:]

Compare *State v. Hendrick*, N. J. L. (1903), and other cases cited *ante*, § 68, nn. 1, 2, 3.

[Text, p. 196, l. 7; *insert*.:]

*incest, or rape under age.*

[Note 5; *add*.:]

*Eng.*: 1913, *R. v. Cargill*, 2 K. B. 271 (rape under age; extrinsic evidence of intercourse of others with the girl, excluded, even though the prosecutrix had without objection introduced evidence of her virginity).

*Conn.*: 1909, *State v. Rivers*, 82 Conn. 454, 74 Atl. 757 (rape under age; inadmissible, except to impeach the witness).

*D. C.*: 1912, *Kidwell v. U. S.*, 38 D. C. App. 566 (rape under age; cross-examination to acts of intercourse with others, held allowable, the prosecutrix here being pregnant). 1913, *Sacks v. U. S.*, 41 D. C. App. 34 (rape under age; unchaste conduct of the woman, excluded; citing a Missouri case and ignoring *Kidwell v. U. S.*).

*Ind.*: 1910, *Heath v. State*, 173 Ind. 296, 90 N. E. 310 (rape under age; excluded).

*N. D.*: 1913, *State v. Apley*, — N. D. —, 141 N. W. 740 (rape under age; undecided; sensible opinion by Goss, J.; here held admissible to explain medical testimony to physical condition, as in Note 6, *infra*).

*S. D.*: *State v. Rash*, 27 S. D. 185, 130 N. W. 91 (rape under age; prosecutrix' unchaste conduct, excluded).

*Contra*: 1906, *State v. Gerike*, 74 Kan. 196, 87 Pac. 759 (rape under age, with pregnancy; the woman's intimate association at night with other men, admitted; no precise rule stated). 1911, *State v. Swindall*, 129 La. 760, 56 So. 702 (incest).

1906, *State v. Mobley*, 44 Wash. 549, 87 Pac. 815 (rape under age, with pregnancy; the woman's habit of staying away from home till after midnight, received).

This view may be justified, and is perhaps preferable to that stated above in the text, on the ground that, though paternity is not in issue, yet, since there must have been intercourse with some one, it is more likely that it was exclusively with some other person, on the principle of §§ 400, 402, par. (1) (a), *post*.

So also the same considerations apply in *abortion*: 1913, *Meno v. State*, 117 Md. 435, 83 Atl. 759 (cited more fully *post*, § 390 n.).

[Note 6; *add*.:]

1904, *State v. Bebb*, 125 Ia. 494, 101 N. W. 189 (like *People v. Craig*, Mich.).

## § 140. Threats by a Third Person.

[Note 1; *add*.:]

1911, *McElroy v. State*, 100 Ark. 301, 140 S. W. 8 (threats by third persons, excluded, no other evidence of their complicity being offered).

1906, *State v. McLain*, 43 Wash. 267, 86 Pac. 390 (arson; mere threats of a third person, excluded).

## § 141. Motive of a Third Person.

[Note 1; *add*.:]

1904, *Bowen v. State*, 140 Ala. 65, 37 So. 233 (murder; facts showing a motive in third persons, excluded). 1904, *Walker v. State*, 139 Ala. 56, 35 So. 1011 (murder; a third per-

[*Note 1 — continued*]

son's motive, without other connecting evidence, excluded). 1910, *McDonald v. State*, 165 Ala. 85, 51 So. 629 (evidence of third person's motive, with evidence of bloodhound's trailing of him, admitted).

1912, *People v. Pezutto*, 255 Ill. 583, 99 N. E. 677 (murder; quarrels, etc., of deceased with third persons, held properly limited by the trial Court in its discretion).

1906, *State v. Barrington*, 198 Mo. 23, 95 S. W. 235 (murder; certain threats by third persons against the deceased, excluded).

1905, *State v. Gaylord*, 70 S. C. 415, 50 S. E. 20 (threats, etc., of a third person received; here, to show that the third person, not the defendant, was the aggressor; compare § 112, n. 6, *ante*).

1906, *Porch v. State*, 50 Tex. Cr. 335, 99 S. W. 102 ("there must be something more than mere motive" evidenced against the third person).

#### § 142. Same: Miscellaneous Facts.

[*Note 1; add:*]

1911, *McGehee v. State*, 171 Ala. 19, 55 So. 159 (inculpatory conduct of a third person, excluded).

1910, *Stout v. State*, 174 Ind. 395, 92 N. E. 161 (murder; that one B. had bought a revolver of similar calibre, and that bloodhounds had trailed him after the murder, not admitted, no offer of other evidence against B. being promised).

1908, *Etlly v. Com.*, 130 Ky. 723, 113 S. W. 896 (wife-murder; sundry evidence pointing to another person, held improperly excluded).

1913, *People v. Emmons*, — Mich. —, 144 N. W. 479 (sale of fermented cider; evidence that other persons had the means of adulterating the cider sold, held admissible).

1912, *State v. Millican*, 158 N. C. 617, 74 S. E. 107 (arson; the defendant's offer to show that during the time after their imprisonment other fires occurred in the same town; unsound; the offer here may have been defective in form, but the opinion's reasoning on the relevancy of such evidence shows a singular ignorance of the facts of crime and of the elements of logic).

#### § 143. Suicide, or other Self-infliction of Harm.

[*Note 1; add:*]

1909, *Carter v. State*, 172 Ind. 227, 87 N. E. 1081 (cited more fully *post*, § 238, n. 6).

1912, *State v. Beeson*, 155 Ia. 355, 136 N. W. 317 (cited more fully *post*, § 1725, n. 1).

#### § 144. Motive for Suicide.

[*Note 1; add:*]

1904, *State v. Kelly*, 77 Conn. 266, 58 Atl. 705 (deceased's despondency several months before, excluded; unsound).

#### § 149. Miscellaneous Traces, in Criminal Cases.

[*Note 1; add:*]

1909, *Phillips v. State*, 162 Ala. 14, 50 So. 194 (human tracks).

1907, *State v. Kehr*, 133 Ia. 35, 110 N. W. 149 (burglary while armed with a revolver; the possession of a revolver when arrested two months later, excluded; this is finical).

1905, *State v. McAnarney*, 70 Kan. 679, 79 Pac. 137 (blood-stains on trousers; excluded here, because the trousers had been placed in contact with the deceased's bloody clothing before chemical testing).

1908, *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (knife like that with which a killing was done).

[*Note 1 — continued*]

1909, *Sorenson v. U. S.* 8th C. C. A., 168 Fed. 785 (burglary; possession of revolver, nitroglycerine, etc., 18 days later, excluded on the facts).

1906, *State v. Freshwater*, 30 Utah 442, 85 Pac. 447 (defective typewriter showing the mark on a letter).

[*Text*, p. 207, l. 4 from below; *insert*:]

"Who finds the heifer dead and bleeding fresh,  
And sees, fast by, a butcher with an axe,  
But will suspect 'twas he that made the slaughter?"

— *Henry VI*, Pt. II, III, 2.

[*Text*, p. 208, bottom line, after "identity"; *add* a new note 1a:]

<sup>1a</sup> Here belongs the modern use of *finger-prints* of the accused, left behind on some object at the scene of the offence.

1909, *Castleton's Case*, 3 Cr. App. 74 (burglary; finger-prints on a candle left behind, proved by photographs, admitted).

1911, *People v. Jennings*, 252 Ill. 534, 96 N. E. 1077 (cited more fully *post*, § 411).

The trustworthiness here depends rather on the scientific principle of Identity (*post*, § 411).

### § 150. Brands on Animals and Timber.

[*Text*, p. 209, lines 4-8 from below; *substitute*:]

Its real probative foundation is the well-established presumption of ownership from possession (*post*, § 2515). Courts have usually held, when the question was raised, that the inference of *ownership* may be drawn, as a matter of common law;<sup>1</sup> and it has been universally conceded that the presence of the brand is evidence of *identity* (i. e. of the animal being one of those originally branded by the brand-user) even though not of ownership. The larger scope of the evidence has been generally confirmed by legislation. In most of the stock-raising communities, etc.

[*Text*, last line; *add*, as a cross-reference:]

and § 1647.

[*Note 1*; *add*:]

1886, *People v. Bollinger*, 71 Cal. 17, 11 Pac. 799; (larceny; "an earmark used by the alleged owners of the hogs was some evidence of ownership").

1907, *State v. Wolfley*, 75 Kan. 406, 89 Pac. 1046 (on common-law principles a brand may be evidence of ownership as well as of identity).

1865, *Plummer v. Newdigate*, 2 Duv. Ky. 1 (a brand "U. S." is admissible as evidence of ownership, but is not *per se* sufficient evidence).

1886, *State v. Cardelli*, 19 Nev. 319, 10 Pac. 433, *semble* (at common law a cattle-brand may be some evidence of ownership).

1888, *Stewart v. Hunter*, 16 Or. 62, 16 Pac. 876 ("Branding stock furnishes evidence of its ownership").

*Contra*: 1872, *Peoples v. Devault*, 11 Heisk. 431 (a "U. S." brand is not evidence of ownership unless shown to have been put on by U. S. officers).

[*Note 2*; *add*:]

*Alta.*: St. 1913, 2d sess., c. 24, § 5 (brand not vented shall be evidence of ownership by registered brand-owner).

[Note 2 — continued]

*Br. C.*: St. 1914, 4 Geo. V, c. 9, § 5 (stock-brand not vented to be evidence of ownership, if recorded and uncanceled).

[Note 2; add:]

*Aris.*: St. 1905, c. 51, § 70 (on trial for violation of the stock laws, the presence of brand or earmark "claimed by the accused to be his brand or mark," though not recorded, is evidence of conversion; and the ownership of live-stock from a foreign State, etc., "may be shown by the marks or brands thereupon" though not recorded); *ib.* § 65 (official record of live-stock brands, proved by certified copy, is "*prima facie* evidence of all the facts required to be entered in said book," and of the rights of the person named, or of the assignee on proof of assignment, "to use said brand," etc.). 1914, *Marley v. State*, — *Aris.* —, 140 Pac. 215 (St. 1905, c. 51, §§ 66, 67, and St. 1912, c. 4, p. 13, as to brand evidence of ownership, considered).

*Colo.*: St. 1913, c. 47, p. 142, Mar. 31, §§ 1, 7, 8 (in all suits involving the title to animals, a certified copy of the record of a brand shall be "*prima facie* evidence of the ownership of such animal").

*Ida.*: Rev. St. 1887, § 1179; St. 1905, Mar. 7, p. 352, §§ 5, 14 (in all proceedings where title or right of possession is involved, the brand on an animal, if duly recorded, shall be *prima facie* evidence that "the animal belongs to" the brand-owner and that the latter has the right of possession at the time of action; "no evidence of ownership of stock by brands or for the purpose of identification shall be permitted" unless the brand is recorded; the State recorder's certified copy of the record, or the original certificate, shall be evidence of the right to use the brand; "parol evidence shall be inadmissible to prove the ownership of a brand"). 1907, *State v. Dunn*, 13 *Ida.* 9, 88 Pac. 235 (under the statute oral evidence of the ownership of a brand is inadmissible; since the statute, "still the brand itself may serve as the means to the owner himself for the identification of the animal"; compare § 1639, *post*).

*Nev.*: 1886, *State v. Cardelli*, 19 *Nev.* 319, 10 Pac. 433 (an unrecorded brand may be evidence of ownership).

*N. Mex.*: 1909, *Terr. v. Valles*, 15 *N. Mex.* 228, 103 Pac. 984 (larceny; unrecorded brand is evidence of identity).

*Okl.*: 1906, *Hurst v. Terr.*, 16 *Okl.* 600, 86 Pac. 280 (larceny of cattle; an unrecorded brand is evidence of ownership; the statutory rule merely provides an additional, not an exclusive sort of evidence; Texas rulings distinguished).

*Tex.*: 1903, *Sapp v. State*, — *Tex. Cr.* —, 77 S. W. 456 (*Turner and Welch Cases*, *supra*, both approved). St. 1913, c. 69, p. 129 (amending Rev. Civ. St. § 7160, by providing "that this shall not apply in criminal cases").

*Wyo.*: St. 1913, c. 126, p. 174 (live-stock brands; amending Comp. St. 1910, § 2602; certified copy of recorded brand to be "*prima facie* evidence" of the ownership of such animal by the party whose brand or mark it might be, and shall be taken as evidence of ownership in all civil or criminal proceedings "when the title to the animal is involved or proper to be proved, when such claim is sustained and corroborated with other evidence").

[Note 4; add:]

1895, *Pittsburgh, F. W. & C. R. Co. v. Callaghan*, 157 *Ill.* 406, 41 *N. E.* 909 (lettering on locomotive cab, held to be evidence of ownership by purporting owner).

1913, *Howell v. Mandelbaum*, — *Ia.* —, 140 *N. W.* 397 (name on a wagon, held evidence of ownership; cases collected).

1907, *State v. Ford*, 76 *Kan.* 424, 91 Pac. 1066 (keeping a place for illegal sale of liquor; bills of sale of liquor found in the defendant's cash register, naming him as vendee, admitted, as analogous to the circumstantial evidence of tags on goods).

1910, *Trombley v. Stevens-Duryea Co.*, 206 *Mass.* 516, 92 *N. E.* 764 (an automobile, occupied by the driver only, injured the plaintiff; held (1) that the number borne on the car,

[*Note 4 — continued*]

with the certificate of registration of the defendant, who was not the driver, were sufficient evidence of the defendant's ownership or right to possession; (2) that the driver's possession of the automobile was no evidence that he was the agent or servant of the owner; the Court's opinion is lamentably inconsistent, for after first stating the question to be "whether there was evidence for the jury," it proceeds to rule that "there is no presumption"; whichever ruling the Court meant to make, it is unsound as a matter of practical experience, which is the basis of all presumptions; and if the ruling was that "there was no evidence," it is a proposition preposterously unfair).

*N. Mex.*: St. 1912, c. 28, § 4 ("in any controversy respecting the identity or ownership or control of an automobile, the number borne by it shall be *prima facie* evidence that it was owned and operated by the person to whom the license therefor was issued").

1910, *People v. Hill*, 198 N. Y. 64, 91 N. E. 272 (murder; keys with tag bearing defendant's name found at the place; held doubtful; this case shows how different a man the judge is when reasoning about his own affairs at home and reasoning in the judicial strait-jacket; suppose he had forbidden a certain young man to court his daughter and then one morning found on the parlor floor by the sofa a bunch of keys with the tabooed young man's name; would he hold that "there was some doubt whether the evidence was properly admitted"?)

*W. Va.*: St. 1905, c. 36 (licenses required for automobiles, and tags provided; "in any controversy respecting the identity or ownership or control of an automobile, the number borne by it shall be *prima facie* evidence that it was owned and operated" by the licensee). St. 1907, c. 82, p. 410, § 61 (like St. 1905, c. 36).

A caution is necessary in extending the analogy of these brand and mark cases to the use of *tags, labels, bills of sale*, and other documents, as applied in *State v. Ford*, Kansas, *supra*. The basis of the inference in the brand cases is the known custom that *only the owner ordinarily* imprints a brand or mark of his initials, name, etc. But when *e. g.* a bill of sale for liquor sold to J. S. is found on J. S.'s premises, the inscription to J. S. is by custom the statement of the vendor, hence is (even when authenticated) no more than the vendor's hearsay statement; hence, its only available status, *prima facie*, is that of an *admission* of J. S.; to bring it to this point, the principles of §§ 260 and 1073, *post*, must be invoked and satisfied.

### § 153. Possession of Chattels, as Evidence of Other Crimes.

[*Note 1; add:*]

1904, *McCormick v. State*, 141 Ala. 75, 37 So. 377 (watch).

1905, *Flanagan v. People*, 214 Ill. 170, 73 N. E. 347; and cases cited *post*, § 2513, n. 8.

[*Note 4; add:*]

1905, *People v. Jackson*, 182 N. Y. 66, 74 N. E. 565 (murder; the defendant's possession of the deceased's watch and pocket-book, admitted).

### § 154. Possession of Money, to evidence Larceny, etc.

[*Note 1; add:*]

1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127 (murder; the accused's lack of money before the crime and possession of it afterwards, and the loss of money from the house of the victim, admitted). 1911, *Com. v. Richmond*, 207 Mass. 240, 93 N. E. 816.

1886, *New York & B. F. Co. v. Moore*, 102 N. Y. 667, 6 N. E. 293 (civil action for embezzlement by an employee). 1905, *People v. Gaffey*, 182 N. Y. 257, 74 N. E. 836 (forgery; the defendant's small salary and large deposits, admitted to show the probable mode of dis-

[*Note 1 — continued*]

position of the cash-stealings covered by the forged notes; the Court seems to err in calling this "evidence of motive").

Distinguish the use of *lack of money* to show *motive* (*post*, § 392).

### § 157. Possession of a Document, to show Seisin, etc.

[*Note 2; add:*]

1904, *State v. Bruni*, 37 Tex. Civ. App. 2, 83 S. W. 209 (ancient deeds admitted to show possession and other acts of ownership).

1905, *Murphy v. Com.*, 187 Mass. 361, 73 N. E. 524 (boundary of town land; certain leases, town votes, and treasurer's entries, not all ancient, admitted to show "actual possession by the town, through its lessees, under a claim of title").

Whether *payment of taxes* (as evidenced by tax-receipts) is evidence of possession of the land, has been a large question; see the following opinion, and cases cited: 1904, *Chastang v. Chastang*, 141 Ala. 451, 37 So. 799.

### § 158. Lack of News, to show Death, etc.

[*Note 1; add:*]

Compare the cases cited *post*, § 664.

So, too, the *fictitious nature* of a name, or the *non-existence* of an alleged person of a certain name and residence, may be evidenced by the failure to find any such person after diligent search:

1907, *Phelps v. Nazworthy*, 226 Ill. 254, 80 N. E. 756 (whether a deed-grantee was a fictitious person; that no person by that name had ever lived in the township, admitted).

1858, *State v. Wentworth*, 37 N. H. 217; and cases cited *post*, §§ 1313, 1725, 1789, and 2531, n. 7.

*Contra*: 1906, *Taylor v. State*, 50 Tex. Cr. 381, 97 S. W. 474 (forgery of names of persons said to be fictitious; the sheriff's returns of "not found" on subpoenas issued in various counties for these persons as witnesses, excluded; such a ruling may be a suitable part of some little esoteric game of quibbles; but it is so vast a distance sundered from the world of common sense as to create a suspicion that the Court is under some mistake as to the nature of the objective, called Truth, which it was placed there to ascertain).

That a *voter*, alleged to have voted illegally as a *non-resident*, cannot be found or heard of on diligent search in the district, is another example of the principle; but some Courts are pedantically strict in their application of it: 1905, *State v. Rosenthal*, 123 Wis. 442, 102 N. W. 49.

### § 166. Resemblance of Child, to show Paternity.

[*Note 1; add:*]

1827, 1836, *Morris v. Davis*, 3 C. & P. 214, 5 Cl. & F. 163 (legitimacy; "the defendant's counsel much relied . . . on the circumstance of personal resemblance that was proved by several witnesses to exist" between the plaintiff and the mother's paramour; on appeal, similar evidence was admitted on both sides without question).

1853, *Doe v. Marr*, 3 U. C. C. P. 36, 51 (inheritance; to show the defendant a bastard, his resemblance to S. and not to the husband M. was held admissible, as "auxiliary evidence").

[*Note 2; add:*]

1913, *Watts v. State*, 8 Ala. App. 264, 63 So. 18 (seduction; exhibition of child, and testimony to its paternity allowed).

1910, *Adams v. State*, 93 Ark. 260, 124 S. W. 766 (seduction; resemblance of a child a few months old, testified to).

## TRACES, TO EVIDENCE AN AC.

[*Note 2 — continued*]

1911, *People v. Richardson*, 161 Cal. 552, 120 Pac. 20 (child 5½ months old, allowed to be exhibited as evidence of paternity).  
1906, *Shailer v. Bullock*, 78 Conn. 65, 61 Atl. 65 (bastardy; exhibition of the child — here 10 months old — allowed).  
1854, *Wright v. Hicks*, 15 Ga. 160, 172 (legitimacy; resemblance of the child to the alleged paramour, considered).  
1904, *McCalman v. State*, 121 Ga. 491, 49 S. E. 609 (testimony to resemblance excluded; following *Hanawalt v. State*, Wis.; *Candler, J.*, diss.).  
1911, *State v. Nathoo*, 152 Ia. 665, 133 N. W. 129 (rape; the child's resemblance to the Hindoo defendant; not decided).  
1896, *People v. Wing*, 115 Mich. 690, 74 N. W. 179 (bastardy; *People v. White* followed).  
1905, *State v. Danforth*, 73 N. H. 215, 60 Atl. 839 (rape; rule of the foregoing cases confirmed; here the child was exhibited and its peculiarities pointed out; the rule as stated above in the text "appears reasonable").  
1888, *State v. Horton*, 100 N. C. 443, 6 S. E. 238 (*State v. Woodruff* followed).  
1908, *Anderson v. Aupperle*, 51 Or. 556, 95 Pac. 330 (seduction; infant of less than 3 months, exhibited; *State v. Danforth*, N. H., followed). 1913, *State v. Russell*, 64 Or. 247, 129 Pac. 1051 (incest; child of 14 months allowed to be exhibited).

[*Text*, p. 220, after the passage from "*King John*," insert:]

"Richard II, IV, 2." *Duchess of York* (pleading for her traitor son with her husband)  
". . . Thou dost suspect  
That I have been disloyal to thy bed,  
And that he is a bastard, not thy son.  
Sweet York, sweet husband, be not of that mind;  
He is as like thee as a man may be;  
Not like to me, nor any of my kin."

### § 167. Corporal Traits, to show Race or Nationality.

[*Note 1; add:*]

1904, *U. S. v. Hung Chang*, 134 Fed. 19, 23 (Chinese descent, evidenced by appearance).  
The same principle should apply to the resemblance of an *animal*, as evidence of its pedigree:  
1904, *Brady v. Shirley*, 18 S. D. 608, 101 N. W. 886, *semble* (qualities of a horse, admitted on the question of its siring by a Hambletonian).

### § 168. Birth of a Child, or Pregnancy, to show Intercourse.

[*Text; add*, at the end, a new paragraph (3):]

(3) So, too, in prosecutions for *rape*, *rape under age*, and *seduction*, the pregnancy is admissible as evidence at least of the intercourse; the accused's identity being provable by other evidence.<sup>3</sup>

<sup>3</sup> *Accord*: 1904, *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904 (seduction under promise of marriage; birth of a child as shown by its presence in court, admitted).  
1912, *Kidwell v. U. S.*, 38 D. C. App. 566 (rape under age).  
1909, *People v. Soto*, 11 Cal. App. 431, 105 Pac. 420 (pregnancy admissible to prove the act charged; but not, as here, the birth of a child from a prior act of intercourse used evidentially).  
1911, *State v. Henderson*, 19 Ida. 524, 114 Pac. 30 (rape under age; birth of a child, admitted).

[Text (3) — *continued*]

1906, *State v. Dolan*, 132 Ia. 196, 109 N. W. 609 (seduction; an obscure ruling, which finds fault with the trial court for not clearly instructing the jury; birth is said to be admissible as evidence of a seduction, but not of the defendant's being the seducer). 1907, *State v. Nugent*, 134 Ia. 237, 111 N. W. 927 (seduction; birth of a child, admitted). 1908, *State v. Blackburn*, 136 Ia. 743, 114 N. W. 531 (rape under age; birth of child, held to be not corroborative of woman's testimony; following *State v. Coffman*, 112 Ia. 8, but ignoring the above two cases). 1909, *State v. Hunt*, 144 Ia. 257, 122 N. W. 902 (seduction; birth of a child held "corroborative of the prosecutrix as to the corpus delicti," though not as connecting the defendant; *Dolan* and *Nugent* cases not cited).

1911, *State v. Nathoo*, 152 Ia. 665, 133 N. W. 129 (carnal knowledge of an insensible female; the fact of a birth was held admissible as corroborative, if intercourse was otherwise proved).

1904, *State v. Walke*, 69 Kan. 183, 76 Pac. 468 (statutory rape).

1905, *State v. Miller*, 71 id. 200, 80 Pac. 51 (same).

1906, *State v. Gereke*, 74 Kan. 196, 86 Pac. 160, *semble* (rape under age; birth of a child, admitted).

1905, *People v. Stison*, 140 Mich. 216, 103 N. W. 542 (incest).

1906, *State v. Palmberg*, 199 Mo. 233, 97 S. W. 566 (rape under age; birth of child, admitted).

1904, *Woodruff v. State*, 72 Nebr. 815, 101 N. W. 1114 (rape under age).

1912, *State v. Holter*, 30 S. D. 353, 138 N. W. 953 (seduction; plaintiff's pregnancy admitted).

1906, *State v. Thompson*, 31 Utah 228, 87 Pac. 709 (adultery with a single woman; her pregnancy admitted as corroborating her, but not as connecting the defendant).

1903, *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810 (rape under age; Fullerton, C. J.: "It conclusively proves her testimony to the effect that the crime charged was committed, and the truth of that lends credence to her testimony to the effect that the person she names is the guilty party"; said of the birth or miscarriage of a child). 1905, *State v. Nelson*, 39 id. 221, 81 Pac. 721 (adultery; birth of child twenty months after husband's absence, admitted); and some of the cases cited *post*, § 398. 1909, *State v. McCool*, 53 Wash. 486, 102 Pac. 422 (rape under age; admitted, but held not sufficient corroboration under the rule of § 2062, *post*).

*Contra*: 1906, *Kevern v. People*, 224 Ill. 170, 79 N. E. 574, *semble* (rape).

1906, *People v. Brown*, 142 Mich. 622, 106 N. W. 149 (rape under age in June, 1904, the statutory age being reached on July 15, 1904; pregnancy in March and May, 1905, excluded; a queer decision, the present question not being distinguished from others involved).

[Text; add a new paragraph (4) :]

(4) So, also, a condition of any *disease*, subsequent to a time in issue, may evidence its prior existence.<sup>4</sup>

<sup>4</sup> Cases cited *post*, § 225, n. 1.

## § 177. Conduct of Animals, to evidence a Human Act.

[Note 2; add:]

Compare the following: 1905, *Miller v. Terr.*, 9 Ariz. 123, 80 Pac. 321 (larceny of a colt; testimony from stockmen who had observed the animal's conduct that "the colt belonged to certain mare which it had been following," admitted).

Compare the unsound ruling in *State v. Landry*, 29 Mont. 218, 74 Pac. 418 (1903), cited *post*, § 1163, n. 6.

In *State v. Hunter*, 143 N. C. 607, 56 S. E. 547 (1907), Chief Justice Clark reminds us of "the classical incident of Ulysses, on his return from his memorable wanderings, being

[*Note 2 — continued*]

recognized by his dog Argos (who died from joy), when his family and his followers knew him not," and "the more modern incident of Aubry's dog of Montargis, who procured the confession of his master's murderer by his recognition of him."

[*Note 3; add:*]

1892, *Hodge v. State*, 98 Ala. 10, 11, 13 So. 385 (murder; that a trained dog had followed the trail to the defendant's house, admitted, on the facts). 1905, *Little v. State*, 145 Ala. 662, 39 So. 674 (the animal must be shown to have been trained to track human beings and to be able to do so accurately). 1906, *Richardson v. State*, 145 Ala. 46, 41 So. 82 (tracing by hounds; admitted). 1906, *Hargrove v. State*, 147 Ala. 97, 41 So. 972 (burglary; trailing of accused by bloodhounds, shown to be trained to the purpose, admitted). 1909, *McDonald v. State*, 165 Ala. 85, 51 So. 629 (admitted; here the uncertainty of the evidence was exhibited by the dogs' trailing of two different persons).

1903, *Davis v. State*, 46 Fla. 137, 35 So. 76 (burglary; trailing by dogs is admissible, on certain conditions indicating "that reliance may reasonably be placed upon the accuracy of the trailing"). 1904, *Davis v. State*, 47 Fla. 26, 36 So. 170 (former opinion applied).

1904, *Allen v. Com.*, — Ky. —, 82 S. W. 589 (rule of *Pedigo v. Com.* applied to exclude such evidence where the dog's qualities were not sufficiently shown). 1905, *Denham v. Com.*, 119 Ky. 508, 84 S. W. 538 (*Pedigo v. Com.* followed). 1909, *Sprouse v. Com.*, 132 K. 269, 116 S. W. 344 (trailing by hounds from a burned house to defendant's house; excluded, partly because the skill of the hounds was not sufficiently shown, and partly because due precautions for accuracy were not taken).

1912, *State v. Rasco*, 239 Mo. 535, 144 S. W. 449 (murder; trailing by bloodhounds, allowed on the testimony to their habits and skill).

1907, *State v. Hunter*, 143 N. C. 607, 56 S. E. 547 (arson; trailing by a trained bloodhound, admitted).

1904, *Parker v. State*, 46 Tex. Cr. 461, 80 S. W. 1008 (bloodhound's tracking of defendant admitted; rule of *Pedigo v. Com.*, Ky., approved).

1908, *State v. Freeman*, 146 N. C. 615, 60 S. E. 986 (burglary; a dog's trailing of the defendant, by shoe-scent, admitted).

1907, *State v. Dickerson*, 77 Oh. 34, 82 N. E. 969 (trailing of a murderer by a bloodhound held admissible, provided that the particular dog was trained in tracking human beings and had in experience been found reliable, this reliability being testified to from personal knowledge, and that the dog had been laid on the trail at a point or track clearly indicated as the guilty party's; the pedigree, etc., of the dog to be admissible in corroboration).

*Contra*: 1914, *People v. Pfanschmidt*, — Ill. —, 104 N. E. 804 (murder and arson, trailing by a bloodhound, by means of a horse-and-buggy scent, to the accused's camp, held not admissible, partly because the conditions here were too full of obstacles to make the trailing trustworthy, and also on the ground that "the trailing of either a man or an animal by a bloodhound should never be admitted in any case").

1903, *Brott v. State*, 70 Nebr. 395, 97 N. W. 593 (Sullivan, C. J.: "That the bloodhound is frequently wrong is a fact well attested by experience. . . . It is unsafe evidence, and both reason and instinct condemn it").

In *McClurg v. Brenton*, 123 Ia. 368, 98 N. W. 881 (1904), where the defendant had trespassed on the plaintiff's premises, looking for stolen fowls, and led by bloodhounds, the Court disparaged such methods.

*Not decided*: 1910, *Stout v. State*, 174 Ind. 395, 92 N. E. 161 (trailing of another person than the accused; the present question not decided; it is still open to be determined in the future when properly presented).

[*Text*, p. 226, last line; *add*.:]

Nevertheless, in actual usage, this evidence is apt to be highly misleading, to the detriment of innocent men. Amidst the popular excitement attendant

[Text, p. 226 — continued]

upon a murder and the chase of the murderer, all the facts upon which the trustworthiness of the inference rests are apt to be distorted in the testimony. Moreover, the very limited nature of the inference possible is apt to be over-estimated, — a consequence dangerous when the jurors are moved by local prejudice. The limitations are well stated by Mr. E. Austin Freeman, in one of the stories in his volume entitled "The Singing Bone" (London, 1909).<sup>4</sup>

<sup>4</sup> This story, entitled "A Case of Premeditation," is quoted in part in the *Illinois Law Review*, IX, 192.

#### § 194. Accused's Character; Reasons of Policy.

[Text, p. 235; after the last quotation, insert:]

1903, Hon. A. C. Plowden, "Grain or Chaff; the Autobiography of a Police Magistrate," c. XI, p. 142: "Another Circuit hero carved a niche for himself in the temple of Fame by a splendid disregard of what I might call the ordinary conventions of a criminal court. B— was not remarkable for too much devotion to his profession. . . . On a certain occasion at Gloucester, B— was instructed to prosecute a man for burglary. Now if there is one elementary principle in criminal procedure more widely known and more sacredly observed than another, it is that the antecedents of a prisoner, if unfavorable, should be religiously kept a secret from the jury, until after they have delivered their verdict. . . . Of this sacred rule B— quickly showed, to the consternation of the prisoner, that he was profoundly ignorant. Having touched on the main features of the charge, he proceeded: 'And now, gentlemen, I come to a very important fact. I am sorry to tell you, though it must make your duty easier, that the prisoner has been previously convicted —' The judge who was trying the case — Baron Bramwell — hastily interposed: 'Mr. B, you must not say that!' 'Oh, but,' retorted the unabashed counsel, 'I can prove it, my lord.' 'Mr. B—,' again interposed the learned judge sternly, 'I am amazed at you! I forbid your doing anything of the kind!' Whereupon B—, even more amazed than the judge, exclaimed reproachfully, 'But here they are!' And before he could be stopped, he held up to the jury, amid much laughter from the Bar, a long list of convictions, with the prisoner's photograph at the top; at the same time casting a withering glance of reproof both at the Bench and at the Bar for what he considered had been a most unmeaning interruption. Needless to say that, in spite of an appeal from the learned judge to the jury to disregard these damning proofs, the jury in double quick time returned a verdict of 'Guilty'; and the prisoner had just reason to regret that his fate had been placed in the hands of a counsel who, with all his sporting instincts, had not grasped the truth that a prisoner, however bad, is entitled to have a run for his money."

[Note 2; add:]

and the citations *post*, § 2251, note 12.

In some of the opinions in *R. v. Bond*, 1906, 2 K. B. 389, 408, reference is made to the contrasting French principle.

[Note 3; add:]

That the jurors' knowledge of an accused's criminal record would in actual experience, not merely in theory, affect their conclusions, and that the guilty and the innocent are alike affected by this ignorance of the jurors, or by their knowledge if incidentally obtained, may be seen from the instances collected in Mr. Arthur Train's invaluable book, "The Prisoner at the Bar," pp. 155-169 (1906).

[*Note 6; add:*]

1905, *State v. Thompson*, 127 Ia. 440, 103 N. W. 377.

1904, *U. S. v. Densmore*, 12 N. M. 99, 75 Pac. 31.

1904, *People v. Rodawald*, 177 N. Y. 408, 70 N. E. 1 (specific acts excluded, "because each specific act shown would create a new issue"; apparently unsound, because here the record of conviction for assault was offered, and the defendant's knowledge that the deceased had been in the State prison, though not a knowledge of the nature of his crime). 1908, *People v. Jones*, 191 N. Y. 291, 84 N. E. 61 (former conviction, excluded).

1905, *State v. Dean*, 72 S. C. 74, 51 S. E. 524 (specific acts of prior violence on others, excluded). 1906, *State v. Andrews*, 73 S. C. 257, 53 S. E. 423 (specific acts of violence, excluded, unless admissible on the principle of § 248, *post*).

But as a sign of the times, revealing a willingness to allow inroads on the rule, see the dissenting opinion of McBride, C. J., in *State v. Start*, 1913, 65 Or. 178, 132 Pac. 512 (cited more fully *post*, § 360, n. 2).

[*Text*, p. 237, § 2; *add* a new par. :]

The English Criminal Evidence Act of 1898<sup>7</sup> made a broad exception, in spirit, to this traditional rule. The effect of that statute is that under certain conditions the accused's record of prior penal convictions does get before the jury and is considered by them as character evidence affirmatively pointing to guilt. The statute does not *say* that the penal record is to be considered for that purpose, but the statute-makers *knew* that it *would* be so considered. Nominally, then, the prior penal record is admitted either to rebut and disprove good character or for some other evidential purpose; but these purposes are supposed to be so limited that safeguards are set against the unlimited use and unsafe misuse of such evidence against an habitual offender.

What are those purposes? The statute (set out in full, *post*, § 488) thus enumerates them :

§ 1, Sub-section (f) : "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless —

"(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

"(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

"(iii) he has given evidence against any other person charged with the same offence."

Here are four distinct evidential avenues. (1) The first, that of par. (i), is the ordinary use of *other offences to show intent*, motive, plan, etc. (*post*, §§ 300-416). Such evidence would have been admissible in any event; the statute merely avoids any doubt as to the propriety of asking for it from the accused himself.<sup>8</sup>

<sup>7</sup> St. 61-2 Vict. c. 36, § 1.

<sup>8</sup> Note that whenever such prior offences are thus relevant, the further objection to asking the accused himself about them, that he is *privileged not to criminate himself*, is expressly met and removed by sub-section e (quoted *post*, § 2276, n. 5).

[Text, p. 237 — continued]

(2) The second, that of the first half of par. (ii), is the present principle, *i. e.* the *rebuttal of his alleged good character* by the fact of former specific bad acts. Here a definite change is made in the prior law. The distinction between this and the French rule is that this rule does not permit the use of prior offences until and unless the accused invokes an alleged good character. Nevertheless, the jury's use of such evidence is certain to go beyond that of mere rebuttal, and to weigh the probability that a prior offender would again offend.<sup>9</sup>

<sup>9</sup> The cases construing this part of the statute are as follows:

1851, *R. v. Shrimpton*, 2 Den. Cr. C. 319, 5 Cox Cr. 387 (under St. 1836, c. 111, quoted *post*, § 196, n. 1; the phrase "give evidence of his good character" includes testimony of good character obtained from an opposing witness on cross-examination).

1909, *Solomon's Case*, 2 Cr. App. 80 (evidence as to recent employment is not evidence of character; whether telling the arresting officer, "I am a respectable man," etc., and putting that in evidence, is evidence of character, not decided).

1910, *R. v. Ellis*, 2 K. B. 747 (meaning of par. (ii) as to "good character," carefully expounded).

(3) The third, that of the second half of par. (ii), is no novelty in the law; it aims at the *testimonial credit* of the accused, by permitting his witness-character to be impeached by prior convictions, whenever he raises the issue of the credibility of the prosecution's witnesses as affected by their character. This is already permissible throughout the United States (*post*, § 987); but the statute's permission is much narrower, in that it applies only when the character of the prosecution's witnesses has been impeached; and is somewhat broader (than in many of the United States), in that it permits any former offence to be inquired about, regardless of the grade of the crime.<sup>10</sup>

<sup>10</sup> The cases construing this part of the statute are as follows:

*Eng.*: 1904, *R. v. Rouse*, 1 K. B. 184, 20 Cox Cr. 592 (false pretences; the accused, on cross-examination answered alleging the prosecutor to be a liar; further cross-questions as to the accused being convicted of drunkenness, etc., were held improper; but the Chief Justice added that "we are not laying down any general rule").

1905, *R. v. Bridgwater*, 1 K. B. 131, 20 Cox Cr. 737 (on a charge of stealing, cross-examination to a prior conviction was held not justified, on the facts, by the clause as to "imputations on the character of the witnesses for the prosecution").

1909, *Preston's Case*, 2 Cr. App. 24, 1 K. B. 568 (cross-examination to previous convictions, not allowed where the defendant's testimony discredited the prosecution's witnesses only in regard to the trustworthiness of an identification).

1909, *Stratton's Case*, 3 Cr. App. 255 (answer by the accused, referring to a prosecutor: "Then you say he is not telling the truth? — He is not," does not justify cross-examination to character; *L. C. J. Alverstone*: "There could have been no unfairer instance of cross-examination").

1909, *Grout's Case*, 3 Cr. App. 64 (defendant's asserting that the constable is "telling lies," held not to entitle prosecution to cross-examine to previous convictions).

1909, *Jones' Case*, 3 Cr. App. 67 (rape on defendant's daughter; defendant's assertion that his wife induced the children to trump up the story, held on the facts to entitle prosecution to such cross-examination).

1910, *Wright's Case*, 5 Cr. App. 131 (under St. 1898, § 1 (f), the accused's testimony that

[Text, p. 237 — *continued*]

he was cajoled into signing a confession, held an imputation against the prosecution's witness, so as to permit cross-examination to prior convictions; the ruling is totally unsound, and the opinion by Darling, J., superficially dismisses the prior rulings).

1910, *Morgan's Case*, 5 Cr. App. 157 (cross-examination to another crime, held on the facts not to be justified by any imputation on the prosecution's witness).

1911, *Seigley's Case*, 6 Cr. App. 106 (cross-examination to prior convictions allowed).

1911, *Rappolt's Case*, 6 Cr. App. 106 (cross-examination to prior convictions allowed, where the defendant testified that the prosecuting witness was a "horrible liar").

1911, *Morrison's Case*, 6 Cr. App. 159, 169 (similar, where a principal witness' character was "violently attacked").

1912, *Westfall's Case*, 7 Cr. App. 176 (cross-examination to drunkenness of prosecuting witness, etc., held not an imputation entitling to cross-examination to defendant's prior convictions).

1912, *R. v. Hudson*, 7 Cr. App. 256, 2 K. B. 464 (larceny; when the defendant through counsel has accused the prosecution's witnesses of having themselves committed the act charged, he may be cross-examined to prior convictions; prior cases examined and distinguished).

(4) The fourth purpose, that of par. (iii), is a novelty, in form, but it is virtually another use of the third purpose, viz. it aims to throw light on the accused's testimonial character, whenever he raises an issue as to the credibility of an accomplice.<sup>1</sup> Theoretically, this par. (iii) should have included the second half of par. (ii).

<sup>1</sup> This part of the statute seems not to have been construed in the recorded cases.

#### § 195. Particular Good Acts, to show Defendant's Character.

[Note 4; *add*.:]

1913, *People v. Bollman*, — Mich. —, 144 N. W. 537 (seduction).

#### § 196. Particular Misconduct of Defendant, to increase Sentence.

[Note 1; *add*.:]

*Eng.*: The practice prior to the statute of 1836 is to be seen from *R. v. Jones*, 6 C. & P. 391.

The subject is now governed by St. 1908, 8 Edw. VII, c. 59 (Prevention of Crime Act) § 10; "In the proceedings on the indictment the offender shall in the first instance be arraigned on so much only of the indictment as charges the crime, and if on arraignment he pleads guilty or is found guilty by the jury, the jury shall, unless he pleads guilty to being a habitual criminal, be charged to inquire whether he is a habitual criminal, and in that case it shall not be necessary to swear the jury again:

"Provided that a charge of being a habitual criminal shall not be inserted in an indictment —

"(a) Without the consent of the Director of Public Prosecutions; and

"(b) Unless not less than seven days' notice has been given to the proper officer of the court by which the offender is to be tried, and to the offender, that it is intended to insert such a charge;

"And the notice to the offender shall specify the previous convictions and the other grounds upon which it is intended to found the charge."

It will be noticed that the concluding provision of St. 1836, permitting the prosecution to show prior conviction on the issue of Not Guilty when the accused offers good character has

[*Note 1 — continued*]

been here omitted, and is transferred into the Criminal Evidence Act 1898; for its construction under that Act, see *ante*, § 194, n. 9.

The procedure under this statute is elaborately discussed in *Turner's Case*, 1909, 3 Cr. App. 103, [1910] 1 K. B. 346.

*N. Br.*: 1912, *R. v. Matheson*, N. Br. S. C., 2 D. L. R. 835 (liquor offences; other rulings collected).

*Cal.*: 1904, *People v. Smith*, 143 Cal. 597, 77 Pac. 449.

[*Note 2; add.*]

*Va.*: 1909, *Wright v. Com.*, 109 Va. 847, 65 S. E. 19 (in capital cases, prior convictions are not admissible under the statute; Keith, P., dissenting in a careful opinion).

*Wis.*: 1909, *Howard v. State*, 139 Wis. 529, 121 N. W. 133 (under St. 1898, § 4736, providing that the accused may admit the former convictions, they should not afterwards be evidenced nor commented on before the jury).

### § 198. Character of Deceased in Homicide, from Particular Acts of Violence.

[*Note 1; add.*]

*Accord*: 1907, *State v. Blee*, 133 Ia. 725, 111 N. W. 19 (recent assault by the deceased, admitted; citing seven cases from other jurisdictions, but not *State v. Beird*, *supra*).

1906, *McQuiggan v. Ladd*, 79 Vt. 90, 64 Atl. 503 (battery; plea, self-defence, the plaintiff being intoxicated and in that condition quarrelsome, his repute being known to defendant; prior instances of quarrelsomeness when intoxicated, admissible, though not known to defendant).

1912, *State v. Waldron*, 71 W. Va. 1, 75 S. E. 558 (murder; violent acts of deceased, just beforehand, unknown to defendant, admitted; careful opinion by Miller, J., approving the above text; Williams, J., diss.).

*Contra*: 1904, *People v. Farrell*, 137 Mich. 127, 100 N. W. 264.

1904, *State v. Ronk*, 91 Minn. 419, 98 N. W. 334 (acts of violence towards third persons, excluded).

1907, *State v. Roderick*, 77 Oh. 301, 82 N. E. 1082, *semble* (inadmissible).

### § 199. Party's Negligence, from Particular Negligent Acts.

[*Note 1; add.*]

1903, *Munroe v. Hartford St. R. Co.*, 76 Conn. 201, 56 Atl. 498 (collision of a street-car with a wagon; the motorman's negligence when employed on another line, excluded).

1906, *Lexington R. Co. v. Herring*, — Ky. —, 96 S. W. 558 (injury on a street-car while entering; that the plaintiff had been "frequently seen getting on and off street-cars while in motion," excluded).

1911, *Engel v. United Traction Co.*, 203 N. Y. 321, 96 N. E. 731 (that the motorman had been discharged for another negligent act, excluded).

1913, *Gynther v. Brown & McCabe Co.*, — Or. —, 134 Pac. 1186 (former mistakes of an engineer in interpreting signals, admitted to show the signal-system defective, but not to show the negligence of the engineer).

1896, *Baker v. Irish*, 172 Pa. 528, 532, 33 Atl. 558 (cited *ante*, § 98, n. 1).

1906, *Veit v. Class & N. B. Co.*, 216 Pa. 29, 64 Atl. 871 (explosion of a boiler, the pump and valve having been plugged and tied, and the deceased being an employee about the engine; the fact that he had several times before plugged the pump, etc., excluded; unsound).

1906, *Southern R. Co. v. Blanford's Adm'x*, 105 Va. 373, 54 S. E. 1 (negligence of a switchman; cited more fully *post*, § 987, n. 1).

1902, *Atherton v. Tacoma R. & P. Co.*, 30 Wash. 395, 71 Pac. 39 (similar to *Christensen v. U. T. Line*, *supra*). Compare the cases cited *ante*, § 98.

[Text, p. 243, after the last line; add a new § 199a:]

**§ 199a. Character of Third Persons, from Particular Acts.**

In other issues, wherever the moral character of a *third person* would be relevant under § 68, *ante*, may that character be evidenced by particular instances? There is no reason for making here an inflexible rule; sometimes such evidence would be valuable and unobjectionable.<sup>1</sup>

<sup>1</sup> 1912, *Noyes v. Boston & Maine R. Co.*, 213 Mass. 9, 99 N. E. 457 (action for value of a house-loss by fire set from the defendant's locomotive; the origin of the fire being disputed, the defendant offered to show numerous instances of the incendiary disposition of the plaintiff's son, as tending to show him to be the author; excluded; this is a good example of the unsound rigidity of the character rule).

**§ 200. Rape Complainant; Character from Particular Acts.**

[Note 1; add:]

1910, *R. v. Muma*, 22 Ont. L. R. 225, 229 (rape on Jan. 31; defence, consent; on Feb. 8 the woman, before then unmarried, was married to V.; cross-examination of the prosecutrix as to having lived with V. as his wife prior to Feb. 8, was held improper; the above cases ignored, and no authority cited; truly the perversity of some courts in some plain things transcends belief).

[Note 2, par. 1; add:]

1906, *Griffin v. State*, 155 Ala. 88, 46 So. 481 (cross-examination to intercourse subsequent to the date charged, excluded, on the facts).

1904, *Plunkett v. State*, 72 Ark. 409, 82 S. W. 845 (excluded, on a charge of rape under age).

1904, *People v. Stratton*, 141 Cal. 604, 75 Pac. 166 (excluded, on a charge of incest).

1904, *Black v. State*, 119 Ga. 746, 47 S. E. 370 (acts of intercourse with a third person T., offered by his testimony, excluded).

1911, *State v. Henderson*, 19 Ida. 524, 114 Pac. 30 (excluded).

1907, *State v. Blackburn*, — Ia. —, 110 N. W. 275 (rape under age; excluded, on the principle of § 1001, *post*, without noticing the present principle).

1911, *Stewart v. Com.*, 141 Ky. 522, 133 S. W. 202 (detaining with intent to rape; intercourse with other men, admitted).

1906, *State v. Romero*, 117 La. 1003, 42 So. 482 (carnal knowledge with consent; the prosecutrix' unchaste conduct, not admitted for the defendant; this is a curious ruling, for it excludes for the defendant that which would have been relevant for the prosecution).

1904, *State v. Smith*, 18 S. D. 341, 100 N. W. 740 (excluded, on cross-examination, on a charge of rape under age of consent, and *semble*, also of rape generally).

1905, *Nolen v. State*, 48 Tex. Cr. 436, 88 S. W. 242 (admissible).

1905, *State v. Stimpson*, 78 Vt. 124, 62 Atl. 14 (cross-examination of the prosecutrix to former acts of prostitution, not allowed on a charge of rape under age, consent being immaterial).

1913, *State v. Holcomb*, 73 Wash. 652, 132 Pac. 416 (excluded, even on cross-examination).

[Note 2, at the end; add a new par.:]

In *rape under age*, the female's consent being immaterial, her unchaste conduct is for that reason immaterial, on grounds independent of those stated in the text above; and this is generally conceded: Cases cited *ante*, § 133, note 5.

In *seduction*, where the statute makes "prior chaste character" a part of the issue, the fact of prior intercourse may become admissible: Cases cited *post*, § 200.

§ 201. **Animal's Disposition, from Particular Instances of Behavior.**

[*Note 2; add:*]

1913, *Mithen v. Jeffery*, 259 Ill. 372, 102 N. E. 778 (after plaintiff's evidence of two instances of vicious conduct, defendant was allowed to offer, through various witnesses, the conduct of the dog on numerous occasions, amounting to an offer of uniform good disposition).  
 1911, *Mayfield Lumber Co. v. Lewis' Adm'r.*, 142 Ky. 727, 135 S. W. 420 (horse's bad conduct after an accident, admitted).  
 1905, *Palmer v. Coyle*, 187 Mass. 136, 72 N. E. 844 (injury by a vicious horse; former vicious acts of the horse, admitted).

§ 203. **Common Offenders; Gambling.**

[*Note 2; add:*]

1911, *Martin v. State*, 2 Ala. App. 175, 56 So. 64 (keeping a gaming table for gaming).  
 1904, *State v. Behan*, 113 La. 701, 37 So. 607 (keeping a house for illegal faro-banking; dealing faro in the same place ten or fifteen days before, admitted).

Compare the cases cited *post*, § 367, n. 3 (prior offences to show intent in illegal gaming).

§ 204. **House of Ill-fame.**

[*Note 1, par. (2); under Contra, add:*]

1908, *State v. Baans*, 77 N. J. L. 123, 71 Atl. 111 (conviction of several inmates, excluded; the opinion is valueless, confusing obviously distinct things, and apparently prepared in a great hurry; the only point that could properly have been made, namely, that of § 1270, *post*, is not noticed).

§ 205. **Seduction.**

[*Note 2; add:*]

1905, *State v. Hummer*, 128 Ia. 505, 104 N. W. 722 (nature of chastity defined).  
 1904, *Woodruff v. State*, 72 Nebr. 815, 101 N. W. 1114 ("specific acts of lewdness" are admissible).  
 1909, *Marshall v. Terr.*, 2 Okl. Cr. 136, 101 Pac. 139 ("chaste" is "a condition actually existing"). 1911, *Hast v. Terr.*, 5 Okl. Cr. 162, 114 Pac. 261.  
 1910, *State v. Dacke*, 59 Wash. 238, 109 Pac. 1050 (rape under age). 1911, *State v. Workman*, 66 Wash. 292, 119 Pac. 751 (statutory rape).

For the use of *reputation* in *rebuttal* in such cases, see *post*, § 1620.

[*Note 3; add:*]

1907, *Russell v. State*, 77 Nebr. 519, 110 N. W. 380 (excluded).  
 1907, *State v. Slattery*, 74 N. J. L. 241, 65 Atl. 866 (*Foley v. State* followed).

[*Note 4; add:*]

1913, *State v. McClure*, — Ia. —, 140 N. W. 203.  
 1909, *State v. Turner*, 82 S. C. 278, 64 S. E. 424 (seduction: under St. 1905, Feb. 22, the State need not prove chastity).

[*Note 6, l. 4; add:*]

1913, *Bray v. U. S.*, 39 D. C. App. 600 (seduction; the woman's intercourse with others subsequent to the seduction, excluded here on the facts).

§ 207. **Excuse for Breach of Promise of Marriage.**

[*Note 1; add:*]

1911, *McKane v. Howard*, 202 N. Y. 181, 95 N. E. 642 (particular instances of fornication, admissible).

*Contra*: 1907, *Colburn v. Marble*, 196 Mass. 376, 82 N. E. 28.

§ 207. **Justification of Defamation of Character.**

[*Note 1; add:*]

1905, *Dowie v. Priddle*, 216 Ill. 553, 75 N. E. 243, *semble* (the proof under the plea, held here not to meet the defamatory statements sued for).

[*Note 2, par. 1; add:*]

1904, *Hewson v. Cleeve*, L. R. 2 Ire. 536, 542 (on a general charge of swindling, justified, particulars must be notified; *J'Anson v. Stuart*, cited *ante*, § 73, and subsequent cases and statutes, commented on).

1907, *Smithy v. Pinch*, 148 Mich. 670, 112 N. W. 686 (charge of being a "low woman"; on a plea of truth, specific acts excluded).

1906, *Pier v. Speer*, 73 N. J. L. 633, 64 Atl. 161 (slandorous charge of fornication and bastardy; under a plea of justification, an offer to prove the plaintiff to have had gonorrhoea, not admitted on the facts).

[*Note 2, par. 2; add:*]

1906, *Earley v. Winn*, 129 Wis. 291, 109 N. W. 633 (slander that plaintiff whipped her mother; particular other violent acts to her mother, excluded; but this seems inconsistent with *Talmadge v. Baker*, *supra*, which is not cited).

§ 208. **Incompetency of Employee.**

[*Note 1; add:*]

1893, *Holland v. Southern P. Co.*, 100 Cal. 240, 34 Pac. 666 (specific acts of an engineer, held admissible to show incompetence; but a single act is insufficient of itself).

1905, *Staunton Coal Co. v. Bub*, 218 Ill. 125, 75 N. E. 770 (injury in a mine by an engineer's negligence in hoisting the cage; the engineer's habitual hoisting of the cage without signal, admitted to show his incompetence).

1906, *Joseph Taylor Coal Co. v. Dawes*, 220 Ill. 145, 77 N. E. 131 (injury to a mine-workman by the lowering of the cage at a speed exceeding the statutory rate; that "the engineer repeatedly lowered the cage" at excessive speed, held not admissible on the present principle, but admissible to show a knowing and wilful violation of the statute, on the principle of § 367, *post*).

1910, *Grebenstein v. Stone & Webster Eng. Co.*, 205 Mass. 431, 91 N. E. 411 ("evidence of a specific act of negligence" of a fellow-servant, not admissible). 1911, *Leary v. Webber Co.*, 210 Mass. 68, 96 N. E. 136 (*Hatt v. Nay* followed).

1911, *Rosenstiel v. Pittsburg R. Co.*, 230 Pa. 273, 79 Atl. 556.

1902, *Green v. Western Amer. Co.*, 30 Wash. 87, 70 Pac. 310 ("specific acts of incompetency of the pit boss," held admissible). 1905, *Conover v. Neher R. Co.*, 38 Wash. 172, 80 Pac. 281 (two prior acts of an engineer, admitted to show incompetence). 1905, *Dossett v. St. Paul & T. L. Co.*, 40 id. 276, 82 Pac. 273 (similar). 1914, *Johansen v. Pioneer Mining Co.*, — Wash. —, 137 Pac. 1019 ("numerous acts" of negligence by defendant's employee, admitted).

§ 209. **Mitigation of Damages; Defamation.**

[*Note 3; change the note number to 1; and add, in par. 1:*]

- 1911, *Wells v. Toogood*, 165 Mich. 677, 131 N. W. 124 (excluded).  
 1906, *Pier v. Speer*, 73 N. J. L. 633, 64 Atl. 161 (excluded).  
 1910, *Fodor v. Fuchs*, 79 N. J. L. 529, 76 Atl. 1081 (excluded).  
 1904, *Cudlip v. Journal Pub. Co.*, 180 N. Y. 85, 72 N. E. 925 (excluded).

§ 211. **Criminal Conversation or Alienation of Affections.**

[*Note 1; add:*]

1906, *Smith v. Hockenberry*, 138 Mich. 129, 101 N. W. 207, 109 N. W. 23 (the wife's criminal intimacy with other men, before the act in question, but not afterwards, admissible; also her intimacy with lewd women).

Compare the cases cited *post*, § 390, n. 1.

[*Note 3; add:*]

1904, *Angell v. Reynolds*, 26 R. I. 160, 58 Atl. 625 (wife's action for alienation of affections; the husband's unchaste conduct with other women, admitted).

§ 213. **Breach of Promise of Marriage.**

[*Note 1; add:*]

*Contra*: 1907, *Colburn v. Marble*, 196 Mass. 376, 82 N. E. 28, *semble* (including immodest conduct).

§ 216. **Criminality of Conduct, Immaterial.**

[*Note 2; add:*]

- 1905, *People v. Cook*, 148 Cal. 334, 83 Pac. 43.  
 1906, *People v. Soeder*, 150 Cal. 12, 87 Pac. 1016.  
 1904, *State v. Franklin*, 69 Kan. 798, 77 Pac. 588.  
 1908, *Welch v. Com.*, — Ky. —, 108 S. W. 863 (motive).  
 1905, *State v. Roberts*, 28 Nev. 350, 82 Pac. 100 (stolen coins, identifying the defendants charged with murder).  
 1905, *State v. Hummer*, 72 N. J. L. 328, 62 Atl. 388.  
 1905, *State v. Rea*, 46 Or. 620, 81 Pac. 822 (larceny of a horse; another larceny involving an admission by the defendant, received).  
 1906, *Thompson v. U. S.*, 144 Fed. 14, 18, C. C. A.

For the use of other crimes as stated in a *defendant's confession* of the crime charged, see also *post*, § 2100, n. 3.

§ 218. **Res Gestæ; Inseparable Crimes.**

[*Note 1; add:*]

- 1906, *Hammond v. State*, 147 Ala. 79, 41 So. 761 (shooting the deceased's brother immediately after shooting the deceased; admitted).  
 1906, *People v. McClure*, 148 Cal. 418, 83 Pac. 437 (killing another person in the same affray; admitted).  
 1906, *People v. Manasse*, 153 Cal. 10, 94 Pac. 92 (shooting of H. and C. as "a part of the same transaction").  
 1910, *People v. Crowley*, 13 Cal. App. 322, 109 Pac. 493 (another murder at the same time).  
 1914, *People v. Harrison*, — Ill. —, 104 N. E. 259 (kidnapping a girl; the physicians' description of the physical condition of the girl after her return, mentioning a swollen face, finger-

[*Note 1 — continued*]

prints on the neck, and a rape, excluded so far as describing the rape appearances; absurd; why not also exclude the swollen face and the finger-prints?).

1909, *Bennett v. Com.*, 133 Ky. 452, 118 S. W. 332 (defacing branded railroad ties).

1913, *May v. Com.*, 153 Ky. 141, 154 S. W. 1074 (murder; killing of another person at the same moment, admitted).

1904, *State v. Robinson*, 112 La. 939, 36 So. 811 (shooting a second person, a moment later; admitted).

1906, *State v. Vaughan*, 200 Mo. 1, 98 S. W. 2 (murder of a prison-guard in escaping; the killing of two other guards at the same time, admitted).

1904, *State v. Howard*, 30 Mont. 518, 77 Pac. 50 (robbery of a mail clerk; the robbery of the baggage-car, etc., at the same time, admitted).

1906, *Terr. v. Livingston*, 13 N. M. 318, 84 Pac. 1021 (horse and mule stolen at the same time). 1908, *Terr. v. Caldwell*, 14 N. M. 535, 98 Pac. 167 (other calves stolen at the same time).

1908, *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135 (assault upon three persons). 1910, *People v. Hill*, 198 N. Y. 64, 91 N. E. 272 (murder; two burglaries, admitted, to explain the finding of three revolvers).

1912, *Starr v. State*, 7 Okl. Cr. 574, 124 Pac. 1109 (other cattle stolen at the same time).

1907, *State v. Kenny*, 77 S. C. 236, 57 S. E. 859 (murder and larceny at the same time).

1911, *State v. McDowell*, 61 Wash. 398, 112 Pac. 521 (indecent assault).

For the use of an *accused's confession* of other crimes, see *post*, § 2100, n. 3.

#### § 220. Power or Strength, from Other Instances.

[*Note 1; add:*]

1905, *State v. Donovan*, 128 Ia. 44, 102 N. W. 791 (seduction under hypnotism; defendant's power evidenced by other instances).

Compare also the instances cited *post*, § 460, some of which illustrate equally the present principle.

#### § 221. Skill or Means, from Other Instances.

[*Note 4; add:*]

1905, *Shockley v. Tucker*, 127 Ia. 456, 103 N. W. 360 (negligent use of X-ray instrument by a physician; other instances of injury caused by the defendant with such instruments, excluded; no authority cited).

#### § 222. Age from Appearance.

[*Note 1, add:*]

1904, *Wistrand v. People*, 213 Ill. 72, 72 N. E. 748 (testimony to appearance may be evidence of age).

1909, *People v. Davidson*, — Ill. —, 88 N. E. 565 (keeping a minor in a house of ill-fame; a person who has seen the woman may testify to her apparent age).

1913, *People v. Kaminsky*, 208 N. Y. 389, 102 N. E. 515 (juvenile offender under 16; age may be determined by inspection of the accused in court).

#### § 223. Health or Disease, from Appearance, Occupation, or Heredity.

[*Note 1; add:*]

For intemperance, see *post*, § 235.

For instances of *subsequent disease*, see *post*, § 225, n. 1.

[*Note 2; add:*]

1905, *Sterling v. Union Carbide Co.*, 142 Mich. 284, 105 N. W. 755 (personal injury; ancestral long life, admitted as evidence of plaintiff's expectancy of life).

1906, *Haynes v. Waterville & O. St. R. Co.*, 101 Me. 335, 64 Atl. 614 (personal injuries and expectancy of life; the ages of the plaintiff's father and grandfather at death, admitted; "a descent from robust, long-lived stock gives greater promise of long life than descent from frail, short-lived ancestry, other things being equal").

But it remains true, as to the specific trait of longevity, that ancestral longevity is not of much weight in estimating the probability of life of a particular person, because too many other circumstances combine to effect the total chance of survival of a particular person; see *Hamilton v. Michigan C. R. Co.*, 135 Mich. 95, 97 N. W. 392 (1903), and § 232, *post*.

§ 225. **Prior or Subsequent Condition; Illness.**

[*Note 1; add:*]

1906, *Nophsker v. Supreme Council*, 215 Pa. 631, 64 Atl. 788 (fraudulent insurance of life; the insured's illness after the issuance of insurance, admitted, its nature indicating a prior existence).

1904, *Kavanaugh v. Wausau*, 120 Wis. 611, 98 N. W. 550 (condition of a horse).

§ 228. **Insanity, evidenced by Conduct.**

[*Note 2; add:*]

1909, *McReynolds v. Smith*, 172 Ind. 336, 86 N. E. 1009.

1906, *Kempf v. Koppa*, 74 Kan. 153, 85 Pac. 806.

1904, *Cashin v. N. Y. N. H. & H. R. Co.*, 185 Mass. 543, 70 N. E. 930.

1906, *State v. Speyer*, 194 Mo. 459, 91 S. W. 1075 (certain letters excluded).

1911, *State v. Leakey*, 44 Mont. 354, 120 Pac. 234 (accused's conversation, admitted on his behalf).

[*Note 6; add:*]

1912, *Lang v. Lang*, — Ia. —, 135 N. W. 604 (testator's delusion as to his children's misconduct; the actual facts admitted).

1908, *O'Dell v. Goff*, 153 Mich. 643, 117 N. W. 59 (will made under an alleged insane delusion that the contestant-son was illegitimate though born during marriage; the chaste repute of the wife, admitted, as evidence of the fact of legitimacy).

Compare also the proof of the *falsity of the alleged fact*, as evidence discrediting the witness who testifies to the repute or rumor of it as the source of an insane person's belief (*post*, § 263).

[*Text*, par. (5), l. 5; *add a new note* <sup>7a</sup>:]

<sup>7a</sup> The following cases show the distinction:

1910, *Clifford v. Taylor*, 204 Mass. 358, 90 N. E. 862 (testimony that a third person, an attorney, refused to make a will for testatrix until a medical man approved, excluded).

1909, *Snell v. Wilson*, 239 Ill. 279, 87 N. E. 1022 (cited more fully *post*, § 260, n. 1).

1909, *Fraleay v. Fraley*, 150 N. C. 501, 64 S. E. 381 (announcement of neighbors' views as to a property settlement of testator, made formally to the testator, admitted as evidence of his mental capacity).

§ 229. **Testamentary Capacity.**

[*Note 1; add:*]

1906, *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755 (statements as to property given to a child, admitted).

[*Note 1 — continued*]

1907, *Smith v. Ryan*, 136 Ia. 335, 112 N. W. 8 (testatrix' declarations admitted to show senile dementia).

[*Note 3; add:*]

1906, *Waters v. Waters*, 222 Ill. 26, 78 N. E. 1.

1906, *Dillman v. McDanel*, ib. 276, 78 N. E. 591.

1904, *Townsend's Estate*, 122 Ia. 246, 97 N. W. 1108 (but here the instruction is misconstrued).

1906, *Meier v. Buchter*, 197 Mo. 68, 94 S. W. 883.

### § 231. Insanity, from Predisposing Circumstances.

[*Note 1, par. 1; add:*]

1911, *People v. Bowen*, 165 Mich. 231, 130 N. W. 706 (wife-murder; rumors of her infidelity, brought to the accused, and conduct of hers, personally known to him, admitted, to evidence his mental disturbance; but not her actual misconduct not known to him).

1912, *People v. Garfalo*, 207 N. Y. 141, 100 N. E. 698 (reports of the murdered wife's infidelity, here excluded because the homicide was deliberate and "not in the heat of an over-mastering passion").

1910, *State v. Greene*, 152 N. C. 835, 68 S. E. 16 (insanity as a plea in homicide; the defendant's wife's communication to him of a rape by the deceased, admitted, but not the fact of the rape).

Cf. Va. St. 1908, c. 59, p. 54 (quoted *post*, § 263).

[*Note 1, par. 3; add:*]

Distinguish also the principle of § 263, *post*, that the non-existence of the fact said to have been reputed or rumored and thus to have caused a certain belief or deranged condition is evidence to *discredit the witness* who testifies to the reputed or rumor.

### § 232. Hereditary Insanity.

[*Note 1; add:*]

1905, *State v. Wetter*, 11 Ida. 433, 83 Pac. 341 (principle approved).

1906, *Dillman v. McDanel*, 222 Ill. 276, 78 N. E. 591 (insanity of a paternal aunt of the testator, lasting only eighteen months, admitted, there being other evidence of the testator's insanity; the Court's opinion cites cases from other jurisdictions, but ignores the foregoing three from its own jurisdiction; this is censurable). 1912, *Martin v. Beatty*, 254 Ill. 615, 98 N. E. 996 (insanity of two brothers, two sisters, and a nephew, held improperly excluded).

1868, *Shailer v. Bumstead*, 99 Mass. 112, 131 (paralysis, etc., of "several of the family of the testatrix," not admitted because of lack of foundation; but a proof of hereditary insanity is competent in support of evidence of the existence of insanity in any given case).

1913, *Prewitt v. State*, — Miss. —, 63 So. 330 (insanity of blood relatives, admitted; that the tendency to insanity is hereditary need not be expressly evidenced).

1906, *Myer's Will*, 184 N. Y. 54, 76 N. E. 920 (general paresis of the testatrix' mother and brother, excluded for lack of evidence that the particular form was hereditary or transmissible).

1906, *Pringle v. Burroughs*, 185 N. Y. 375, 78 N. E. 150 (ancestral or collateral insanity, not admitted without conduct-evidence of the person himself).

Pa.: 1877, *Laros v. Com.*, 84 Pa. 204, 209 (quoted *supra*).

1909, *Com. v. Snyder*, 224 Pa. 526, 73 Atl. 910 (*Laros v. Com.* approved).

§ 233. **Prior and Subsequent Insanity.**

[*Note 1; add:*]

1911, *Odom v. State*, 174 Ala. 4, 56 So. 913.

1904, *Shaffer v. U. S.*, 24 D. C. App. 417, 433 (accused).

1905, *Starke v. State*, 49 Fla. 41, 37 So. 850.

1904, *Chicago U. T. Co. v. Lawrence*, 211 Ill. 373, 71 N. E. 1024 (mental condition of an injured person).

1910, *Taylor v. Taylor*, 174 Ind. 670, 93 N. E. 9 (adjudication of insanity in 1906, held not improperly excluded, on the facts, to show insanity at the time of making a will in 1900).

1905, *Glass' Estate*, 127 Ia. 646, 103 N. W. 1013 (presumption as to senile dementia, discussed). 1906, *Jones' Estate*, 130 Ia. 177, 106 N. W. 610 (presumption defined). 1906, *Wharton's Will*, 132 Ia. 714, 109 N. W. 492. 1909, *Speer v. Speer*, 146 Ia. 6, 123 N. W. 176 (testator ill of broncho-pneumonia and executing a will while ill; testimony of witnesses "on the day but not at the time, when this will was executed," as to his business capacity of mind, not admitted, because of "no probative force"; a singular example of a Court straining the law to avoid the supposed necessity of a new trial).

1911, *Banks v. Com.*, 145 Ky. 800, 141 S. W. 380.

1904, *State v. Lyons*, 113 La. 959, 37 So. 890.

1905, *Gesell v. Baugher*, 100 Md. 677, 60 Atl. 481 (a sibylline utterance, purporting to follow the foregoing cases).

1904, *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358 (will; the range of time is in the trial Court's discretion). 1905, *Hagar v. Norton*, 188 Mass. 47, 73 N. E. 1073 (transfer of stock, etc., by deceased; *Shailer v. Bumstead* followed). 1909, *Jenkins v. Weston*, 200 Mass. 488, 86 N. E. 955 (the trial Court's discretion controls as to time). 1913, *Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487 (undue influence; circumstances 12 years prior, held not improperly excluded on the facts).

1913, *Bullard's Estate*, *McAllister v. Rowland*, — Minn. —, 144 N. W. 412 (adjudication of insanity, made two months after the will, admitted).

1909, *State v. Crowe*, 39 Mont. 174, 102 Pac. 579 (trial Court's discretion).

1904, *State v. Quigley*, 26 R. I. 263, 58 Atl. 905.

§ 235. **Intoxication.**

[*Note 1; add:*]

1905, *Smith v. State*, 142 Ala. 14, 39 So. 329 (conduct in a saloon, admitted to show the extent of intoxication).

1904, *Ford v. Kansas City*, 181 Mo. 137, 79 S. W. 923 (specific instances of intoxication, admitted to corroborate medical testimony to a general intemperance, as being the real cause of plaintiff's suffering).

[*Note 2; add:*]

1911, *Stouse v. State*, 6 Okl. Cr. 415, 119 Pac. 271 (murder; that the defendants were drinking intoxicating liquor shortly before, admitted). 1912, *Rogers v. State*, 8 Okl. Cr. 226, 127 Pac. 365 (witness).

[*Note 3; add:*]

1905, *Miller v. People*, 216 Ill. 309, 74 N. E. 743 (limits of time as to the taking of intoxicating liquor, considered).

1908, *Pollock v. State*, 136 Wis. 136, 116 N. W. 851 (intoxication 1½ hours later, excluded).

§ 238. **Design or Plan; Sundry Instances of Conduct.**

[*Note 1; add:*]

1911, *State v. Hatfield*, 65 Wash. 550, 118 Pac. 735 (possession of a corporate seal).

[Note 3; add:]

1906, *State v. Nethken*, 60 W. Va. 673, 55 S. E. 742.

[Note 6; add:]

1909, *Carter v. State*, 172 Ind. 227, 87 N. E. 1081 (abortion with drugs; the woman's inquiries, a few days before, as to mechanical methods of producing miscarriage, excluded; unsound).

1910, *Com. v. Howard*, 205 Mass. 128, 91 N. E. 397 (wife-murder by strangling; a soldier's handbook, including instructions for the compression of the carotid artery, with the leaf turned down at that place, the book belonging to the defendant, admitted).

1904, *Wilmington S. Bank v. Waste*, 76 Vt. 331, 57 Atl. 241 (forgery by H. of a note bearing W.'s signature; that in H.'s desk were found sheets of paper with defendant's name written several times, excluded, because no other evidence of H.'s authorship was given; erroneous).

§ 246. **Belief of Defendant in Homicide; Deceased's Reputation.**

[Text, p. 310, lines 2 and 3 from below:]

For "three," read "two"; omit "and Massachusetts."

[Note 4; add:]

1909, *Pate v. State*, 162 Ala. 32, 50 So. 357 (character as a man who would "take his adversary unawares," admitted).

[Note 8; add:]

1883, *Com. v. Barnacle*, 134 Mass. 215 (repudiating *Com. v. Mead*, *infra*, note 13).

1905, *Com. v. Tircinski*, 189 id. 257, 75 N. E. 261 (approving *Com. v. Barnacle*).

1909, *Stevens v. State*, 84 Nebr. 759, 122 N. W. 58 ("physical health and strength" of the prosecuting witness).

[Note 9; add:]

1904, *Sims v. State*, 139 Ala. 74, 36 So. 138 (excluded, because the defendant's knowledge was not shown).

1906, *Rodgers v. State*, 144 Ala. 32, 40 So. 572 (but the defendant's knowledge must be shown).

1906, *Jackson v. State*, 147 Ala. 699, 41 So. 178.

1906, *Warrick v. State*, 125 Ga. 133, 53 S. E. 1027 (but the defendant's knowledge must be shown).

1904, *State v. Clayton*, 113 La. 782, 37 So. 754, *semble*.

1909, *Stockham v. Malcolm*, 111 Md. 615, 74 Atl. 569 (plaintiff's carrying knuckles; here excluded for lack of evidence of overt act).

[Note 11; add:]

1904, *Kennedy v. State*, 140 Ala. 1, 37 So. 90.

1909, *State v. Magill*, 19 N. D. 131, 122 N. W. 330.

The rule in *Texas* rests on the statute, P. C. 1895, § 713, quoted *infra*, note 13; but the Court has read into the statute a limitation which does plain violence to its express words.

1906, *Arnwine v. State*, 50 Tex. Cr. 254, 96 S. W. 4 ("after proof of the communicated threat, the State may introduce evidence of the good character of the deceased, even where the defendant has not sought to do so; but this has never been extended, so far as we are aware, to instances of uncommunicated threats").

1906, *Puryear v. State*, 50 Tex. Cr. 454, 98 S. W. 258.

[Note 13; add:]

1905, *Green v. State*, 143 Ala. 2, 39 So. 363 (rule stated).

1909, *Pate v. State*, 162 Ala. 32, 50 So. 357 (repute in a place 8 miles away, admitted).

[Note 13 — continued]

1904, *Long v. State*, 72 Ark. 427, 81 S. W. 387 (reputation of the deceased residing in another State, excluded).

1906, *People v. Lamar*, 148 Cal. 564, 83 Pac. 993.

1904, *State v. Golden*, 113 La. 791, 37 So. 757 (the trial judge, not the jury, determines whether the overt act has been sufficiently evidenced, but his ruling may be reviewed).

1906, *State v. Rodriguez*, 115 La. 1004, 40 So. 438 (mode of preparing the judge's certificate of finding as to the overt act, under St. 1896, No. 113, requiring a bill of exceptions to be taken down at the time in writing; Provosty, J., diss., says that "the recognized purpose of that act was to take from the control of the trial judge, where the doctrine of *State v. Ford* [*supra*] had placed it, the statement of the facts upon which a bill has been retained").

1906, *State v. Craft*, 118 La. 117, 42 So. 718 (rule of the trial Court's discretion, affirmed: this ruling indicates a respect for precedents, which renders no longer applicable the remarks *supra* in this note upon the lack of respect formerly shown by this Court for its own precedents).

1907, *State v. Mathews*, 119 La. 665, 44 So. 336 (excluded, because no overt act was shown).

1905, *Com. v. Tircinski*, 189 Mass. 257, 75 N. E. 261 (the foregoing cases repudiated; the deceased's general character as a violent and quarrelsome man, known to the defendant, admitted).

1907, *State v. Zorn*, 202 Mo. 12, 100 S. W. 591.

1910, *State v. Colvin*, 226 Mo. 446, 126 S. W. 448 (certain testimony held insufficient).

1904, *People v. Rodawald*, 177 N. Y. 408, 70 N. E. 1 (admissible, if the reputation has come to the defendant's knowledge).

1907, *State v. Roderick*, 77 Oh. 301, 82 N. E. 1082 (admissible; correcting the loose remarks in *Marts v. State*, *supra*, that besides reputation-evidence some other evidence of the actual character must be given).

1911, *State v. Parker*, 60 Or. 219, 118 Pac. 1011 (holding that the jury are not to consider the threats unless they have a doubt as to the aggressor; but all attempts of this sort to control the jury by instructions of law are misguided).

### § 247. Threats of Deceased in Homicide.

[Text, p. 314; after par. (d), insert a new par. (e):]

(e) The *actual making* of the threats is immaterial, if there was a communication made to the defendant of supposed threats.<sup>2a</sup> This illustrates the contrast of principle with the doctrine of uncommunicated threats.

<sup>2a</sup> 1909, *Morris v. Terr.*, 1 Okl. Cr. 617, 99 Pac. 760. 1912, *Rogers v. State*, 8 Okl. Cr. 226, 127 Pac. 365.

1909, *Buckner v. State*, 55 Tex. Cr. 511, 117 S. W. 802.

[Note 3; add:]

1904, *Gregory v. State*, 140 Ala. 16, 37 So. 259 (rule applied). 1905, *Dunn v. State*, 143 Ala. 67, 39 So. 147 (rule applied). 1904, *Gilmore v. State*, 141 Ala. 51, 37 So. 359 (rule applied).

1906, *Martin v. State*, 144 Ala. 8, 40 So. 275 (rule applied). 1906, *Skipper v. State*, 144 Ala. 100, 42 So. 43 (excluded, because no issue of self-defence arose).

1904, *Lee v. State*, 72 Ark. 436, 81 S. W. 385.

1906, *People v. Lamar*, 148 Cal. 564, 83 Pac. 993.

1904, *Taylor v. State*, 121 Ga. 348, 49 S. E. 303 (communicated expressions of peaceful intent, admitted in rebuttal).

1914, *People v. Terrell*, — Ill. —, 104 N. E. 264 (excluded, because no evidence of an overt act was offered).

1911, *Malone v. State*, 176 Ind. 338, 96 N. E. 1 (threats excluded for lack of overt act).

[*Note 3 — continued*]

1906, *State v. Rodriguez*, 115 La. 1004, 40 So. 438 (mode of preparing an exception to the judge's ruling as to the overt act; cited more fully *ante*, § 246, n. 13). 1906, *State v. Craft*, 118 La. 117, 42 So. 718 (rule of the trial Court's discretion, affirmed; "that question is no longer open for discussion"; Breaux, C. J., diss.). 1907, *State v. Mathews*, 119 La. 665, 44 So. 336 (excluded, because no overt act was shown). 1912, *State v. Harris*, 131 La. 616, 59 So. 1009 (overt act must be shown etc.). 1905, *State v. Tolla*, 72 N. J. L. 515, 62 Atl. 675 (murder of a man by a woman; the man's prior attempts to violate her, excluded in the absence of any act at the time indicating "a present intention to harm the defendant"). 1910 *White v. State*, 4 Okl. Cr. 143, 111 Pac. 1010 (not admissible where no issue of self-defence is made).

[*Note 3, last paragraph; add:*]

1906, *State v. Mitchell*, 130 Ia. 697, 107 N. W. 804 (threats of the defendant's landlord, a third person, excluded).

### § 248. Deceased's Violent Acts, in Homicide.

[*Note 1; add:*]

1911, *Coulter v. State*, 100 Ark. 561, 140 S. W. 719 (excluded). 1883, *Doyal v. State*, 70 Ga. 134, 147 (specific acts of violence, excluded). 1906, *Warrick v. State*, 125 Ga. 133, 53 S. E. 1027 (excluded). 1911, *State v. Louie Moon*, 20 Ida. 202, 117 Pac. 757 (threats of associates of the deceased, excluded). 1904, *People v. Farrell*, 137 Mich. 127, 100 N. W. 264 (admissible). 1910, *State v. Green*, 229 Mo. 642, 129 S. W. 700 (excluded). 1909, *State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035 (prior specific acts of violence, here admitted; *State v. Felker* and *State v. Shadwell* approved but enlarged in scope). 1907, *State v. Roderick*, 77 Oh. 301, 82 N. E. 1082 (acts of violence known to defendant by repute only, excluded; but *semble* such acts personally known to him may be admissible). 1906, *Sneed v. Terr.*, 16 Okl. 641, 86 Pac. 70 (prior violence by deceased, the same night, admitted). 1906, *McHugh v. Terr.*, 17 Okl. 1, 86 Pac. 433 (assault with intent; *State v. Burton*, — Kan. —, approved). 1912, *Rogers v. State*, 8 Okl. Cr. 226, 127 Pac. 365 (admitted). 1908, *State v. Doris*, 51 Or. 136, 94 Pac. 44 (prior assault by a third person similar in size etc. to the deceased, admitted). 1905, *State v. Thrailkill*, 71 S. C. 136, 50 S. E. 551 (excluded). 1905, *State v. Dean*, 72 S. C. 74, 51 S. E. 524 (*State v. Dill* approved). 1906, *State v. Andrews*, 73 S. C. 257, 53 S. E. 423 (admissible if "so connected in point of time or occasion with the fatal rencontre as to produce reasonable apprehension," etc.). 1909, *State v. Raice*, 24 S. D. 111, 123 N. W. 708 (deceased's prior acts of violence to third persons, notified to defendant, excluded). 1906, *McQuiggan v. Ladd*, 79 Vt. 90, 64 Atl. 503 (cited *ante*, § 198, n. 1).

Distinguished here the use of *prior quarrels* or difficulties between the deceased and the accused as evidence of *motive* (*post*, § 396).

For the propriety of *contradicting* the fact of such prior acts of violence, see *post*, § 263.

### § 249. Reputation of Incompetent Employees.

[*Note 1; add:*]

1905, *Southern Pac. Co. v. Hetzer*, 135 Fed. 272, 276, 285, C. C. A. ("a general reputation for incompetence" is admissible).

[*Note 1 — continued*]

1905, *Huntt v. McNamee*, 141 Fed. 293, 299, C. C. A., *semble* (admissible only after other evidence of specific acts).

1911, *Rosenstiel v. Pittsburgh R. Co.*, 230 Pa. 273, 79 Atl. 556 (the learned judge here seems to be in error in supposing that any courts have a contrary rule).

1913, *Serdan v. Falk Co.*, 153 Wis. 169, 140 N. W. 1035 (reputation admissible, to evidence knowledge, after the fact of incompetence has been evidenced, even though the knowledge is not disputed).

#### § 250. Acts of Incompetent Employee.

[*Note 1; add:*]

*Accord*: 1911, *Leary v. Webber Co.*, 210 Mass. 68, 96 N. E. 136 (prior instances admitted; opinion obscure). 1910, *Igo v. Boston Elev. R. Co.*, 204 Mass. 197, 90 N. E. 574 ("Incompetence cannot be inferred from a single act of negligence").

1911, *Rosenstiel v. Pittsburgh R. Co.*, 230 Pa. 273, 79 Atl. 556 (inconsistent statements, but apparently specific acts when known to the proper authority are admissible, contrary to *Frazier v. R. Co.*, *infra*).

1903, *Wabash S. D. Co. v. Black*, 126 Fed. 721, 726, C. C. A. (previous bursting of two similar pulleys made by the same employees, admitted). 1905, *Southern Pac. Co. v. Hetzer*, 135 Fed. 272, 279, C. C. A. (negligence of a fellow-servant; "specific acts of incompetence of the servant, notice of which was brought home to the master before the accident" are admissible, and also acts "so notorious that they ought to have been known"; but not specific acts "of which the master had no notice or knowledge prior to the alleged accident"). 1905, *Huntt v. McNamee*, 141 Fed. 293, 299, C. C. A. (there must be either specific acts "brought home to the knowledge of the master" or acts "of such nature and frequency that the master in the exercise of due care must have had them brought to his notice"). 1909, *Pittsburgh R. Co. v. Thomas*, 3d C. C. A., 174 Fed. 591 (negligent motorman as a fellow-servant; two prior negligent acts here held insufficient; good opinion, distinguishing between the concrete negligence of the specific act and the incompetence of the man doing the act).

*Contra*: 1894, *Cosgrove v. Pitman*, 103 Cal. 268, 275, 37 Pac. 232 (specific acts, not admissible; here, of intemperance; following *Frazier v. R. Co.*, Pa.).

1913, *Simon v. Hamilton L. Co.*, 76 Wash. 370, 136 Pac. 361 (acts of incompetency subsequent to the period of employment, excluded).

1913, *Guy v. Lanark Fuel Co.*, — W. Va. —, 79 S. E. 941 (company physician's competence; some specific instances of intoxication, held not enough on the facts to know defendant's knowledge of the physician's intemperateness).

#### § 251. Owner of a Vicious Animal.

[*Note 1; add:*]

1905, *Palmer v. Coyle*, 187 Mass. 136, 72 N. E. 844 (injury by a vicious horse; the reputation of the horse, admitted to show defendant's knowledge).

[*Notes 2; add:*]

1906, *Warren v. Porter*, 144 Mich. 699, 108 N. W. 435 (injury by a runaway team; a former instance of its running away, known to the defendant, admitted).

#### § 252. Owner of a Dangerous Machine or Place.

[*Text*, p. 324, l. 2; *add:*]

or to show *negligence of the employees* (*ante*, § 199).

[*Note 3; add:*]

1909, *Miller v. Mullan*, 17 Ida. 28, 104 Pac. 660 (mere rumor held inadmissible).

*Distinguish* here the use of a *local custom* for trespassers to walk on a railroad track at a certain part, as an element in determining the wanton management of a railroad train; here the custom does not evidence the knowledge; but the custom, plus knowledge by the engineer otherwise evidenced, may serve to fix his conduct as wanton. 1910, *Birmingham So. R. Co. v. Fox*, 167 Ala. 281, 52 So. 889.

[*Note 6; add:*]

1904, *Davis v. Kornman*, 141 Ala. 479, 37 So. 789 (injury to an employee at a machine; prior similar defects of operation, admitted).

1903, *Roche v. Llewellyn I. Co.*, 140 Cal. 563, 74 Pac. 147 (prior accident to a boiler on a third person's premises; held not admissible against the defendant on the facts).

1908, *Hotchkiss M. M. & R. Co. v. Bruner*, 42 Colo. 305, 94 Pac. 331 (former mine accident, admitted to show notice; citing cases from Ind., Minn., N. Y., and Pa., and ignoring the foregoing case). 1913, *Meeker v. Fairfield*, — Colo. —, 136 Pac. 471 (that other persons had before fallen at the same place, admitted to show notice).

1905, *Mobile & O. R. Co. v. Vallowe*, 214 Ill. 124, 73 N. E. 416 (*Chicago v. Powers* approved).

1905, *Frank v. Hanly*, 215 Ill. 216, 74 N. E. 130 (employee's injury at a machine; prior injury to another employee at the same machine, and his notification to the defendant, admitted to show the latter's notice of the defect). 1907, *Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079 (prior falls at a coal-hole, admitted to show knowledge).

1904, *Potter v. Cave*, 123 Ia. 98, 98 N. W. 569 (injury at a stairway; "previous accidents on this stairway and warnings to the defendant that it was dangerous," excluded, on the singular theory that "if dangerous in fact, his knowledge would be immaterial"; wholly ignoring the above Iowa cases, citing a few of those in § 458, *post*, but ignoring the later ones; a reprehensible opinion). 1904, *Harrison v. Ayrshire*, 123 Ia. 528, 99 N. W. 132 (defect near the walk where plaintiff was hurt, admitted). 1905, *Farrell v. Dubuque*, 129 Ia. 447, 105 N. W. 696 (condition of other similar frames erected on the street, admitted to show notice).

1904, *Crigler v. Ford*, — Ky. —, 82 S. W. 599 (previous falls of an elevator, admitted).

1904, *Yates v. Covington*, 119 Ky. 228, 83 S. W. 592 (see the citation *post*, § 458, n. 2).

1912, *Maryland El. R. Co. v. Beasley*, 117 Md. 270, 82 Atl. 157 (prior operation of an automatic bell alarm, admitted).

1910, *Bleistine v. Chelsea*, 204 Mass. 105, 90 N. E. 526 (adjacent sewer's condition, admitted). 1913, *Williams v. Winthrop*, 213 Mass. 581, 100 N. E. 1101 (highway defect; "Generally in this Commonwealth evidence of this character has been excluded").

1904, *Gregory v. Detroit U. R. Co.*, 138 Mich. 368, 101 N. W. 546. 1908, *Woodworth v. Detroit U. R. Co.*, 153 Mich. 108, 116 N. W. 549 (prior highway accidents, admitted).

1905, *Hunter v. Ithaca*, 141 Mich. 539, 105 N. W. 9 (*Strudgeon v. Sand Beach* followed).

1908, *Wüta v. Interstate Iron Co.*, 103 Minn. 303, 115 N. W. 169 (former mine accidents under similar circumstances, admissible).

1903, *Kingfisher v. Altizer*, 13 Okl. 121, 74 Pac. 107 (defective bridge; other accidents at the same place, and other defects in the bridge, admitted to show notice).

1904, *Nelson v. Union R. Co.*, 26 R. I. 251, 58 Atl. 780 (injury by a trolley-pole's breaking a light globe; prior similar breakages admitted to show knowledge).

1908, *Carr v. American Locomotive Co.*, 29 R. I. 276, 70 Atl. 196 (prior trouble with a valve, admitted).

1882, *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. 840 (see the citation *post*, § 458, n. 2).

1904, *Johnson v. Union P. C. Co.*, 28 Utah 46, 76 Pac. 1089 (prior defective operation of a mine-car, admitted). 1911, *Harris v. Ogden Steam Laundry Co.*, 39 Utah 436, 117 Pac. 700 (injury while made dizzy by gasoline fumes; instances of the effect of such fumes on other persons, admitted).

1904, *Franklin v. Engel*, 34 Wash. 480, 76 Pac. 84 (trap-door to a cellar; *Elster v. Seattle*

[*Note 6 — continued*]

followed). 1905, *Hansen v. Seattle L. Co.*, 41 Wash. 349, 83 Pac. 102 (prior accidents at the same and similar cog-wheels, admitted). 1913, *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 233 (prior fall at a step, admitted).

1904, *Duncan v. Grand Rapids*, 121 Wis. 626, 99 N. W. 317 (general condition of a sidewalk, admitted). 1904, *Lyon v. Grand Rapids*, ib. 609, 99 N. W. 311 (similar evidence excluded, not being material to show notice here). 1904, *Hallum v. Omro*, 122 Wis. 337, 99 N. W. 1051 (general condition of a sidewalk, for three years past, admitted). 1905, *Pumorio v. Merrill*, 125 Wis. 102, 103 N. W. 464 (similar). 1908, *Fleming v. Northern T. P. Mill*, 135 Wis. 157, 114 N. W. 841 (machine).

Compare the citations *post*, § 438, n. 6.

### § 254. Adverse Possession, Stolen Goods, Gambling Houses.

[*Note 1; add:*]

1905, *Henry v. Brown*, 143 Ala. 446, 39 So. 325.

1906, *Doe v. Edmondson*, 145 Ala. 557, 40 So. 505 (title by prescription).

1904, *Miller v. Shumway*, 135 Mich. 654, 98 N. W. 385.

[*Note 1, last line; add:*]

and § 1587.

[*Note 3; add:*]

1908, *Oldstadt v. Lineham*, 1 Alta. 417 (ninety-three notes obtained by fraudulent misrepresentation; to show defendant's notice of the fraud when he purchased, his taking of similar notes from the same payee on former occasions was admitted).

[*Note 3; add:*]

1904, *State v. Simon*, 70 N. J. L. 407, 57 Atl. 1016 (receiving goods; conversations with the seller, admitted).

Compare the cases cited *post*, § 1781 (declarations by the accused).

[*Text*, p. 326, l. 3; *add:*]

The leasing of premises for *gaming* may raise an issue of knowledge, which is provable by the repute of the house; <sup>5</sup> but usually other kinds of evidence are involved (*post*, § 367).

<sup>5</sup> 1905, *Bashinski v. State*, 122 Ga. 164, 50 S. E. 54.

1904, *State v. Steen*, 125 Ia. 307, 101 N. W. 96.

### § 255. Dealer with a Partnership.

[*Note 2; add:*]

1907, *Bush & H. Co. v. McCarty Co.*, 127 Ga. 308, 56 S. E. 430 (evidence not here sufficient as offered).

### § 256. Maker of False Representations.

[*Note 2; add:*]

1905, *Connelly v. Brown*, 73 N. H. 193, 60 Atl. 750 (deceit by a tenant; the landlord's statements to her, admitted, to show her belief in the truth of representations by her to the plaintiff as to the landlord's intent).

**§ 257. Seller of Liquor to Intemperate or Minor.**

[*Note 1, par. 2; add:*]

and the following decision:

1906, *State v. Brooks*, 74 Kan. 175, 85 Pac. 1013 (knowingly permitting the use of a building for liquor sales; repute of the place as a liquor nuisance, admitted).

**§ 258. Party Prosecuting or Arresting without Probable Cause.**

[*Note 1, first point; add, under Accord:*]

1907, *Emory v. Eggan*, 75 Kan. 82, 88 Pac. 740 (but reputation in another city, such as not to be known to the defendant, is inadmissible).

1906, *Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33.

[same; *add, under Contra:*]

1906, *Sinclair v. Ruddell*, 16 Man. 53, 60.

[*Note 1, second point, at the bottom; add, under Accord:*]

1904, *Thurkettle v. Frost*, 137 Mich. 649, 100 N. W. 283.

1905, *Shea v. Cloquet L. Co.*, 97 Minn. 41, 105 N. W. 552.

1913, *McIntosh v. Wales*, — Wyo. —, 134 Pac. 260 (plaintiff's good repute, admitted, even before it is impeached by defendant).

[*Note 2; add:*]

1906, *Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33 (prosecution for larceny, the plaintiff's confession, communicated to the defendant, of prior larcenies, excluded; unsound).

1909, *Schoette v. Drake*, 139 Wis. 18, 120 N. W. 393 (prior disorderly conduct of plaintiff on same day, admitted).

[*Note 5; add:*]

1913, *Webb v. Gray*, — Ala. —, 62 So. 194 (defamation of plaintiff's chastity; purporting letters of plaintiff to L., admitting intercourse, shown by L. to defendant, admissible to evidence good faith).

1904, *Griswold v. Griswold*, 143 Cal. 617, 77 Pac. 672 (malicious proceedings in lunacy; the family physician's report to defendant, admitted to show his probable cause).

**§ 260. Possessor of a Document.**

[*Note 1, par. 1; add:*]

1906, *U. S. v. Greene*, 146 Fed. 784, D. C. (a letter by defendant, in his letter-book, locked up and not sent, admitted).

1907, *State v. Ford*, 76 Kan. 424, 91 Pac. 1066 (illegal sale of liquor; cited *ante*, § 150, n. 4).

[*Note 1, par. 3; add:*]

1909, *Snell v. Weldon*, 239 Ill. 279, 87 N. E. 1022 (obscene letters from a woman legatee to the testator, found in his trunk, excluded, on the ground that his moral delinquency was not material to insanity or to undue influence; but also on the erroneous ground that "the retaining the letters in his trunk did not necessarily imply assent to what they contained"; his retention of the series was at least some evidence of a sympathetic state of mind towards the writer, especially in view of his marginal comment on one of them, "the best letter of all, sure"; *Wright v. Tatham* not cited).

§ 261. **Miscellaneous Instances of Belief or Knowledge.**[*Note 2; add:*]

1906, *Ditto v. Slaughter*, — Ky. —, 92 S. W. 2 (duress of a wife in signing a note under threats by the payee to prosecute the husband; whether the husband's report to the wife that threats had been made to him was admissible; the Court divided evenly).

1911, *Washoe Copper Co. v. Junila*, 43 Mont. 178, 115 Pac. 917 (knowledge of a lode, as essential at the time of an application for placer patent; a "declaratory statement" as to the lode, void in form, not admissible to show knowledge in the community; *sed quare*).

The following ruling, on the Court's theory, perhaps belongs here, though it might also belong under § 231, n. 1, par. 2:

1908, *Curtice v. Dixon*, 74 N. H. 386, 68 Atl. 587 (deed made while insane and unduly influenced; to show that the grantor disliked the defendant on account of her quarrelsome disposition, his statement to that effect had been received; specific instances of such disposition were then received in corroboration, though these instances were not known to the grantor).

[*Note 4; add:*]

1911, *Murphy v. Atlanta & C. A. L. R. Co.*, 89 S. C. 15, 71 S. E. 296 (incompetence of employee known to employer; declarations of trainmaster at time of employment, admitted). 1906, *Gulf C. & S. F. R. Co. v. Matthews*, 100 Tex. 63, 93 S. W. 1068 (whether a person knew of M.'s death; his reading of newspapers and hearing conversations on the subject, admitted).

Compare also the cases admitting *character to show motive* (*post*, § 390, n. 1).

[*Text*, p. 330; *add two new sections:*]

§ 262. (14) **Insane Belief, as shown by Facts told to the Party.** The present principle sometimes comes into play where a deranged mental condition is said to have been caused in part by a belief in certain facts. Here it may therefore be shown that the party was made aware of the supposed exciting facts by a repute or rumor or other form of communication, which thus tended to create the belief and cause the derangement.<sup>1</sup>

<sup>1</sup> Cases cited *ante*, § 231.

§ 263. **Disproof of the Facts communicated.** In some of the foregoing classes of cases — notably those of § 248 (deceased's violent acts) and § 262 (facts exciting mental derangement) — the question may arise whether the *objective facts themselves may be disproved*. On the one hand, the non-existence of those facts seems at first sight to have no bearing; because it is the mere report or repute or communication (and not the truth of it) which has been introduced to show the party's state of mind; for example, in homicide, the reasonableness of the accused's apprehension of the deceased's aggression is equally great, if the accused has heard of a cruel and violent act of the deceased, even though that act was never committed. On the other hand, assuming that for any purpose the objective fact has a bearing, the rule against contradicting a witness on a collateral point (*post*, § 1001) should not stand in the way; for if the fact is relevant at all, it is not any more collateral than the rumor of it.<sup>2</sup>

<sup>2</sup> *Post*, § 1005, n. 7.

[Text, p. 330 — continued]

That the objective truth, however, of the fact reported or rumored, may sometimes be relevant seems clear, namely, when the *non-existence of the fact* is offered as tending to show that the witness testifying to the communication of the alleged fact is not testifying truly. For example, on a prosecution for murder, the defence being insanity caused by brooding over the deceased's persistent pursuit of the virtue of the defendant's wife, suppose that the defendant's wife testifies in his behalf to numerous reports, made by her to the defendant, of the deceased's attempts to seduce her; now if it could be shown indubitably that such attempts upon the witness never took place, would this not make it less likely that the alleged communications of them were made by her? In other words, would not the witness to these communications be discredited on the material question whether the communications were ever made? As a mere question of natural instinctive reasoning, the affirmative answer would seem plain. If we add to this the feature that the wife further testifies (on cross-examination) that the deceased's alleged attempts did in fact take place, we thus add the circumstance that the witness is proved to have falsified on that point; and thus the lie on the fact of the attempts enables the prosecution to argue additionally that the witness is falsifying on the other fact of the communication of the alleged attempts to the defendant. From both points of view, therefore, it seems proper to allow the prosecution to disprove the alleged acts, the communication of which is alleged to have produced the defendant's mental condition.\*

\* The following ruling and statute confirms this result: 1907, *Knapp v. State*, 168 Ind. 153, 79 N. E. 1076 (homicide; plea, self-defence; the defendant testified to having heard before the affray that the deceased had clubbed to death a certain old man while arresting him; this fact, if true, was admissible on the principle of § 248, *ante*, to evidence the defendant's state of mind; the prosecution offered to show that in truth the old man had not been clubbed, but had died of senility and alcoholism; this was admitted as tending to show the improbability of the clubbing having occurred and therefore of the witness having heard of it by report; good opinion by Gillett, J.; it will be noticed that this is in effect the same point that arose in the Thaw trial for murder, N. Y., March, 1907). Va. St. 1908, c. 59, p. 54 (in homicide or assault with intent or cases under Code § 3671, when the accused has evidenced "that he believed a wrong to have been committed upon some member of his family," etc., whether on a "defence of insanity or as evidence of extenuating circumstances," the prosecution may evidence "the truth or falsity of the existence of such a wrong," whereon the accused may "introduce evidence in rebuttal as to such truth or falsity").

*Contra*, in principle:

1883, *People v. Hurtado*, 63 Cal. 288 (murder; the wife's confession of adultery with the deceased was testified to by the defendant; evidence tending to prove the fact of that adultery was not admitted for the defendant as corroborating his testimony to her confession; nor would the prosecution have been allowed to prove her innocence).

1907, *Shipp v. Com.*, 124 Ky. 643, 99 S. W. 945 (murder; defence, insanity, partly caused by his wife's confession of infidelity with S.; his wife's character for chastity, held not admissible for the prosecution to show that she "was not guilty of the conduct ascribed to her").

1913, *People v. Harris*, 209 N. Y. 70, 102 N. E. 546 (wife-murder; the accused having testified

[Text, p. 330 — continued]

that his wife had told him that "she was in the family way by T.," the prosecution offered to show that the wife was not pregnant at all, as evidence that she did not make such a statement to him; held inadmissible, conceding the relevancy of the fact, as pointed out above, but emphasizing the principle of avoiding confusion of issues on collateral points; the reply in this case must be that as the accused rested his defence largely on the provocation involved in the alleged statement, the fact of the making of the statement could not be deemed collateral in any real sense; for nobody ever heard of an alleged threat by a deceased in a homicide case being excluded from refutation because it was collateral, and yet it plays precisely the same important part in the issue as the wife's statement here). 1907, *Jones v. State*, 51 Tex. Cr. 472, 101 S. W. 993 (homicide; the defendant's wife had told the defendant that the man had raped her; proof of a continued illicit intimacy between deceased and the wife, tending to show that her intercourse had been voluntary, excluded).

Compare the citations *ante*, § 228, n. 6, § 231, n. 1, *post*, § 1005, n. 7.

The judicial view contrary to that above expressed was given general notoriety in consequence of *nisi prius* rulings in the Thaw trial (N. Y. City, March, 1907; murder of one believed to have seduced the defendant's wife), and the Loving trial (Houston, Va., June 27, 1907; murder of one believed to have ravished the defendant's daughter). The public comment called forth by these cases emphasized further the unfortunate possibilities of abuse inherent in that solution for unscrupulous or reckless persons.

The following case ignores this principle:

1914, *People v. Jung Hing*, — N. Y. —, 106 N. E. 105 (murder; the defence being that the deceased had charged the defendant with taking a ring which deceased said he had given to his girl G. W., the prosecution called G. W. to prove that she did not know defendant, that she had never given him a diamond ring, and that deceased had never given her a diamond ring; held inadmissible, on the ground that deceased's supposed statements were evidenced merely as words provoking a quarrel, on the principle of § 1768, *post*, that hence their truth was immaterial, and hence G. W.'s testimony was erroneous; yes, but *also*, the facts, if facts, that deceased had *not* given her a diamond ring, etc., were evidence that deceased did not make any such charge to the defendant, and that defendant's witnesses were falsifying; this is so obvious to the plain man, and was so obviously the reason for introducing the evidence, that it is curious to find the Court of Appeals ignoring it; they could hardly avoid at least facing the point).

#### § 266. Conduct and Utterances as Evidence of Knowledge or Belief.

[Note 2, col. 1; *add*.:]

1904, *State v. Kelly*, 77 Conn. 266, 58 Atl. 705 (murder by strychnine; the defence being suicide, the deceased's statement when speaking of suicide, "I have got the stuff to do it with," not admitted to show possession of strychnine or knowledge of its qualities; also excluding the deceased's statements, on finding dead chickens, "They are dead from strychnine," etc., on the ground of the *res gestæ* rule, *post*, § 1773; this is unsound; the accused may have been plainly guilty, in the Court's opinion, and no new trial needed (*ante*, § 21), but that does not excuse the distortion of the rules of evidence; all the above evidence was admissible on the present principle).

1905, *Fox v. Manchester*, 183 N. Y. 141, 75 N. E. 1116 (negligent maintenance of an electric wire; the defendant's officer's testimony at an inquest after the injury, stating that he knew of the defective wire before the injury, held to be a hearsay assertion of a past fact; a good illustration of the limits of the principle).

[Note 3; *add*.:]

The following case ignores this principle: 1906, *Salem News P. Co. v. Caliga*, 144 Fed. 965, C. C. A. (libel for asserting that the plaintiff's picture was a mere copy of T.'s picture; conversations of persons showing their belief in the assertion, excluded).

[*Note 4; add.:*]

1905, *Haughton v. Aetna L. Ins. Co.*, 165 Ind. 32, 73 N. E. 592 (insured's statements pending application for insurance, admitted to show "knowledge of his physical condition at the time of making the alleged false and fraudulent statements").

1906, *Nophsker v. Supreme Council*, 215 Pa. 631, 64 Atl. 788 (rule of *Swift v. Ins. Co.*, N. Y., applied, but not with a careful statement of the principle).

#### § 269. Legitimacy, as evidenced by Parents' Conduct.

[*Note 3, par. 1; add.:*]

1906, *Breidenstein v. Bertram*, 198 Mo. 328, 95 S. W. 828 (but here the further question is involved of the effect of a statute declaring that recognition of an illegitimate child, after marriage with the mother, shall legitimate it).

#### § 270. Identity, as evidenced by Belief, etc.

[*Note 4; add.:*]

1906, *Thompson v. U. S.*, 144 Fed. 14, 20, C. C. A. (a witness allowed to identify a man by name, though she had "come to know" his name subsequently; "knowledge of the name by which the person is generally known is of sufficient reliability to be put in evidence").

Compare the cases cited *ante*, § 87, *post*, §§ 2024, 2148, 2149.

#### § 273. Demeanor when Arrested.

[*Note 2; add.:*]

1903, *People v. Farrington*, 140 Cal. 656, 74 Pac. 288 (demeanor when found with stolen property, admitted).

1914, *People v. Duncan*, 261 Ill. 339, 103 N. E. 1043 (attempted suicide while in jail, admitted).

1904, *Austin v. Bartlett*, 178 N. Y. 310, 70 N. E. 855 (defendant's failure to call upon plaintiff after her injury, not admitted).

#### § 274. Accused's Demeanor during Trial.

[*Note 1; add.:*]

1908, *People v. McGinnis*, 234 Ill. 68, 84 N. E. 687 (following *Purdy's Case*).

[*Note 2; add, under Accord.:*]

1910, *Waller v. U. S.*, 8th C. C. A., 179 Fed. 810.

#### § 276. Flight, Escape, Resistance, or Concealment.

[*Note 3; add, in par. 1.:*]

1905, *Franklin v. State*, 145 Ala. 669, 39 So. 979 (false statements as to identity). 1906, *Allen v. State*, 146 Ala. 61, 41 So. 624 ("all the facts connected with the flight" are admissible). 1906, *Glass v. State*, 147 Ala. 50, 41 So. 727 (resistance at the time of arrest, admitted).

1905, *People v. Easton*, 148 Cal. 50, 82 Pac. 840 (rule applies to a defendant pleading insanity). 1913, *People v. Lee Nam Chin*, — Cal. —, 137 Pac. 917 (instructions discussed; knowledge of the corpus delicti is necessary, *Sloss, J.*, diss. on this point). 1911, *People v. Jones*, 160 Cal. 358, 117 Pac. 176 (another instance of the futility of including in the instructions a disquisition of law on the inferences from flight; the opinion seems to approve the two erroneous notions mentioned in par. (a) and (b) *supra*).

[Note 3 — continued]

1905, *Wooldridge v. State*, 49 Fla. 137, 38 So. 3 (and here the governor's proclamation of a reward, the sheriff's testimony of search, etc., were admitted to show the circumstances of the flight).

1904, *Johnson v. State*, 120 Ga. 135, 47 S. E. 510 ("the events and circumstances connected with the flight" are admissible; here, the denial of identity, etc.). 1905, *Grant v. State*, 122 Ga. 740, 50 S. E. 946 (flight on seeing the officer in another town, where he had no authority to arrest, admitted).

1904, *McKevitt v. People*, 208 Ill. 460, 70 N. E. 693 (resisting arrest, admitted).

1904, *State v. Poe*, 123 Ia. 118, 98 N. W. 587. 1905, *State v. Richards*, 126 Ia. 497, 102 N. W. 439. 1905, *State v. Matheson*, 130 Ia. 440, 103 N. W. 137.

1905, *State v. Kesner*, 72 Kan. 87, 82 Pac. 720 (failure to appear for trial in pursuance to a recognizance bond).

1905, *State v. Nash*, 115 La. 719, 39 So. 854 (flight is admissible, even when the killing was open and public; explaining *State v. Melton*, 37 La. An. 77 and later cases). 1906, *State v. High*, 116 La. 79, 40 So. 538 (two shots fired by defendant, in resisting arrest, admitted).

1908, *State v. Lambert*, 104 Me. 394, 71 Atl. 1092 (possession of a revolver at the time of arrest, admitted).

1906, *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55 (resistance, and other circumstances, while in flight, admitted).

1904, *Kennedy v. State*, 71 Nebr. 765, 99 N. W. 645 (attempt to escape). 1904, *Woodruff v. State*, 72 Nebr. 815, 101 N. W. 1114.

1913, *Robinson v. State*, 8 Okl. Cr. 667, 130 Pac. 121.

1890, *State v. Lee*, 17 Or. 488, 21 Pac. 455. 1905, *State v. Ryan*, 47 Or. 338, 82 Pac. 703.

1909, *State v. Osborne*, 54 Or. 289, 103 Pac. 62 (flight).

1904, *Bennett v. State*, 47 Tex. Cr. 52, 81 S. W. 30 (efforts of the sheriff to find the defendant, admitted).

1904, *State v. Deatherage*, 35 Wash. 326, 77 Pac. 504.

The dissenting opinion of Deemer, C. J., in *State v. Poe*, Ia., *supra*, is the most sensible deliverance on this subject, and ought to put an end to judicial quibbling.

On the same principle an *attempt at suicide* is admissible: 1904, *State v. Jagers*, 71 N. J. L. 281, 58 Atl. 1014.

[Note 3, par. 2; *add*.:]

The unfortunate influence of the above Federal cases may be seen in the following opinions:

1910, *People v. Fiorentino*, 197 N. Y. 560, 91 N. E. 195 (here the Court gives undue weight to *Hickory v. U. S.*, and erroneously says that "flight of itself is no evidence of guilt" is "sound as an abstract proposition of law"; of course, the same would be true of any evidence whatever: "of itself" it is not proof; but it is absurd to single out flight as the subject for such a charge).

1911, *Terr. v. Lucero*, 16 N. M. 652, 120 Pac. 304 (following the Federal cases).

1911, *State v. Papa*, 32 R. I. 453, 80 Atl. 12.

1914, *Stewart, U. S.*, 9th C. C. A., 211 Fed. 41 (an instruction held not to be within the rulings of the *Hickory* and *Alberty* cases).

[Note 3; *add* a new par. :]

Another form of quibble, using the present principle as a steeple-chase obstacle to win the game of a lawsuit, is to name all these possible aspects of the inference as *instructions to the jury*; of course the trial judge cannot be expected to divine just how the Supreme Court will agree on all details; hence frequent reversals; *e. g.*

1912, *State v. Schmulback*, 243 Mo. 533, 147 S. W. 966.

[Note 4; add:]

1909, *Lowman v. State*, 161 Ala. 47, 50 So. 43 (flight of an accomplice, excluded).

The following is of course correct: 1906, *Boykin v. State*, 89 Miss. 19, 42 So. 601 (that the county had paid the reward for the arrest of defendant as a fleeing homicide, excluded).

[Note 5; add:]

1913, *Goforth v. State*, — Ala. —, 63 So. 8 (postcards mailed by the accused shortly after his departure, admitted to indicate non-concealment of his whereabouts, and thus to rebut the inference of guilt of a murder from his flight).

1913, *State v. Hogg*, 64 Or. 57, 129 Pac. 115 (flight to escape a mob).

### § 278. Falsehood, Fraud, Spoliation, etc.

[Text, p. 357; after the quotation from *R. v. Castro*, insert:]

1905, *Phillimore, J.*, in *R. v. Watt*, 20 Cox Cr. 852: "The principle is in fact well established. . . . It is this, that the conduct in the litigation of a party to it, if it is such as to lead to the reasonable inference that he disbelieves in his own case, may be proved and used as evidence against him."

[Note 3; add, in par. 1:]

1907, *Weaver v. State*, 83 Ark. 119, 102 S. W. 713 (affidavit for continuance; repudiating *Burris v. State*, 38 Ark. 221, *infra*, and *Polk v. State*, 45 id. 165, on the ground that they were decided when an accused was disqualified to testify).

1906, *Bennett v. Susser*, 191 Mass. 329, 77 N. E. 884 (a "deliberate misstatement of fact" by a party on a material point may be considered by the jury "as an admission that his claim is wrongful"; but here the instruction was not held demandable).

1905, *People v. Hoffmann*, 142 Mich. 531, 105 N. W. 838 (false affidavit of continuance).

1906, *State v. Jennings*, 48 Or. 483, 87 Pac. 524 (false statements).

1893, *Tucker v. U. S.*, 151 U. S. 164, 168, 14 Sup. 299 (affidavit of continuance).

1910, *Waller v. U. S.*, 8th C. C. A., 179 Fed. 810 (feigning insanity).

*Contra*: 1905, *Darrell v. Com.*, — Ky. —, 88 S. W. 1060 (this astonishing ruling holds that where the State has avoided a demand for continuance by admitting an affidavit of testimony of absent witness, the State cannot show that the witness is dead and that the sworn statement as to his absence was false; compare § 2595, n. 2, *post*).

The apparent ruling in *Brown v. State*, 142 Ala. 287, 38 So. 268 (1904), that the fabrication of a statement of testimony of an absent witness ("showing") cannot be proved, where the party has neither formally introduced the showing nor called the witness, seems erroneous.

Compare the principle of *falsus in uno* as applied to witnesses (*post*, § 1008).

[Note 4; add:]

1680, *Earl of Stafford's Trial*, 7 How. St. Tr. 1461, 1479 (that the defendant had tried unsuccessfully to bribe a person to come as witness, admitted).

1905, *R. v. Watt*, 20 Cox Cr. 852 (that the defendant had induced a witness to testify falsely on a prior day in the same cause, admitted; good opinion by *Phillimore, J.*).

1905, *State v. Koller*, 129 Ia. 111, 105 N. W. 391 (adultery; the wife's attempt to dissuade the husband's witnesses, admitted). 1911, *State v. Kimes*, 152 Ia. 240, 132 N. W. 180 (subornation of a witness to perjury).

1904, *State v. Gianfala*, 113 La. 463, 37 So. 30 (offer of bribe to the deputy to release him).

1905, *Dickey v. State*, 86 Miss. 525, 28 So. 776 (attempt to suborn perjury).

1904, *Blair v. State*, 72 Nebr. 501, 101 N. W. 17 (removal of the prosecutrix).

[Note 5; add:]

1907, *In re Durant*, 80 Conn. 140, 67 Atl. 497 (intimidating a witness; the witness' deposition admitted, to show what had led to the intimidation).

[*Note 5 — continued*]

1910, *Minihan v. Boston Elev. R. Co.*, 205 Mass. 402, 91 N. E. 414 (intimidation of witnesses).

1907, *State v. Mathews*, 202 Mo. 143, 100 S. W. 420 (threats to dissuade the prosecuting witness from appearing, admitted).

### § 279. Other Rules discriminated.

[*Note 1*, par. 1; *add*, under *Accord*.:]

1904, *State v. Aspara*, 113 La. 940, 37 So. 883 (false statements as to alibi).

[*Text*, p. 359; *add* a new paragraph:]

(4) An offer of compromise is in general inadmissible (*post*, § 1062); hence, in a criminal prosecution, an offer of money to the injured party, which might otherwise be admissible as an attempt to bribe a witness, may be inadmissible if construable merely as an offer to redress the wrong.<sup>2</sup>

<sup>2</sup> 1906, *Sanders v. State*, 148 Ala. 603, 41 So. 466 (rape; offer of money to the woman's father).

### § 280. Fraud by Agents.

[*Note 2*; *add*.:]

1908, *Strong v. State*, 85 Ark. 536, 109 S. W. 536 (threats against witness for prosecution, by unknown person, admitted merely to rebut the defendant's allegation that the witness was testifying under a bias for the State, on the principle).

1907, *Eacock v. State*, 169 Ind. 488, 82 N. E. 1039 (procuring a witness to leave the State, by third persons with the defendant's privity, admitted).

1909, *Com. v. Min Sing*, 202 Mass. 121, 88 N. E. 918 (bribery of four persons, who did not in fact testify, by a police officer assisting in getting evidence, and by an interpreter used by him, excluded on the facts, no connivance of the prosecuting attorney being "suggested or suspected by the counsel for the defendant").

1907, *Jeffries v. State*, 89 Miss. 643, 42 So. 801 (eloignement of the prosecutrix by the defendant's brother, excluded).

1913, *Burnaman v. State*, — Tex. Cr. —, 159 S. W. 244 (corrupt offer by the accused's brother, who was also a witness, held admissible, *Davidson*, P. J., diss.; prior cases collected).

### § 282. Taking Precautions to prevent Injury; etc.

[*Note 1*; *add*, in a new paragraph:]

So, too, an employer's general rule of conduct for employees may be some evidence against him, on this principle, as an admission of the standard of care required, where the act of his employee in violation of the rule is charged against the employer as an act of negligence: 1902, *Chicago & A. R. Co. v. Eaton*, 194 Ill. 441, 62 N. E. 784 (*cited post*, § 283, n. 5, par. 2).

1904, *Stevens v. Boston Elev. R. Co.*, 184 Mass. 476, 69 N. E. 338 ("A rule made by a corporation for the guidance of its servants in matters affecting the safety of others," and its violation, raises an implication that there was a breach of duty towards the third person "as well as towards the master who prescribed the conduct that he thought necessary or desirable for protection in such matters. Against the proprietor of a business the methods which he adopts for the protection of others are some evidence of what he thinks necessary or proper to insure their safety"; good opinion by *Knowlton*, C. J., citing authorities).

[Note 1 — continued]

1913, *Canham v. Rhode Island Co.*, — Vt. —, 85 Atl. 1050 (collecting the cases).  
For the use of *other persons' regulations*, or *municipal ordinances*, to evidence negligence, see *post*, § 461.

[Note 2; add:]

*Accord*: 1904, *Camsusa v. Coigdarripe*, 11 Br. C. 177, 192 (action for breach of trust; the trustee's conveyance of his property pending suit, held a proper subject for cross-examination).

1907, *Pelkey v. Hodgdon*, 102 Me. 426, 67 Atl. 218 (mortgage of property, admitted).

181, *Heneky v. Smith*, 10 Or. 349 (transfer of land, after a shooting, admitted).

1906, *State v. Kincaid*, 142 N. C. 657, 55 S. E. 647 (seduction; transfer of property to evade the result of conviction, admitted).

[Note 3; add:]

*Contra*: 1904, *Darrell v. Com.*, — Ky. —, 82 S. W. 289 (but here because the charge was rape, and the defendant admitted the intercourse and alleged consent; no authority cited).  
1913, *Bray v. U. S.*, 39 D. C. App. 600 (seduction; no authority cited).

[Text, p. 363, l. 1; after "occur", insert new note 3a:]

3<sup>d</sup> 1911, *Engel v. United Traction Co.*, 203 N. Y. 321, 96 N. E. 731 (discharge of motor-man since the injury, excluded).

The *offer of remedial assistance*, to an injured person, by one whose apparatus or conduct has caused the injury or on whose premises the injury has occurred, ought not to be evidence of an admission of culpable causation.

1908, *Binewicz v. Haglin*, 103 Minn. 297, 115 N. W. 271 (injury received on a building; the defendant's payment of a weekly sum to the injured man's wife, and his promises of further assistance, admitted, but treated as of little weight).

1914, *Grogan v. Dooley*, — N. Y. —, 105 N. E. 135 (the plaintiff was injured while in the employ of the defendant; the mere fact that the defendant offered to pay the plaintiff's wages during disability and his physician's bill, held not admissible).

1904, *Clarke v. N. Y. N. H. & H. R. Co.*, 26 R. I. 59, 58 Atl. 245 (setting fire to timber by locomotives; that the defendant's employees aided in putting out the fire, held not to allow an inference).

[Note 4; add:]

1909, *Hyndman v. Stephens*, 19 Man. 187 (excluded).

1908, *Longhead v. Collingwood Shipbuilding Co.*, 16 Ont. L. R. 64 ("This had been so ruled by myself and probably other judges, over and over again at *nisi prius*").

1903, *Roche v. Llewellyn I. Co.*, 140 Cal. 563, 74 Pac. 147 (defendant's insurance against accidents held inadmissible to evidence negligence, and also to evidence the fact that the plaintiff was an employee of defendant and not of a third person).

1906, *Capital C. Co. v. Holtzman*, 27 D. C. App. 125, 138 (the fact of defendant's insurance against accident, excluded, except as affecting a witness' bias).

1913, *Mithen v. Jeffery*, 259 Ill. 372, 102 N. E. 778 (defendant's protection by liability insurance not being admissible, questions to jurors on voir dire, intended to introduce the fact indirectly, are improper; prior Illinois cases cited).

1896, *Barg v. Bousefield*, 65 Minn. 355, 68 N. W. 45 (that defendant was insured against accidents in a particular mill, admitted solely as an admission that the employees there working, including the plaintiff, were employees of the defendant and not of a third person).

1908, *Gracy v. Anderson*, 104 Minn. 476, 116 N. W. 1116 (allowing a questioning of jurors as to insurance-interests, but not allowing the cross-examination of the defendant on this subject to affect his credibility, subject to the trial Court's discretion).

[Note 4 — *continued*]

1913, *Zimmerle v. Childers*, — Or. —, 136 Pac. 349 (indemnity bond).

1913, *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 232 (questions to jurors as to connection with indemnity companies, allowed; distinguishing this from questions directly intended to advise jurors that the suit was defended by an insurer; following *Hoyt v. Independent Paving Co.*, 52 Wash. 672, 101 Pac. 367, and distinguishing *Stratton v. Nichols L. Co.*, 39 Wash. 323, 81 Pac. 831; the distinction is futile; either the ascertainment of jurors' interest or the suppression of the fact of insurance must frankly be allowed to prevail; no compromise is worth while).

1906, *Chybowski v. Bucyrus Co.*, 127 Wis. 332, 106 N. W. 833 (offer to prove insurance, excluded). 1908, *Wankowski v. Crivitz P. & P. Co.*, 137 Wis. 123, 118 N. W. 643 (counsel's remark as to insurance, held not prejudicial on the facts).

[Note 4, par. 1; for "69 Vt. 486," substitute:

"90 Me. 369."

[Note 4; *insert*, after par. 1:]

But the taking out of a policy may be an admission of *ownership*, where that is disputed (on the principle of § 283, note 5, *post*).

1904, *Perkins v. Rice*, 187 Mass. 28, 72 N. E. 323 (ownership of an elevator).

[Note 4, par. 2; *add*.:]

and cases cited in §§ 393, 969, *post*.

## § 283. Repairs after an Injury.

[Note 5; *add*.:]

*Ala.*: 1904, *Jackson L. Co. v. Cunningham*, 141 Ala. 206, 37 So. 445 (defective roadbed; changes of track-timbers, etc., admitted, to identify other timbers). 1904, *Frierson v. Frazier*, 142 Ala. 232, 37 So. 825 (ferry accident, subsequent placing of a rail, admitted only on cross-examination of a defendant who had testified to that subject). 1904, *Davis v. Kornman*, 141 Ala. 479, 37 So. 789 (injury at a machine; protective construction since the injury, excluded).

*Ark.*: 1906, *St. Louis S. W. R. Co. v. Plumlee*, 78 Ark. 147, 95 S. W. 442 (subsequent removal of hand-car wheels for safety, excluded). 1907, *Bodcaw L. Co. v. Ford*, 82 Ark. 555, 102 S. W. 896 (subsequent repairs to a machine, excluded). 1912, *St. Louis S. M. & S. R. Co. v. Steed*, 105 Ark. 205, 151 S. W. 257 (repairs of a car, excluded).

*Cal.*: 1904, *Helling v. Schindler*, 145 Cal. 303, 78 Pac. 710 (subsequent sharpening of planer's knives, excluded).

*Colo.*: 1907, *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 92 Pac. 922 (subsequent removal of a pipe-arm causing the injury, excluded).

*Ga.*: 1902, *Georgia S. F. R. Co. v. Cartledge*, 116 Ga. 164, 42 S. E. 405; in the note now in the original citation strike out the word "not" before "however," and the author's comment "a singularly unjudicial utterance"; the word "not" was thus erroneously printed in the advance sheets of 42 S. E. Rep., from which the author took the citation; but by the courtesy of W. H. Fleming, Esq., of Augusta, Ga., the author has learned that in the bound volume and in the official report the judge in revising corrected the error, omitting "not"; the author desires here publicly to express his regret for the ill-founded criticism.

*Ia.*: 1888, *Kuhns v. Wisconsin I. & N. R. Co.*, 76 Ia. 68, 72, 40 N. W. 92 (subsequent repairs of a track, not receivable as "an admission that the track was out of repair"). 1899, *Beard v. Guild*, 107 Ia. 476, 78 N. W. 201 (subsequent repairs to a hack, excluded; no Iowa cases cited, but three cases from other States). 1899, *Frohs v. Dubuque*, 109 Ia. 219, 221, 86 N. W. 342 (subsequent repairs to a sidewalk; the incidental mention of it, under proper

## [Note 5 — continued]

instructions, held not error). 1904, *Cronk v. Wabash R. Co.*, 123 Ia. 349, 98 N. W. 884 (subsequent condition of a track, excluded). 1904, *See v. Wabash, R. Co.*, 123 Ia. 443, 99 N. W. 106 (repairs at a crossing, excluded). 1906, *Fitter v. Iowa Tel. Co.*, 129 Ia. 610, 106 N. W. 7 (injury by telephone poles; defendant's subsequent change in method of work, excluded, in an opinion which at last seems squarely to lay down a general rule against this evidence; of the above cases, however, only *Hudson v. R. Co.* is cited). 1907, *Patton v. Sanborn*, 133 Ia. 650, 110 N. W. 1032 (sidewalk; subsequent replacement, here admitted for other purposes).

*Ky.*: 1905, *Louisville & N. R. Co. v. Morton*, 121 Ky. 398, 89 S. W. 243 (defective method of loading logs; subsequent safe use of another method, excluded, on the present principle; erroneous on the facts, because the principal object was merely to show by experiment that there was another method which was safe). 1891, *Standard Oil Co. v. Tierney*, 92 Ky. 367, 17 S. W. 1025 (fire of oil during transit; subsequent change of mode of shipping, etc., excluded). 1897, *Louisville & N. R. Co. v. Bowen*, — Ky. —, 39 S. W. 31 (precautions at a crossing; preceding case followed).

*Md.*: 1906, *Ziehm v. United El. L. & P. Co.*, 104 Md. 48, 64 Atl. 61 (subsequent change in location of wires, excluded).

*Mass.*: 1904, *Stevens v. Boston Elev. R. Co.*, 184 Mass. 476, 69 N. E. 338 (rule as to sounding a gong).

*Mich.*: 1906, *Moon v. Pere Marquette R. Co.*, 143 Mich. 125, 106 N. W. 715 (collision; defendant's change of rules to prevent collisions, excluded).

*Mo.*: 1887, *Brennan v. St. Louis*, 92 Mo. 488, 2 S. W. 481. 1891, *Alcorn v. R. Co.*, 108 Mo. 90, 18 S. W. 188 (repairs to a switch-block, excluded). 1905, *Bailey v. Kansas City*, 189 Mo. 503, 87 S. W. 1182 (subsequent repairs to a sidewalk, excluded). 1904, *Schermer v. McMahon*, 108 Mo. App. 36, 82 S. W. 535 (excluded).

*Nebr.*: 1908, *Pribbeno v. Chicago B. & O. R. Co.*, 81 Nebr. 494, 116 N. W. 494 (subsequent change of a bridge to prevent a flood, excluded).

*N. H.*: 1908, *Cummings v. Farnham*, 75 N. H. 135, 71 Atl. 632 (change in method of work, not to be a basis of argument).

*N. Y.*: 1907, *Loughlin v. Brassil*, 187 N. Y. 128, 79 N. E. 854 (subsequent repair of a machine, excluded).

1913, *Sloan v. Warrenburg*, 36 Okl. 523, 129 Pac. 720 (fall of a telephone pole; improved method of replacing it, excluded). 1913, *Shawnee G. & E. Co. v. Motesenbocker*, — Okl. —, 135 Pac. 357 (electric wires; subsequent improvements of system, excluded).

1907, *Worthy v. Jonesville Oil Mill*, 77 S. C. 73, 57 S. E. 634. 1908, *Plunkett v. Clearwater B. & M. Co.*, 80 S. C. 310, 61 S. E. 431 (subsequent repairs of machinery, excluded; "the question may be regarded as settled, under the case of *Worthy v. Jonesville Oil Mill*").

*U. S.*: 1904, *Choctaw, O. & G. R. Co. v. McDade*, 191 U. S. 64, 24 Sup. 24 (subsequent changes, admitted to explain away the evidence of subsequent measurements introduced by the defendant).

1904, *Southern R. Co. v. Simpson*, 131 Fed. 705, 711, 65 C. C. A. 544 (custom of whistling at a crossing since the accident, excluded).

1905, *Davidson S. S. Co. v. U. S.*, 142 Fed. 315, 318, C. C. A. (subsequent precautions as to a breakwater, excluded). 1907, *Armour v. Skene*, 1st C. C. A., 153 Fed. 241 (injury by a runaway horse; defendant's discharge of the driver, a year later, not admissible).

*Wash.*: 1906, *Thomson v. Issaquah S. Co.*, 43 Wash. 253, 86 Pac. 588 (subsequent change here admitted to show that there was another feasible method of guarding a machine).

*Wis.*: 1907, *Odegard v. North Wis. L. Co.*, 130 Wis. 659, 110 N. W. 809 (sawmill; subsequent working, excluded).

## [Note 6; add:]

1907, *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 92 Pac. 922 (sidewalk obstruction). 1904, *Perkins v. Rice*, 187 Mass. 28, 72 N. E. 323 (like *Readman v. Conway*).

[*Note 6 — continued*]

1887, *Brennan v. St. Louis*, 92 Mo. 488, 2 S. W. 481 (acts of repair of a highway). 1906, *Bailey v. Kansas City*, 189 Mo. 503, 87 S. W. 1182 (city's repairs, not admitted where control was conceded).

[*Note 7; add:*]

1907, *Brunger v. Pioneer R. P. Co.*, 6 Cal. App. 691, 92 Pac. 1043 (machine). 1912, *Koskoff v. Goldman*, 86 Conn. 415, 85 Atl. 588 (admitted as contradictory of certain expert testimony).

1908, *Sample v. Chicago B. & O. R. Co.*, 233 Ill. 564, 84 N. E. 643 (subsequent filling of a hole, admitted to show error in the opponent's photograph).

1909, *Consolidated G. E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651 (electric wires).

So, also, a change of practice may be admissible to show that the *different method was feasible* for avoiding danger.

1911, *Fonder v. General Construction Co.*, 146 Wis. 1, 130 N. W. 884 (change in method of placing workmen at a derrick).

See, also, where the *possibility of several causes* requires such description.

1909, *Place v. Grand Trunk R. Co.*, 82 Vt. 42, 71 Atl. 836.

### § 284. Failure to Prosecute, etc.

[*Note 1; add, under Accord:*]

1902, *R. v. Higgins*, 35 N. Br. 18, 24 (failure of the accused to name G. as the guilty person, until the accused testified in his own behalf at the trial, admissible).

1908, *Louisville & N. R. Co. v. Varner*, 129 Ga. 844, 60 S. E. 162 (failure to complain of an injury, admitted).

1907, *Page v. Hazelton*, 74 N. H. 252, 66 Atl. 1049 (failure to demand an alleged debt, though in need of money).

For a *failure to make or file a claim*, in answer to a request, etc., as constituting an admission by silent assent, see *post*, § 1072.

[*Note 3; add:*]

Here also must be considered the scarcely distinguishable *admissions by silence* (*post*, § 1072) in failing to include a claim, to deny an opponent's claim, and the like.

[*Note 4; add:*]

1908, *Louisville & N. R. Co. v. Varner*, 129 Ga. 844, 60 S. E. 162 (complaint of injury uttered to B, not admitted to explain away a failure to complain to A; unsound).

### § 285. Failure to Produce Evidence.

[*Note 2; add:*]

1906, *Alexander v. Blackman*, 26 D. C. App. 541, 551 (inventor's wife and daughter, etc., in a patent case).

1908, *Georgia F. & A. R. Co. v. Sasser*, 4 Ga. App. 276, 61 S. E. 505 (rule applied where depositions were used, as allowed in this State — see *post*, § 1415, n. 5 — though the deponents were present in court).

1909, *Sullivan v. Girson*, 39 Mont. 274, 102 Pac. 320 (diamond ring converted by defendant, who refused to produce it).

1904, *Chicago, B. & O. R. Co. v. Krayenbuhl*, 70 Nebr. 766, 98 N. W. 44 (failure to call defendant's employee; inference allowed).

1862, *Steininger v. Hoch's Ex'r*, 42 Pa. 432 (failure to call a witness to the transaction, held open to inference). 1893, *Hall v. Vanderpool*, 156 Pa. 152, 26 Atl. 1069 (title to property

[*Note 2 — continued*]

claimed under the plaintiff's father; the plaintiff's failure to call her father, held open to inference). 1906, *Green v. Brooks*, 215 Pa. 492, 64 Atl. 672 (title to personality; the plaintiff's failure to call his son, who was in court, held open to inference).

1906, *Grunburg v. U. S.*, 145 Fed. 81, 89, C. C. A. (failure to call employees, inference allowed).

#### § 286. Witnesses not Produced; Unavailable or Privileged.

[*Note 5; add:*]

1907, *Jamison v. U. S.*, 7 Ind. Terr. 661, 104 S. W. 872 (wife incompetent for or against the accused).

1904, *Wright v. Davis*, 72 N. H. 448, 57 Atl. 335 (a plaintiff disqualified as a survivor to some of the facts; the defendant's counsel allowed to allude to the plaintiff's failure to testify at all, but, on the principle of § 1807, *post*, not to assert that the defendant would have waived any disqualification of the plaintiff).

1909, *Rhea v. Terr.*, 3 Okl. Cr. 230, 105 Pac. 314 (the defendant's wife being qualified to testify for him, but he and she being privileged that she should not testify against him, his failure to call her was held to be open to inference).

[*Note 6; add:*]

1912, *Com. v. Spencer*, 212 Mass. 438, 99 N. E. 286 (wife competent but not compellable).

#### § 287. Witnesses Prejudiced or Inferior in Value.

[*Note 2; add:*]

1904, *Cavanagh v. Riverside*, 136 Mich. 660, 99 N. W. 876 (highway injury; failure to call the highway overseer; inference not allowed).

1909, *Cooper v. Upton*, 60 W. Va. 648, 64 S. E. 523.

#### § 288. Witnesses equally Available to both Parties.

[*Note 1; add:*]

1909, *Jordan v. Austin*, 161 Ala. 585, 50 So. 70.

1906, *Mutual Industrial I. Co. v. Perkins*, — Ark. —, 98 S. W. 709.

1913, *Delaney v. Berkshire St. R. Co.*, 215 Mass. 591, 102 N. E. 901 (defendant's argument, calling attention to a statute allowing discovery of witnesses' names, and aiming to rebut a possible inference that the defendant had the power to produce more witnesses than the plaintiff, held properly suppressed by the trial court).

1913, *Fulsom-Morris C. & M. Co. v. Mitchell*, 37 Okl. 575, 132 Pac. 1103.

1913, *Iowa Court R. Co. v. Hampton E. L. & P. Co.*, 8th C. C. A., 204 Fed. 961 (defendant's employee).

[*Note 3; add:*]

1905, *Lambert v. Hamlin*, 73 N. H. 138, 59 Atl. 941 (employee of defendant, in the city at the time of trial; inference allowed against the defendant).

#### § 289. Party Himself Failing to Testify.

[*Note 1; add:*]

1911, *Du Bose v. Conner*, 1 Ala. App. 456, 55 So. 432.

1909, *Bone v. Hayes*, 154 Cal. 759, 99 Pac. 172 (failure to testify in explanation).

1906, *Hull v. Douglas*, 79 Conn. 266, 64 Atl. 351 (inference allowed).

[Note 1 — continued]

1908, *Belknap Hardware Co. v. Sleeth*, 77 Kan. 164, 93 Pac. 580 (client's refusal in a deposition to explain, "on advice of counsel," the advice being bad, held open nevertheless to inference).

1906, *Reinhardt v. Mark's Adm'r.*, — Ky. —, 93 S. W. 32 (but here not applicable, because the party was disqualified).

1908, *Howe v. Howe*, 199 Mass. 598, 85 N. E. 945.

1905, *McDonald v. Smith*, 139 Mich. 211, 102 N. W. 668.

1913, *Powell v. Strickland*, 163 N. C. 393, 79 S. E. 872 (like *Devries v. Phillips*).

1908, *Brooks v. Garner*, 20 Okl. 236, 94 Pac. 694.

1912, *Bonelli v. Burton*, 61 Or. 429, 123 Pac. 37.

1911, *Fisher v. Travelers' Ins. Co.*, 124 Tenn. 450, 138 S. W. 316 (of course, this inference may be made equally well where there are admissions which might be explained away).

1906, *Aragon Coffee Co. v. Rogers*, 105 Va. 51, 52 S. E. 843 (*bona fide* purchase of a note by the plaintiff; the plaintiff's refusal on the stand to explain his motive for the investment, held open to inference).

1906, *Sears v. Duling*, 79 Vt. 334, 65 Atl. 90.

1906, *Loverin & B. Co. v. Bumgarner*, 59 W. Va. 46, 52 S. E. 1000 (defendant's failure to testify in denial of letters, etc., though present at the trial, held open to inference).

The same inference may apply to the *prosecuting witness* in a criminal case: 1905, *Morgan v. State*, 124 Ga. 442, 52 S. E. 748.

[Note 1; at the end of par. 1, insert:]

On interrogatories before trial, an answer given after provisional refusal may prevent this use of the refusal:

1913, *Harrington v. Boston Elev. R. Co.*, 214 Mass. 563, 101 N. E. 977 (a corporation president's answers, as party, to interrogatories, were refused by him, subject to the Court's direction, later the Court directed him to answer, and he did so; held, that the reading of the original refusal to answer was improper).

## § 290. Sundry Distinctions.

[Note 2, l. 1; add:]

1905, *People v. Davis*, 147 Cal. 346, 81 Pac. 718; *People v. Lee*, 1 Cal. App. 169, 81 Pac. 969 (qualifying the preceding).

1910, *State v. Dudley*, 147 Ia. 645, 126 N. W. 812.

1906, *Lowdon v. U. S.*, — C. C. A. —, 149 Fed. 673, 677.

[Note 2, last line; add:]

1904, *Gater v. State*, 141 Ala. 10, 37 So. 692.

1908, *McDuffee v. State*, 55 Fla. 125, 46 So. 721 (approving the above comment).

1911, *State v. Gruber*, 19 Ida. 692, 115 Pac. 1.

1908, *People v. Kemmis*, 153 Mich. 117, 116 N. W. 554 ("We approve and adopt the rule stated by Mr. W.").

1906, *People v. Pekarz*, 185 N. Y. 470, 78 N. E. 294. 1913, *People v. Lingley*, 207 N. Y. 396, 101 N. E. 170 (approving the foregoing passage).

1914, *Durham v. State*, — Tenn. —, 163 S. W. 447.

[Note 6, par. 1; add:]

1904, *People v. McGarry*, 136 Mich. 316, 99 B. W. 147.

[Note 8, under *Accord*; add:]

1905, *Starke v. State*, 49 Fla. 41, 37 So. 850 (but merely the service of a subpoena does not suffice, where an attachment for non-appearance was available).

## [Note 8 — continued]

1904, *Foster v. Atlanta R. T. Co.*, 119 Ga. 675, 46 S. E. 840 (but the explanation cannot include a statement that the absent alleged eye-witnesses know nothing of the affair; this ruling is over-strict).

1905, *Macon R. & L. Co. v. Mason*, 123 Ga. 773, 51 S. E. 569.

1905, *Warth v. Loewenstein*, 219 Ill. 222, 76 N. E. 378 (why a party's brother had left the country, allowed).

1913, *Curtis & G. Co. v. Pribyl*, — Okl. —, 134 Pac. 71 (subpoenas for eye-witnesses who had failed to appear, admitted, as rebutting the inference from failure to call them).

1907, *Weidner v. Standard Life & A. Ins. Co.*, 132 Wis. 624, 113 N. W. 50 (illness of eye-witnesses, admitted, as explaining the failure to call them).

## [Note 9; add, at the beginning:]

*Accord*: 1904, *Harrison v. Harrison*, 124 Ia. 525, 100 N. W. 344 (attempting to eloin a witness).

1905, *McDonald v. Smith*, 139 Mich. 211, 102 N. W. 668.

1908, *State v. Callahan*, 76 N. J. L. 426, 69 Atl. 957.

## [Note 10; add:]

1908, *McDuffee's Adm'r v. Boston & Maine R. Co.*, 81 Vt. 52, 69 Atl. 124 (brakeman killed; the defendant resting without evidence, held that no inference could be based thereon).

Yet it is a tenable view that this doctrine is unsound. Certainly, it is artificial; and it tends to obstruct the direct getting at the truth.

## § 291. Documents or Chattels Destroyed or not Produced.

[Note 1; add, under *Canada*:]

1905, *Hale v. Leighton*, 35 N. Br. 256 (a book of entries kept for both parties, but in the plaintiff's possession; the plaintiff's refusal to produce it, held open to inference, on the facts, but not merely because he did not produce the original on notice to produce).

## [Note 2; add:]

1904, *Hannay v. New Orleans Cotton Exch.*, 112 La. 998, 36 So. 831 (agency for investment; inference allowed from failure to produce contemporaneous writings).

1905, *Com. v. Bond*, 188 Mass. 91, 74 N. E. 293 (forgery; the defendant's destruction of the proceeds, etc., admitted).

1905, *Sullivan v. Sullivan*, 188 Mass. 380, 74 N. E. 608 (action on a note requiring an attesting witness' signature; an instruction that the defendant's destruction of it would justify the inference that it was a witnessed note, held proper on the facts).

1879, *Jones v. Knauss*, 31 N. J. Eq. 609, 614 (declaration of trust destroyed; "slight evidence of the contents of the instrument will usually in such a case be sufficient").

1905, *Patch Mfg. Co. v. Protection Lodge*, 77 Vt. 294, 60 Atl. 74 (boycott by a union; the defendant refused to produce its books; held that "the spoliation of evidence . . . cannot supersede the necessity of other evidence"; on the facts, this ruling was too favorable).

1909, *New York C. & H. R. R. Co. v. U. S.*, 212 U. S. 481, 29 Sup. 304 (corporation's failure to produce certain books).

1913, *In re Herman*, D. C. N. D. Ia., 207 Fed. 594 (destruction of letters by the party alleging a loan, considered).

1905, *Neece v. Neece*, 104 Va. 343, 51 S. E. 739 (executor's suppression and concealment of deceased's title-deeds from the family, held open to inference under the present principle).

1904, *Stout v. Sands*, 56 W. Va. 663, 49 S. E. 428 (the suppression is not an admission to the fullest extent; "there must be some other evidence in support of the claim; a *prima facie* case must be made"; here said of a contract).

1879, *Dimond v. Henderson*, 47 Wis. 172, 174 (partner's accounting; the imperfect method of keeping the accounts, held to involve this principle against the accountant).

§ 293. Conduct as Evidence of Consciousness of Innocence.

[Note 1; add:]

1904, *Walker v. State*, 139 Ala. 56, 35 So. 1011 (murder; defendant's offer to be taken to the dying person to see if she identified him, excluded).

1906, *Allen v. State*, 146 Ala. 61, 41 So. 624 (voluntary surrenders admissible only as contradicting or explaining evidence of flight).

1904, *Thomas v. State*, 47 Fla. 99, 36 So. 161 (excluded, where not part of the *res gestae*).

1909, *Bailey v. State*, 94 Miss. 863, 48 So. 227 (defendant's refusal to accept an opportunity to escape from prison, excluded, *Whitfield, C. J., diss.*).

1909, *Hoxie v. Walker*, 75 N. H. 308, 74 Atl. 183 (question not decided; here, the defendant's expression of indignation on hearing that a detective of the plaintiff was watching the defendant's house).

1906, *Sneed v. Terr.*, 16 Okl. 641, 86 Pac. 70 (voluntary surrender, excluded).

§ 306. Other Evidential Purposes discriminated.

[Text, par. (3) at the end; add new note 1:]

<sup>1</sup> For the use of an *accused's confession* of other crimes, see *post*, § 2100, n. 3.

§ 318. Forgery and Counterfeiting; Law in Various Jurisdictions.

[Note 1; add:]

1894, *Langford v. State*, 33 Fla. 233, 14 So. 815 (uttering of a note with forged indorsements; other prior and subsequent utterings of notes with forged indorsements, etc., admitted to show knowledge and intent; knowledge of the others being forgeries, at the time of the uttering charged, need not be expressly shown).

1905, *Wooldridge v. State*, 49 Fla. 137, 38 So. 3 (forgery of school warrants; forgery of other similar warrants, admitted to show intent).

1906, *Pittman v. State*, 51 Fla. 94, 41 So. 385 (rule of *Langford v. State* applied).

1907, *State v. Calhoun*, 75 Kan. 259, 88 Pac. 1079 (forgery of a note; forgery of similar notes transferred at the same time, admitted).

1905, *People v. Peck*, 139 Mich. 680, 103 N. W. 178 (embezzlement; a certain receipt from W. offered by the defendant was alleged to be forged; the forgery of other documents as W.'s, excluded).

1907, *State v. Stark*, 202 Mo. 210, 100 S. W. 642 (forgery of a deed; possession of another forged deed to the same land, admitted).

1906, *State v. Newman*, 34 Mont. 434, 87 Pac. 462 (forgery of bounty certificates; other forged certificates, admitted).

1904, *People v. Weaver*, 177 N. Y. 434, 69 N. E. 1094 (other forged notes, not admitted on the facts; *Werner, J., diss.*). 1906, *People v. Dolan*, 186 N. Y. 4, 78 N. E. 569 (forgery of a note; utterance of other forged notes in the same and other names, admitted to show knowledge, and also to show a general plan; *People v. Weaver*, distinguished).

1908, *State v. Murphy*, 17 N. D. 48, 115 N. W. 84 (forgery of tax-receipts; other similar forgeries of receipts for taxes from the same and another taxpayer, admitted).

1907, *State v. Kelliher*, 49 Or. 77, 88 Pac. 867 (forgery of school-land certificate papers; joint-indictee's forgery of numerous similar documents, not admitted on the facts).

1903, *Withaup v. U. S.*, 127 Fed. 530, 531, 62 C. C. A. 328 (forgery of a pension-check indorsement; forged vouchers, etc., admitted as evidencing a "single scheme to defraud").

1904, *Bryan v. U. S.*, 133 Fed. 495, 66 C. C. A. 369 (uttering counterfeit 5-cent pieces, possession of a mold for counterfeit 25-cent pieces, admitted). 1905, *Dillard v. U. S.*, 141 Fed. 303, 308, C. C. A. (forgery of Chinese immigrant duplicate certificates; other forged duplicate certificates admitted to show intent). 1912, *Ex parte Schorer, C. C.*, 197 Fed. 67, 77 (extradition; other uttering of similar forged acceptances, held sufficient on the facts, quoting § 312, *supra*).

§ 321. **False Pretences or Representations; Law in Various Jurisdictions.**

[*Note 1; add:*]

1904, *R. v. Wyatt*, 20 Cox Cr. 462, 1 K. B. 188 (obtaining credit for lodging, etc., under false pretences to W.; the facts that the accused had left other persons' apartments while in debt to them were admitted to show a fraudulent system and to negative mistake or honest motive). 1905, *R. v. Smith*, 20 Cox Cr. 804 (obtaining credit on false pretences as agent of M., the defendant alleging that he had merely given M.'s name as a reference, his representations to another vendor a few days later that he was agent of M. were admitted; *R. v. Wyatt* commented on; *R. v. Holt* discredited). 1909, *Fisher's Case*, 3 Cr. App. 176 (obtaining a car, pony, and harness by false pretences; an instance of obtaining a horse by false pretences, held admissible, but instances of obtaining on credit fraudulently fodder and provender, excluded; this ruling, quite unsound on principle, is like a revival of the old-fashioned vain subtleties; indeed, it is a stricter ruling than would have been rendered a century ago; on appeal, [1910] 1 K. B. 149, reversed, on the correct ground that the evidence was of other false representations not sufficiently similar to show a system of swindling by the same method). 1910, *R. v. Ellis*, 2 K. B. 747 (false pretences by an art-dealer in mis-stating the purchase-cost of an article; two other false pretences to the same buyer, during the preceding nine years, as to the genuineness of articles sold, held not admissible). 1910, *Charlesworth's Case*, 4 Cr. App. 167 (false pretences as to a fortune; other pretences to another person two years before, admitted on special grounds). 1911, *Edinburgh Life Ass. Co. v. Y.*, 1 Dr. R. 306 (action to set aside a policy issued on fraudulent representations of a peculiar sort; similar representations made in obtaining other policies from the same and other companies, held admissible, but only after amendment of the plaintiff's pleadings). 1913, *Partridge v. U. S.*, 39 D. C. App. 571 (false pretences as to a stock guaranty; similar false representation to another person, admitted on the facts). 1909, *People v. Weil*, 243 Ill. 208, 90 N. E. 731 (confidence game, here by borrowing money through impersonation; prior use of the same trick on another person, admitted). 1905, *Johnson v. State*, 75 Ark. 427, 88 S. W. 905 (conspiracy to cheat by betting on a race; similar acts, including subsequent ones, admitted to show intent). 1905, *Malley Co. v. Button*, 77 Conn. 571, 60 Atl. 125 (goods procured by false representations; other similar representations to other stores, excluded). 1905, *State v. Seligman*, 127 Ia. 415, 103 N. W. 357 (false pretences as life insurance agent; other similar transactions with other persons, admitted to show intent). 1906, *Elbert v. Mitchell*, 131 Ia. 598, 109 N. W. 181 (fraudulent representations as to hogs sold; similar false representations to other persons, admitted for the plaintiff to show intent or scienter, but similar honest transactions with others, not admitted for the defendant). 1908, *Gibson v. Seney*, 138 Ia. 383, 116 N. W. 325 (other false representations to other persons, as to a right of way, admitted). 1906, *State v. Briggs*, 74 Kan. 377, 86 Pac. 447 (false pretences as to real estate loans; similar pretences to other persons, admitted). 1912, *People's Bank v. Reid*, 86 Kan. 245, 120 Pac. 339 (fraudulent notes; similar transactions with other persons, admitted). 1905, *Com. v. Clancy*, 187 Mass. 191, 72 N. E. 842 (false pretences concerning a business sold; other similar transactions admitted, on the theory of conspiracy; *Com. v. Jackson* distinguished). 1905, *People v. Hoffmann*, 142 Mich. 531, 105 N. W. 838 (obtaining money by false vouchers for inquests; similar false vouchers, admitted to show knowledge and intent). 1904, *State v. Boatwright*, 182 Mo. 33, 81 S. W. 450 (false pretences by a fake race; other fake races, etc., more than a year before, excluded). 1907, *State v. Roberts*, 201 Mo. 702, 100 S. W. 484 (fraud in exchange of lands for goods; similar fraud on another person about the same time, admitted to show intent). 1913, *State v. Foley*, 247 Mo. 607, 153 S. W. 1010 (false pretences; other similar frauds, admitted).

[*Note 1 — continued*]

1907, *Crosby v. Wells*, 73 N. J. L. 790, 67 Atl. 295, 301 (fraud as a defence to an investment-contract; similar false representations as to the same investment, made to other persons, admitted).

1911, *Dyer v. U. S.*, C. C. A., 186 Fed. 614 (using the mails to defraud, by false representations as to medical skill and eminence; the prosecution was not allowed to show that the defendant had been three times convicted of various crimes in the U. S. and other times in England; either counsel or court missed the real point of objective here, for obviously the prosecution, in showing the gross falsity of the representations that the defendant was a "noted expert" and "one of the greatest living specialists" in certain diseases, was entitled to show the defendant's life-events to be of the opposite character).

1906, *State v. Oppenheimer*, 41 Wash. 630, 84 Pac. 588 (obtaining money by false pretences; the obtaining from various other parties by similar false pretences, excluded, because not shown to be part of a scheme, following *State v. Bokien* and the unsound Massachusetts doctrine; it is a pity that this over-strict and unpractical rule should be approved instead of repudiated).

1903, *Baker v. State*, 120 Wis. 135, 97 N. W. 566 (false pretences; certain other pretences and lies, excluded). 1904, *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 98 N. W. 923 (contract; plea, false representations; similar representations to others, excluded, intent being immaterial).

### § 326. **Knowing Possession or Receipt of Stolen Goods; Law in Various Jurisdictions.**

[*Note 1; add, at the end of the English cases:*]

Further rulings are:

1909, *Powell's Case*, 3 Cr. App. 1 (the limitations of St. 34-35 Vict. c. 112, § 19 do not apply to proof of possession of other stolen goods offered to rebut evidence of honest intent).

[*Note 1; add, under American cases:*]

1904, *Schultz v. People*, 210 Ill. 196, 71 N. E. 405 (receiving stolen rings; W. having stolen five or six rings, and D. having shown them all to the defendant, she purchased the two in issue; held error to offer the others in evidence; this is an over-strict ruling, especially as the opinion ignores the purpose of the evidence to show knowledge). 1907, *Lipsey v. People*, 227 Ill. 364, 81 N. E. 348 (receiving stolen goods, — here, electric light sockets; the delivery of another quantity of such goods about the same time, held admissible, citing one N. Y. case and a loose generality from a treatise, and ignoring the foregoing case).

1905, *Beuchert v. State*, 165 Ind. 523, 76 N. E. 111 (that "other stolen goods" were found, is admissible; here, on a charge of possessing bars of steel stolen from B., the possession of watches and jewelry stolen from other persons was admitted).

1905, *State v. Levich*, 128 Ia. 372, 104 N. W. 334 (receipt of other stolen goods from the same person, admissible).

1914, *Com. v. McGarvey*, 158 Ky. 570, 165 S. W. 973 (knowing receipt of stolen goods; possession of other kinds of stolen goods, admitted, without showing knowledge that the other goods were stolen).

1914, *State v. Cohen*, — Mo. —, 162 S. W. 216 (receipt of stolen property; other receipt of different kinds of stolen property from the same person, admitted, without evidence of knowledge of their stolen character).

1913, *Kaufman v. State*, — Tex. Cr. —, 159 S. W. 58 (concealing stolen property; purchase and concealment of other goods of various sorts obtained from sundry owners by the same set of thieves, admitted as showing system).

1909, *State v. Winter*, 83 S. C. 251, 65 S. E. 243 (prior receipt of similar goods, not knowing them to have been stolen, admitted).

[*Note 1 — continued*]

1888, *State v. Jacob*, 30 S. C. 131, 8 S. E. 698 (like *State v. Winter*).  
 1909, *Sapir v. U. S.*, 2d C. C. A., 174 Fed. 219 (receiving stolen property with knowledge; here, pieces of brass; receipt of other pieces of brass, etc., from another person, before and after, admitted).

**§ 331. Embezzlement.**

[*Note 1; add, under Florida:*]

1904, *Eatman v. State*, 48 Fla. 21, 37 So. 576 (embezzlement; prior conversions of other sums collected for the same employer, admitted to show intent).  
 1905, *State v. Carmean*, 126 Ia. 291, 102 N. W. 97 (other transactions, held inadmissible on the facts).  
 1908, *Morse v. Com.*, 129 Ky. 294, 111 S. W. 714 (embezzlement; other embezzlements admitted, with certain too refined distinctions as to the purpose).  
 1914, *Com. v. Dow*, — Mass. —, 105 N. E. 995 (embezzlement from a corporation; transactions with another corporation whose accounts were connected, admitted).  
 1912, *State v. Hall*, 45 Mont. 498, 125 Pac. 639 (embezzlement; other offences of the same nature, admitted).  
 1906, *State v. Newman*, 73 N. J. L. 202, 62 Atl. 1006 (embezzlement of timber; another act of the same sort, excluded; erroneous on the facts).  
 1911, *Carter v. State*, 6 Okl. Cr. 232, 118 Pac. 264 (embezzlement; other similar offences, admissible, if a part of a system, to show that the defendant did take the money).  
 1912, *State v. Downer*, 68 Wash. 672, 123 Pac. 1073 (embezzlement; subsequent similar acts, admitted; prior rulings collected and explained).

**§ 334. Transfers in Fraud of Creditors.**

[*Note 1; add:*]

1905, *Fabian v. Traeger*, 215 Ill. 220, 74 N. E. 131 (sale in fraud of creditors; another sale at the same time, admitted to show the intent).  
 1904, *Kaufman v. Tredway*, 195 U. S. 271, 25 Sup. 33 (preference to a brother under the bankruptcy act; certain transactions six or seven months before, admitted to show knowledge).

**§ 338. Other Fraudulent Transfers.**

[*Note 1; add:*]

1912, *Welch v. Barnett*, 34 Okl. 166, 125 Pac. 472 (fraud and undue influence in persuading an Indian to execute his will in favor of the petitioner, a white man; similar transactions with four other Indians, admitted; sensible opinion by Ames, C.).

**§ 340. False Claims; Fraudulent Insurance.**

[*Note 1; add:*]

1906, *State Life Ins. Co. v. Johnson*, 73 Kan. 567, 85 Pac. 597 (insurance fraud).

**§ 341. Sundry Frauds.**

[*Note 2; add:*]

1904, *Howard v. State*, 72 Ark. 586, 82 S. W. 196 (false warrants by a county clerk; similar warrants to other persons, admitted to show intent).

[*Note 2 — continued*]

1910, *People v. Tomalty*, 14 Cal. App. 224, 111 Pac. 513 (falsification of accounts; other similar offences, admitted).

1913, *State v. O'Neil*, 24 Ida. 582, 135 Pac. 60 (false report by a bank officer; other false reports admitted).

1912, *People v. Marrin*, 205 N. Y. 275, 98 N. E. 474 (notary charged with knowingly making a false certificate of acknowledgment of mortgage by J. C.; to show that J. C. was a myth, or to show knowledge by defendant of the false personation by the acknowledgee, eight other instances were admitted of false certificates by defendant of acknowledgments by different other persons; three judges dissenting).

1913, *Kettenbach*, U. S., 9th C. C. A., 202 Fed. 377 (false entry by bank officer; false reports to the U. S. Comptroller, seven years prior, admitted).

[*Note 3; add:*]

1905, *Yakima V. Bank v. McAllister*, 37 Wash. 566, 79 Pac. 1119 (action on a note; defence, that the signature was made by signing another document under which the defendants had fraudulently placed the note; other similar frauds by the defendants upon other persons, admitted to show a general scheme).

[*Note 4; add:*]

1906, *Packham v. Glendmeyer*, 103 Md. 416, 63 Atl. 1048 (the testatrix left three wills; on an issue of fraud as to one of them, fraud as to another by the same parties was not admitted on the facts).

1909, *Harris v. Delaware L. & W. R. Co.*, 77 N. J. L. 278, 72 Atl. 50 (forfeiture of a personal ticket for knowing misuse; the misuse on other occasions, admitted).

1904, *Balliet v. U. S.*, 129 Fed. 689, 693, 64 C. C. A. 201 (fraudulent use of the mails; sundry reports, etc. of defendant, admitted). 1908, *Jones v. U. S.*, 9th C. C. A., 162 Fed. 417, 427 (conspiracy to obtain land-grants by fraudulent homestead claims; other instances of similar fraudulent claims by defendants in connivance with other persons, admitted).

1910, *Jones v. U. S.*, 9th C. C. A., 179 Fed. 584, 610 (fraudulent acquisition of public lands; similar transactions in another part of the State and by a different method, admitted). 1912, *Marshall v. U. S.*, C. C. A., 197 Fed. 511 (fraudulent use of the mails in connection with a fraudulent society; the defendant's fraud in another like scheme at the same time, excluded, on not very intelligible grounds). 1914, *Lueders v. U. S.*, 9th C. C. A., 210 Fed. 419 (concealment of bankrupt's estate; concealment of other property, admitted).

1905, *Murray v. Moore*, 104 Va. 707, 52 S. E. 381 (conspiracy to defraud; certain letters as to other fraudulent devices, excluded).

## § 342. Perjury.

[*Note 1; add:*]

1908, *Williamson v. U. S.*, 207 U. S. 425, 28 Sup. 163 (conspiracy to suborn perjury in proceeding for the purchase of U. S. public lands; acquisition of State school lands by similar methods, admitted to show motive or intent).

## § 343. Bribery.

[*Note 2; add:*]

1905, *Haynes v. Com.*, 104 Va. 854, 52 S. E. 358 (bribery of an officer while under arrest on a charge of keeping a disorderly house; the defendant's acts of prostitution of little girls in the house, excluded).

1912, *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989 (bribe-taking, to abstain from

[*Note 2 — continued*]

enforcing the law against houses of ill-fame; receipt of bribes as to houses other than the two charged, admitted).

[*Note 3; add.:*]

1906, *Shelburne and Queen's Election Case*, *Cowie v. Fielding*, 37 Can. Sup. 604 (avoidance of election in 1904 for corrupt practices of agents; the agents' corrupt acts at a 1900 election, adopted by the respondent, not admitted to show their agency for him in 1904, or as evidence of system).

1910, *People v. Ruef*, 14 Cal. App. 576, 114 Pac. 54 (bribery of a supervisor; other bribes admitted as a part of the same plan). 1910, *People v. Glass*, 158 Cal. 650, 112 Pac. 281 (bribery of supervisors in San Francisco, operations of the defendant company in Oakland, an adjacent city, excluded, on the ground that the transactions were offered only "to besmirch and degrade the defendant," and not to evidence motive, plan, or the like; as a sample of the unconscious inconsistency of the Court's attitude may be noted its asseveration that "it was not offered to show motive," followed in a few sentences by the assertion that it was offered to show that the defendant "had gone to the borderline of crime in the Oakland transaction and found that stopping there his efforts to prevent competition were without success," and hence "when the same problem arose in San Francisco . . . he became a lawbreaker and a criminal"; obviously, as the Court thus puts it, the failure in the Oakland transaction furnished a reason and motive in the choice of measures to be used in San Francisco; so that, by the Court's own way of putting it, the evidence clearly was admissible; two judges diss. on one or more points; the opinion of the majority exhibits signs of puffing and hard breathing in its labored efforts to state their case for reversal; it is unfortunate that this Supreme Court and others have been so tender on behalf of persons charged with bribery that the inherent difficulties of conviction thus become almost insuperable; this tendency of Courts to construe narrowly the present principle is noticeable throughout the decisions here collected; the spot is a putrid one in the law of evidence).

1904, *State v. Schnettler*, 181 Mo. 173, 79 S. W. 1123 (municipal officer receiving a bribe for a street railway bill; receipt of another bribe for a lighting bill, admitted, as part of a general scheme).

1914, *People v. Duffy*, — N. Y. —, 105 N. E. 839 (bribery by a police sergeant; other collections of money from other persons for the same purpose, admitted).

### § 347. Larceny; Law in Various Jurisdictions.

[*Note 1; add.:*]

1911, *Adamson's Case*, 6 Cr. App. 205 (larceny by trick; similar offence a week later, admitted).

1910, *State v. Effler*, 25 Del. 92, 78 Atl. 411 (larceny by trick; similar tricks with other persons about the same time, admitted). 1913, *Effler v. State*, — Del. —, 85 Atl. 731 (conspiracy to steal by trick; similar trick three months later, done upon another person, excluded; clearly unsound; the opinion misconceives the distinction between intent and identity).

1905, *Ryan v. U. S.*, 26 D. C. App. 74, 83 (larceny of a trunk; possession of a forged letter, held inadmissible).

1902, *Bishop v. State*, 194 Ill. 365, 62 N. E. 785 (larceny of wire; larceny of other similar wire, excluded on the facts).

1905, *Clampitt v. U. S.*, 6 Ind. T. 92, 89 S. W. 666 (larceny; possession of other similar stolen property, admissible).

1905, *Bank of Irwin v. American Exp. Co.*, 127 Ia. 1, 102 N. W. 107 (loss of a package of money; that the bank had suffered recently from thefts of an unknown employee, ex-

[*Note 1 — continued*]

cluded). 1906, *Mier v. Phillips F. Co.*, 130 Ia. 570, 107 N. W. 621 (action for coal mined by the defendant underneath the plaintiff's land by crossing the boundary of the defendant's land; the fact that defendant had also mined under H.'s land adjacent was excluded; the present principles are ignored; *R. v. Bleasdale*, *supra*, not cited). 1905, *Seymour v. Bruske*, 140 Mich. 244, 103 N. W. 613 (conversion of logs; defendant's "general business of converting the logs of other people in this lake," excluded; erroneous). 1906, *State v. Allen*, 34 Mont. 403, 87 Pac. 177 (larceny of horses; other larcenies of horses about the same time, admitted). 1909, *Terr. v. West*, 14 N. Mex. 546, 99 Pac. 343 (larceny of a horse; stealing and selling of other horses, admitted). 1913, *People v. Katz*, 209 N. Y. 311, 103 N. E. 305 (larceny by manipulation of stocks; similar proposal made about the same time, admitted to show intent). 1907, *Chitwood v. U. S.*, 8th C. C. A., 153 Fed. 551 (secreting, and stealing mail contents; defendant's destruction of mail by burning shortly before, admitted to evidence intent). 1913, *State v. Bowen*, — Utah —, 134 Pac. 623 (larceny of a cow from B.; theft of five other cattle and a horse, as shown by the defendant's possession of their hides, without showing that any of them were stolen, held inadmissible; the opinion carelessly fails to make clear whether the other thefts, if duly evidenced, would have been admissible).

#### § 348. Larceny; Sundry Limitations.

[*Text*, p. 428, l. 8, from the top; *omit* the word "radical," and *add* in *Note 1*, at the end:] No doubt it would be fairer to the cause of the defendant to exclude the evidence, if he *does not propose to make any issue* as to intent or inadvertence. But if the State should therefore wait till the defendant's case was put in, so as to find out whether such an issue is to be met by him, the State would then presumably be met by his objection that new matter cannot be first introduced on rebuttal (*post*, § 1873), and would thus be prevented from using the evidence at all. Either, then, (1) the rule for the scope of rebuttal must be liberally construed for the State in such cases; or (2) the accused must be required to announce, before the State closes, whether he will make an issue on the point of Intent (both of which alternatives seem improbable of acceptance); or (3) the rule must stand as stated in the text.

The above qualification was called forth by comments by H. H. Coleman, Esq., of Vicksburg, Miss.

#### § 349. Kidnapping.

[*Note 1; add:*]

1913, *People v. Pettanza*, 207 N. Y. 560, 101 N. E. 428 (kidnapping; kidnapping of another boy, not admitted, on the facts).

#### § 351. Robbery and Burglary.

[*Note 3; add:*]

1905, *State v. Rudolph*, 187 Mo. 67, 85 S. W. 584 (murder during robbery; the deceased's presence under a warrant for the accused for another robbery, admitted).

[*Note 4; add:*]

1904, *State v. Donovan*, 125 Ia. 239, 101 N. W. 122 (burglary; the finding of goods stolen from other parties, admitted).

1913, *State v. Wheeler*, 89 Kan. 160, 130 Pac. 656 (burglary; other burglaries, with which the defendant was not shown to be associated, held improperly admitted).

[*Note 4 — continued*]

1909, *People v. Burke*, 157 Mich. 108, 121 N. W. 282 (blowing up a bank; conviction for a similar crime in 1904 in Indiana, excluded).

1907, *State v. Toohey*, 203 Mo. 674, 102 S. W. 530 (burglary of a sleeping-car; burglary of another car, coupled to the former, at the same time, admitted).

1904, *People v. Loomis*, 178 N. Y. 400, 70 N. E. 919 (confession of another burglary, not admitted on the facts).

1907, *Herndon v. State*, 50 Tex. Cr. 552, 99 S. W. 558 (burglary; possession of goods stolen from another house, excluded on the facts).

### § 352. Extortion and Blackmail.

[*Note 2; add:*]

1907, *Eacock v. State*, 169 Ind., 488, 82 N. E. 1039 (conspiracy to blackmail K.; other conspiracies to blackmail, admitted);

1908, *State v. Routzahn*, 81 Nebr. 133, 115 N. W. 759 (blackmail, by a chief of police, levied on a prostitute; the payment of such sums to the defendants by other prostitutes, held admissible).

### § 354. Arson.

[*Note 6; add:*]

1911, *R. v. Wilson*, 4 Alta. 35 (arson to defraud; proposal to lure a third person, nine months before, to burn a building of the defendant, admitted).

1904, *Mitchell v. State*, 140 Ala. 118, 37 So. 76 (arson of H.'s house; the arson of the house of H.'s brother on the same night, admitted).

1914, *Kahn v. State*, — Ind. —, 105 N. E. 385 (arson; another fire in defendant's premises, five years before, excluded).

1906, *Raymond v. Com.*, 123 Ky. 368, 96 S. W. 515 (arson of the barn of V., landlord of R.; the defendant was subtenant of R., and had been evicted by R. at the instigation of V.; the burning of R.'s barn four weeks before, excluded; flagrantly erroneous, the defendant having threatened to get even with both R. and V.; *Hobson, C. J., diss.*).

1905, *Palatine Ins. Co. v. Santa Fé M. Co.*, 13 N. M. 241, 82 Pac. 363 (fraudulent arson; former burning of the plaintiff's goods after increase of insurance, one year and a half before, excluded).

1914, *People v. Grutz*, — N. Y. —, 105 N. E. 843 (arson to obtain insurance-money; complicity in nine other arsons for the same purpose, not admitted on the facts; three judges diss.).

### § 357. Rape.

[*Note 1; add, under Rape:*]

1912, *R. v. Paul*, Alta. S. C., 5 D. L. R. 347 (rape; similar act done by defendant to the prosecutrix' sister, a few minutes before, excluded).

1905, *Funderburk v. State*, 145 Ala. 661, 39 So. 672 (rape; subsequent intercourse with the woman's consent, on the same evening, not admissible for the State).

1904, *State v. Trusty*, 122 Ia. 82, 97 N. W. 989 (rape; prior intercourse, etc., admitted).

1904, *State v. Carpenter*, 124 id. 5, 98 N. W. 775 (similar).

1906, *State v. Crouch*, 130 Ia. 478, 107 N. W. 173 (rape of an imbecile; defendant's prior lascivious conduct towards the prosecutrix, admitted).

1910, *Smith v. Hendrix*, 149 Ia. 255, 128 N. W. 360 (civil action for rape; former assault on the woman, admitted).

[*Note 1 — continued*]

1904, *State v. Johnson*, 111 La. 935, 36 So. 30 (rape; that the defendants broke and entered another house near by on the same night, admitted, to show proximity and intent).

1904, *State v. Lewis*, 112 La. 872, 36 So. 788 (former rapes and threats of rape upon the same woman, offered to show her state of fear and submission; not expressly ruled upon).

1905, *State v. Hummer*, 72 N. J. L. 328, 62 Atl. 388 (carnal abuse; charges by other girls against the defendant, here admitted merely to explain away the impeachment of the police officer's testimony).

1905, *Harmon v. Terr.*, 15 Okl. 147, 79 Pac. 765 (rape of another woman at the same time, by other men in the defendant's company, admitted).

1914, *State v. Jensen*, — Or. —, 140 Pac. 740 (assault with intent to rape a child; another assault on a different girl at another time and place, excluded).

1909, *State v. Williams*, 36 Utah 273, 103 Pac. 250 (rape under age; the defendant's similar dealing with other little girls, excluded).

[*Note 1; add, under Assault with Intent:*]

1913, *Rodley's Case*, 9 Cr. App. 69, 3 K. B. 468 (burglary with intent to rape; defendant's entry of another house on the same night and having intercourse with a woman, not admitted under the circumstances).

### § 359. Abortion.

[*Note 5; add:*]

1906, *R. v. Bond*, 2 K. B. 389 (abortion; the use of similar instruments upon another woman three months later, to procure a miscarriage, admitted on the facts; two judges dissenting; it is rather odd that neither counsel nor any of the seven judicial opinions, though canvassing the related precedents, cites the above ruling of *R. v. Perry*, which appears to be the only prior one in England on this precise crime).

1912, *Thomson's Case*, 7 Cr. App. 276 (abortion in March, 1912; operation on the same woman for another pregnancy in September, 1911, admitted).

1909, *R. v. Pollard and Tinsley*, 19 Ont. L. R. 96 (performance of an abortion upon another person some weeks before, not admitted, though the defendant acknowledged the act and the only issue was lawful purpose).

1913, *State v. Brown*, — Del. —, 85 Atl. 797 (abortion; another abortion, near the same time, upon another woman, admitted to evidence intent, but not design).

1904, *Sullivan v. State*, 121 Ga. 183, 48 S. E. 949 (prior unsuccessful attempts on the same female, admitted).

1906, *Clark v. People*, 224 Ill. 554, 79 N. E. 941 (murder in attempting abortion; testimony by five or six persons that the defendant during several years preceding had "solicited patronage and held herself out as being able and willing to commit abortion," etc., admitted to show intent). 1908, *People v. Hagenow*, 236 Ill. 514, 86 N. E. 370 (abortion; the defendant's advertisements as a professional abortionist, and her habitual performance of abortions, admitted to show intent and means).

1913, *Avery v. State*, 121 Md. 229, 88 Atl. 148 (abortion; that the accused on the occasion of the woman's first visit had connection with another woman who accompanied her, excluded).

1905, *People v. Hodge*, 141 Mich. 312, 104 N. W. 599 (manslaughter by abortion; performance of a similar operation upon a third person for the purpose of an abortion, admitted).

1912, *State v. Pryor*, 67 Wash. 216, 121 Pac. 56 (abortion; rape and sodomy by the defendant upon the same woman, excluded).

§ 360. *Indecent Exposure, Sodomy, Bigamy, etc.*

[*Note 2; add:*]

1912, *People v. Swift*, 172 Mich. 473, 138 N. W. 662 (sodomy; two prior acts, admitted).  
 1913, *State v. Start*, 65 Or. 178, 132 Pac. 512 (sodomy; other similar acts with other persons at other times, excluded; the majority opinion indulges in some misplaced sentimentality which might have been spared, such as "the law will pursue him with the vindictive zeal of a Javert"; the dissenting opinion, by McBride, C. J.; frankly would admit the evidence to indicate "that he possessed that abnormal moral nature that was equal to committing the act charged"; this would mean a large inroad upon the character rule, and indeed the learned Chief Justice avows that "the necessity for many of these archaic rules has ceased, and they may well be relegated to the scrapheap of unnecessary judicial machinery"; to which we may thankfully agree, with the saving request that a dignified historical museum, not the despised scrapheap, be the place of consignment).  
 1913, *State v. McAllister*, — Or. —, 136 Pac. 354 (crime against nature; commission of the same act with other boys, excluded, following the majority opinion in *State v. Start*; McNary, J., diss., in one able opinion).

[*Note 3; add:*]

1909, *Robinson v. State*, 6 Ga. App. 696, 65 S. E. 792 (bigamy; arrest for beating his first wife eight years before, excluded).

§ 363. *Homicide.*

[*Note 10; add:*]

*Murder by violence*: 1913, *R. v. Gibson*, 28 Ont. L. R. 525, 13 D. L. R. 393 (murder of R. while bargaining for the sale of junk; felonious assault on D., the companion of R., a few minutes later, held admissible). 1913, *Rice v. People*, — Colo. —, 136 Pac. 74 (assault and battery; the defendant's admission, "This has been going on for 7 years," received).  
 1914, *Frank v. State*, — Ga. —, 80 S. E. 1016 (murder of a woman on the deceased's premises; prior lascivious conduct at similar stated periods with women on the premises, held admissible to show motive).  
 1904, *Terr. v. Watanabe*, 16 Haw. 196, 221 (murder; testimony as to the defendant's black-mailing, etc., admitted, presumably to show a general plan).  
 1905, *Brown v. People*, 216 Ill. 418, 74 N. E. 790 (murder of R.; an assault in another room, a few minutes before, on M., excluded; unsound). 1914, *People v. Pfanschmidt*, 262 Ill. 411, 104 N. E. 804 (murder with arson; evidence of plans for a bank robbery having no relation to the murder, excluded).  
 1905, *Shepherd v. Com.*, 119 Ky. 931, 85 S. W. 191 (murder; defendant's admission that "he is the third one I have knocked down," excluded).  
 1909, *State v. Blount*, 124 La. 202, 50 So. 12 (murder; killing of two other persons at the same time, admitted).  
 1905, *Com. v. Snell*, 189 Mass. 12, 75 N. E. 75 (murder of K., who lived with H.; the defendant's plan to murder H., against which K.'s presence was an obstacle, etc., admitted).  
 1909, *People v. Klise*, 156 Mich. 373, 120 N. W. 989 (assault with intent; prior assault on a third person, excluded).  
 1905, *State v. Brown*, 188 Mo. 451, 87 S. W. 519 (murder; assault on a hackman the same evening, excluded; on the facts, the ruling is an extreme example of morbid phantasmagoria). 1905, *State v. Bailey*, 190 Mo. 257, 88 S. W. 733 (murder of a non-union hack-driver; assault and robbery of another such driver just before, admitted).  
 1907, *Clark v. State*, 79 Nebr. 473, 113 N. W. 211 (murder while robbing; other robberies on the same night by the same gang, held admissible).

[*Note 10 — continued*]

1904, *People v. De Garmo*, 179 N. Y. 130, 71 N. E. 736 (manslaughter by beating a child; certain former acts of violence to the same child, not admitted: an over-strict ruling).  
 1908, *People v. Governale*, 193 N. Y. 581, 86 N. E. 554 (murder while being arrested; prior shooting affray leading to the pursuit, admitted on the issue of self-defence).  
 1905, *State v. Adams*, 138 N. C. 688, 50 S. E. 765 (murder of M. B.; the killing of her two children at the same time, admitted). 1910, *State v. Plyler*, 153 N. C. 630, 69 S. E. 269 (murder; prior attempt to assassinate the deceased, admitted).  
 1907, *State v. Hazlet*, 16 N. D. 426, 113 N. W. 374 (murder; sodomy by the defendant, under circumstances not appearing, excluded).  
 1907, *State v. Dickerson*, 77 Oh. 34, 82 N. E. 969 (murder of a woman; arson of her house two weeks before by defendant, not admitted to show intent, and on the facts held not admissible to show motive).  
 1912, *Clemmons v. State*, 8 Okl. Cr. 159, 126 Pac. 704 (assault with intent to kill; the shooting of the same person by the defendant, two years before, excluded).  
 1911, *Williams v. State*, 4 Okl. Cr. 523, 114 Pac. 1114 (murder; a former assault admitted).  
 1909, *State v. La Rose*, 54 Or. 555, 104 Pac. 299 (murder; two similar assaults on other persons within the next two days, admitted on the facts).  
 1906, *State v. Smalls*, 73 S. C. 516, 53 S. E. 976 (murder; defendant's violent conduct to third persons just before, admitted).  
 1904, *State v. Coleman*, 17 S. D. 594, 98 N. W. 175 (murder; certain forgeries admitted as showing motive and plan).  
 1907, *Holder v. State*, 119 Tenn. 178, 104 S. W. 225 (murder of a father by shooting, attempt to poison the whole family, admitted).  
 1912, *Dietz v. State*, 149 Wis. 462, 136 N. W. 166 (murder in resisting arrest; to negative the defendant's assertion that he believed the officers to be private marauders, the defendant's course of conduct in prior years in resisting arrest under similar circumstances was admitted).

Compare the cases cited *ante*, § 106, *post*, § 396.

*Murder by poisoning*: 1904, *Cawthon v. State*, 119 Ga. 395, 46 S. E. 897 (poisoning of T.; after T.'s death, H. died, after drinking T.'s brandy; obscure ruling).  
 1906, *People v. Collins*, 144 Mich. 121, 107 N. W. 1114 (murder of L. by arsenic; death of W. by arsenic, four months before, W. living in the defendant's family, not admitted; no sufficient foundation being shown; Grant and Montgomery, J.J., diss., on the ground that it was admissible to show defendant's possession of arsenic). 1914, *People v. Macgregor*, — Mich. —, 144 N. W. 869 (murder by arsenic poisoning; the defendant was a physician, attending the S. family; the father John W. died in 1908, the sons Peter in July 1910, Albert in May, 1911, and Scyrel in August, 1911; the charge being the death of Scyrel, the death of Albert by arsenic poisoning was admitted).  
 1911, *State v. Hyde*, 234 Mo. 200, 136 S. W. 316 (murder of the father-in-law of defendant, a physician, by poisoning with strychnine and cyanide; killing of other members of the family, co-legatees with the defendant's wife of the deceased's fortune, by various poisons, including disease germs, offered to evidence intent, excluded, on the absurd and unfounded principle that the means of death used in the other instances must be "precisely similar"; the ruling is founded on the unsupported statement of a single treatise; Donellan's Case, *supra*, § 303, sufficiently shows the novelty and impropriety of such a limitation; offered to show motive, the other killings were held to be admissible, but not sufficiently evidenced).  
 1904, *State v. Sargood*, 77 Vt. 80, 58 Atl. 971 (poisoning of B.'s colts; H. having opposed defendant's desires, the attempted poisoning of H. was admitted as part of a plan).  
 1913, *State v. Hazzard*, 75 Wash. 5, 134 Pac. 514 (murder by starvation; the deceased being one of two women who had jointly arranged to put themselves under the defendant's care, the illness of the other woman under the defendant's treatment was admitted).

§ 364. **Assault with Intent.**

[Note 4; add:]

1909, *Com. v. House*, 223 Pa. 487, 72 Atl. 804 (assault on a woman; assault on another woman about the same time, excluded).

1904, *Livingston v. State*, 47 Tex. Cr. 405, 83 S. W. 1111 (assault by a father on his daughter; repeated attempts of the father to have intercourse with her, explaining her refusal to go with him, which led to the assault, excluded; unless the Supreme Court knew of facts not disclosed in the decision, it was a brutally unjust one).

§ 367. **Miscellaneous Offences; Gaming, etc.**

[Note 3; add:]

1908, *First Nat'l Bank v. Miller*, 235 Ill. 135, 85 N. E. 312 (gambling in grain contracts without intent to deliver, as a defence to a note; the payee's similar transactions with other persons, admitted, to show intent). 1912, *People v. Viskniskki*, 255 Ill. 384, 99 N. E. 621 (renting premises for gaming; two former instances of renting to the same party and their use for gaming, admitted).

1904, *State v. Behan*, 113 La. 754, 37 So. 714 (keeping a house for illegal faro-banking; prior similar acts of gaming not more than two weeks before, admitted to show knowledge and intent).

1913, *Dupree v. State*, — Okl. Cr. App. —, 134 Pac. 86 (gambling; former convictions for gambling, excluded).

Compare the cases cited *ante*, § 203, n. 2 (proof of an habitual or continuing offence, *e.g.*, keeping a gaming house).

For reputation to evidence knowledge, see *ante*, § 254.

[Note 4; add:]

1909, *Jaynes v. People*, 44 Colo. 535, 99 Pac. 325 (poisoning a horse; rule stated).

1909, *People v. Minney*, 155 Mich. 534, 119 N. W. 918 (mutilating a horse by cutting off its tongue; other similar offences, excluded).

[Note 5; add:]

1907, *Price v. Clapp*, 199 Term. 425, 105 S. W. 864 (libel in an anonymous letter written to the plaintiff's employer and calling the plaintiff a thief; the defendant and his wife were alleged as the writers, but denied it; admissions of the defendant's wife that she had written other anonymous letters, excluded; clearly unsound; the peculiar custom of writing anonymous letters served to identify the defendant on the issue before the court; post-office inspectors could have enlightened the court on this subject).

[Note 9; add:]

1910, *Lee v. State*, 8 Ga. App. 413, 69 S. E. 310 (prescription of cocaine not in good faith as medicine; defendant's frequent issuance of such prescriptions without inquiry, admitted; enlightened opinion by Powell, J.).

1911, *Stanley v. State*, 9 Ga. App. 141, 70 S. E. 894 (unlawful prescription of cocaine; frequent prescription of cocaine to others, without inquiry, admitted).

1906, *Joseph Taylor Coal Co. v. Dawes*, 220 Ill. 145, 77 N. E. 131 (injury to a mine-workman by an unlawful lowering of the cage at a speed forbidden by statute; the engineer's repeated lowering of the cage at such speed, admitted to show knowledge and wilfulness).

[Note 10; add:]

1912, *State v. Oden*, 130 La. 598, 58 So. 351 (illegal liquor selling; later sale in another parish, excluded).

[*Note 10 — continued*]

1909, *Lockard v. Van Alstyne*, 155 Mich. 507, 120 N. W. 1 (damage by sale of liquor; on the issue whether the intent was to sell for medicine or to sell for beverage, the practice of the defendant to sell for beverage was admitted). 1910, *People v. Giddings*, 159 Mich. 523, 124 N. W. 546 (illegal sale; sales to others, admitted).

[*Note 12; add:*]

1912, *Curry v. State*, 117 Md. 587, 83 Atl. 1030 (illegal sale; prior sales admitted to show intent and to evidence the "place of business" mentioned in the statute).

1903, *State v. Wenzel*, 72 N. H. 396, 56 Atl. 918 (keeping in December, not admitted to prove intent in April, on peculiar facts and theory).

1914, *Taliaferro v. U. S.*, 5th C. C. A., 213 Fed. 25 (illegal sale of liquor; keeping also a bawdy-house held inadmissible; unsound on the facts).

1905, *State v. Costa*, 78 Vt. 198, 62 Atl. 38.

### § 371. Copyright Infringement.

[*Note 1; add:*]

1904, *Encyclopædia Brit. Co. v. American N. Ass'n*, 130 Fed. 460, 464, C. C. A.

### § 376. Habit; Miscellaneous Examples.

[*Note 2; add:*]

1906, *Parrott v. Atlantic & N. C. R. Co.*, 140 N. C. 546, 53 S. E. 432 (to disprove an alleged custom of a conductor in taking tickets, instances of his not doing so were received).

[*Note 3; add:*]

1909, *Gray v. Chicago. R. I. & P. R. Co.*, 143 Ia. 268, 121 N. W. 1097 (deceased's practice of care at a crossing, admitted, but not particular instances).

1903, *Reagan v. Manchester St. R.*, 72 N. H. 298, 56 Atl. 314 (collision; by a motorman, that he had often run at a speed of twenty miles, admitted).

### § 377. Habit in Contracts.

[*Note 1; add:*]

*Contra*: 1905, *Patterson v. First N. Bank*, 73 Nebr. 384, 102 N. W. 765 (certificate of deposit signed by the president of a bank; prior instance of the bank's honoring such a document, excluded, partly because too remote, but partly on the erroneous theory that such evidence must involve an issue of fraud).

*Accord*: 1908, *Hawkins v. Windhorst*, 77 Kan. 674, 96 Pac. 48 (wife's authority to husband to sign checks; former instances admitted).

1910, *Valiquette v. Clark B. C. M. Co.*, 83 Vt. 538, 77 Atl. 869 (authority to draw a draft; the acceptance of three prior drafts, admitted).

[*Note 2; add:*]

*Accord*: 1909, *People v. Zito*, 237 Ill. 434, 86 N. E. 1041 (sales of cocaine; the clerk's authority being in issue, sales before and after the one charged were admitted).

[*Note 4; add:*]

1905, *Galvin v. Beals*, 187 Mass. 250, 72 N. E. 969 ("The fact that a landlord makes other repairs is not evidence that he agreed to keep the premises in repair").

1909, *Fitch v. Martin*, 84 Nebr. 745, 122 N. W. 50 (services rendered as attorney; "con-

[Note 4 — *continued*]

tinued professional services" admitted in discretion to evidence "an annual renewal of the contract").

1905, *Waldner v. Bowdoin S. Bank*, 13 N. D. 604, 102 N. W. 169 (usury; habit of the defendant to charge usurious interest; not decided).

[Note 5; *add.*]

1906, *Taylor v. Schofield*, 191 Mass. 1, 77 N. E. 652 (commission on a patent-sale to C.; defendant's former agreement with P. for a sale, not admitted to show the terms of the present one or the reason for breaking it).

1909, *Provencher v. Moore*, 105 Me. 87, 72 Atl. 880 (horse-boarding; terms of plaintiff's offer to another person, excluded).

1912, *Mance v. Hossington*, 205 N. Y. 33, 98 N. E. 203 (action for services; cross-examination of the defendant about other suits brought against him by his employees for services, held improper).

1912, *Chesterfield Mfg. Co. v. Leota Cotton Mills, C. C. A.*, 194 Fed. 358 (whether the plaintiff's cotton had been properly dyed by the defendant; to show that the trouble was due to the poor quality of cotton and not to the defendant's process, the defendant's evidence that three other mills' cotton had been properly dyed during the same period was excluded; erroneous).

1904, *Coman v. Wunderlich*, 122 Wis. 138, 99 N. W. 612 (goods not equal to sample; similar insufficiency of similar goods sold to another person on the same day, excluded).

1904, *Sullivan v. Manston M. Co.*, 123 Wis. 360, 101 N. W. 679, *semble* (whether grain was bailed or sold; usage admitted).

## § 378. Prescriptive Possession; Surveys, Boundaries.

[Note 2, l. 4 from the end; *add.*]

1907, *Godfrey v. Dixon P. & L. Co.*, 228 Ill. 487, 81 N. E. 1089.

## § 382. Prior or Subsequent Status.

[Note 1; *add.*]

1912, *Potlatch Lumber Co. v. Anderson, C. C. A.*, 199 Fed. 742 (lumber-camp injury; that no rules for protection from falling trees were in force a year before and a year after the injury in question, held properly admitted in the trial Court's discretion).

[Note 3; *add.*]

1909, *Sullivan v. Girson*, 39 Mont. 274, 102 Pac. 320 (possession of a ring pledged).

1910, *Tonopah & G. R. Co. v. Fellanbaum*, 32 Nev. 304, 107 Pac. 883 (land-patent; but erroneously declining to presume earlier from later possession).

[Note 4; *add.*]

1913, *Carey v. Hawaiian Lumber Mills*, 21 Haw. 506 (continuance of original corporators and stockholders, presumed).

1909, *Tate v. Rose*, 35 Utah 229, 99 Pac. 1003 (ownership in 1875, to evidence ownership at time of action begun).

[Note 8; *add.*]

1906, *Winkleman v. White*, 147 Ala. 481, 42 So. 411 (domicile of a non-resident mortgagor, presumed to continue).

§ 389. **Motive; General Principle; Knowledge of Circumstances.**

[Note 2; add:]

1907, *Sasser v. State*, 129 Ga. 541, 59 S. E. 255.

1908, *Bachinski v. Bachinski*, 152 Mich. 693, 116 N. W. 556 (whether a daughter was intentionally omitted from her father's will made when she was 11 years old; her conduct as a prostitute at 18, excluded). 1913, *People v. Auerbach*, — Mich. —, 141 N. W. 869 (murder; insurance on deceased's life for wife's benefit, as a motive for defendant, who might expect to marry her; held inadmissible, for lack of evidence of defendant's prior knowledge).

1912, *Mullins v. Com.*, 113 Va. 787, 75 S. E. 193 (murder).

1909, *Spick v. State*, 140 Wis. 104, 121 N. W. 664 (the knowledge need not be directly evidenced; the trial Court's discretion controls; good opinion by Marshall, J.).

§ 390. **Motives for Murder.**

[Note 1; add:]

1909, *Rollings v. State*, 169 Ala. 82, 49 So. 329 (murder; bad character of defendant's wife, without other evidence, excluded).

1909, *Ware v. State*, 91 Ark. 555, 121 S. W. 927 (murder; defendant's seduction of deceased's daughter, unknown to deceased, excluded).

1904, *People v. Wright*, 144 Cal. 161, 77 Pac. 877 (certain adulterous relations, excluded, following *People v. Gress*). 1905, *People v. Cook*, 148 Cal. 334, 83 Pac. 43 (murder of K. for indecent proposals to defendant's daughter; incestuous relation of defendant and his daughter, admitted; *People v. Gress*, *supra*, discredited on this point).

1905, *Gossett v. State*, 123 Ga. 431, 51 S. E. 394 (murder; the defence being that the killing was done on sight of the deceased seducing the accused's daughter, the prosecution was allowed to prove the daughter's lewd character and the accused's knowledge of it, but not particular acts of her unchastity).

1904, *State v. Levy*, 9 Ida. 483, 75 Pac. 227 (relations with prostitutes).

1910, *People v. McMahon*, 244 Ill. 45, 91 N. E. 104 (murder of defendant's house-servant by poison; the servant being pregnant, by the defendant as alleged, the prosecution's offer to show the plaintiff to be on bad terms with his wife was rejected; quite unsound; no authority whatever cited).

1908, *Lawson v. State*, 171 Ind. 431, 84 N. E. 974 (defendant woman's adultery, on a charge of husband-murder, admitted). 1910, *Porter v. State*, 173 Ind. 694, 91 N. E. 340 (wife-murder; defendant's illicit relations with other women, admitted).

1912, *Meno v. State*, 117 Md. 435, 83 Atl. 759 (abortion by the alleged seducer; the woman's intercourse with a third person as evidencing the latter's paternity, not admitted for defendant).

1910, *Com. v. Howard*, 205 Mass. 128, 91 N. E. 397 (wife-murder; the defendant's recent attempt to persuade his wife to an abortion, admitted with other circumstances to show a desire to get rid of her as a burden; also letters between the defendant and another woman showing an intimacy).

1913, *Miller v. State*, — Okl. Cr. —, 131 Pac. 717 (illicit relations as a motive for murder).

1906, *State v. Martin*, 47 Or. 282, 83 Pac. 849 (killing of the father of a girl M.; that defendant had seduced M., admitted as showing motive). 1909, *State v. Hembree*, 54 Or. 463, 103 Pac. 1008 (wife-murder; incest with the daughter, and the wife's discovery of it, as a motive, allowed).

1906, *State v. Legg*, 59 W. Va. 315, 53 S. E. 545 (wife's murder of husband; the wife's adultery, admitted).

For the principle that the criminality of conduct showing motive is no objection, see *ante*, §§ 216, 305, 363.

[Note 2; add:]

1905, *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018 (deceased's information against defendant for burglary, admitted).

1910, *State v. McKowen*, 126 La. 1075, 53 So. 353.

1904, *State v. Lewis*, 181 Mo. 235, 79 S. W. 671 (that the deceased officer was killed while searching defendant's house to discover money robbed from a bank a month before, admitted).

1906, *State v. Spaugh*, 200 Mo. 571, 98 S. W. 55 (prior assault, as a motive for murdering the sheriff seeking to arrest, admitted).

1906, *Thompson v. U. S.*, 144 Fed. 14, 18, C. C. A. (counterfeiting notes; defendant's admission that he was liable to arrest as an abortionist, admitted as showing a motive for the use of counterfeit money).

[Note 3; add:]

1906, *Hayes v. State*, 126 Ga. 95, 54 S. E. 809 (murder; indictment and judgment against the accused for gaming, the deceased having testified thereon against him, admitted).

1909, *State v. Finch*, 54 Or. 482, 103 Pac. 505 (murder; the deceased's preferment of various charges against the defendant, admitted).

1909, *Spick v. State*, 140 Wis. 104, 121 N. W. 664 (deceased an informer upon a prior crime of defendant).

[Note 5; add:]

1903, *Bess v. Com.*, 116 Ky. 927, 77 S. W. 349 (insurance-money, personalty, and defendant's arson, etc., admitted).

### § 391. Motive for Other Deeds.

[Note 1; add:]

1905, *State v. Koller*, 129 Ia. 111, 105 N. W. 391 (adultery; the defendant's wife's violence, etc., to him, admitted in his favor).

For the principle that the *criminality* of conduct showing motive is no objection, see *ante*, §§ 216, 305, 363.

### § 392. Pecuniary Circumstances as creating a Motive.

[Note 1; add:]

1905, *Security Trust Co. v. Robb*, 142 Fed. 78, 84, C. C. A. (conversely, the defendant's possession of ample means may evidence the plaintiff's lack of good faith in making a demand for security).

[Note 2; add:]

The following seems to belong here: 1911, *Dougherty v. White*, 2 Boyce, 25 Del. 316, 80 Atl. 237 (action for work and labor, amounting to \$900, against a deceased's estate; that the plaintiff, at the time of the supposed credit, borrowed money on notes from the testator, admitted to disprove his claim).

[Note 5; add, under *Accord*.:]

1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127 (*Com. v. Jeffries* approved).

[Note 6; add:]

1905, *Dimmick v. U. S.*, 135 Fed. 257, 70 C. C. A. 141 (larceny by a clerk of the mint; that he was in debt while there, admitted).

[*Note 7; add, under Accord:*]

1871, *Chahoon's Case*, 20 Gratt. 733, 738, 791 (forgery of the signature of H. on a bond; H.'s good pecuniary condition, admitted to negative the probability of his borrowing).  
 1871, *Sands' Case*, ib. 800, 803, 821 (similar).  
 1905, *State v. Moyer*, 58 W. Va. 146, 52 S. E. 30 (embezzlement).

[*Note 9; add:*]

1906, *Green v. Dodge*, 79 Vt. 73, 64 Atl. 499 (market value of a lease, admitted to show the terms agreed on).  
 1909, *Landis & Schick v. Watts*, 84 Nebr. 671, 121 N. W. 980 (value of services, here excluded, because of an account stated; *Root, J., diss.*).  
 1913, *Ffolliott v. Lord*, 76 Wash. 309, 136 Pac. 126 (contract for car rentals; market costs, etc., offered on the present principle, excluded; foregoing cases ignored; three judges diss.).  
 1907, *Anderson v. Arpin H. L. Co.*, 131 Wis. 34, 110 N. W. 788 (services in piling lumber, etc.; good opinion by *Marshall, J.*).

### § 393. Legal Liability as creating a Motive.

[*Note 1; add:*]

1911, *Bock v. Wall*, 207 Mass. 506, 93 N. E. 821 (whether a dam had been maintained at a height for 20 years; a deed of C. covenanting so to maintain it, admitted).  
 1907, *Virginia-Carolina C. Co. v. Knight*, 106 Va. 674, 56 S. E. 725 (defendant's insurance against accidents to employees, not admissible to show that he would be less careful).  
 Compare the cases cited *post*, §§ 949, 969.

### § 396. Hostility in General, at Other Times.

[*Note 3; add:*]

But the details of prior quarrels as showing the hostility of the *deceased*, on a charge of homicide, are not open to the same objection, and may be received on the principle stated in the opinion of *Whitfield, C. J.*, in *Brown v. State, Miss.*, cited *infra*, n. 5.

[*Note 5; add:*]

*Canada*: 1909, *R. v. Law*, 19 Man. 259 (anonymous libel; various acts of malicious mischief done by the accused to the libellee's family, not admitted to show ill-will as making probable the defendant's authorship).  
 1907, *R. v. Sunfield*, 15 Ont. L. R. 252 (murder).

[*Note 5; add:*]

*Alabama*: 1900, *Longmire v. State*, 130 Ala. 66, 30 So. 413 (after the State's improper examination into particulars of a prior difficulty, the defendant was allowed to show all the particulars in rebuttal). 1905, *Kroell v. State*, 139 Ala. 1, 36 So. 1025 (particulars of a former difficulty allowed on re-direct examination for the State, the defendant having gone into them on the cross-examination). 1904, *Gordon v. State*, 140 Ala. 29, 36 So. 1009 (murder; previous difficulties, not admitted for the defendant). 1904, *Plant v. State*, 140 Ala. 52, 37 So. 159 (a difficulty with deceased before the killing, and the defendant's expressions of animus immediately after, admitted). 1904, *Pitts v. State*, 140 Ala. 70, 37 So. 101 (deceased's curses, in a prior difficulty, excluded, under the rule forbidding details). 1905, *Dunn v. State*, 143 Ala. 67, 39 So. 147 (particulars of a prior difficulty, excluded). 1905, *Sanford v. State*, 143 Ala. 78, 39 So. 370 (prior difficulty of deceased with a third person; particulars admitted on the facts to show motive; but the particulars of a prior difficulty between deceased and defendant were excluded). 1906, *Patterson v. State*, — Ala. —, 41 So. 157 (particulars of a prior difficulty, excluded). 1906, *Stallworth v. State*, 146 Ala. 8,

[Note 5 — continued]

41 So. 184 (similar). 1906, *Morris v. State*, ib. 66, 41 So. 274 (murder; expressions of hostility, admitted). 1908, *Robinson v. State*, 155 Ala. 67, 45 So. 916 (after the State shows prior difficulties, the defendant cannot show their details). 1913, *Smith v. State*, — Ala. —, 62 So. 864 (details of prior threats sometimes admissible; later expressions of defendant's hostility, admitted).

*California*: 1905, *Arnold's Estate*, 147 Cal. 583, 82 Pac. 252 (hostility of a legatee charged with undue influence).

*Georgia*: 1906, *Graham v. State*, 125 Ga. 48, 53 S. E. 816 (defendant's hostile language before and after the homicide, admitted). 1906, *Green v. State*, 125 Ga. 742, 54 S. E. 724 (wife-murder; acts of ill treatment to the wife, not too remote, admissible).

*Kansas*: 1893, *State v. Sortor*, 52 Kan. 531, 34 Pac. 1036 (prior quarrels admitted, but not the details).

*Maine*: 1906, *Lenfest v. Robbins*, 101 Me. 176, 63 Atl. 729 (trespass for assault; the defendant allowed to explain that the hostility "was not on his side").

*Mississippi*: 1904, *Schrader v. State*, 84 Miss. 593, 36 So. 385 (murder of C.; a prior quarrel between C. and A., a friend of the defendant, admitted). 1904, *Thompson v. State*, 84 Miss. 758, 36 So. 389 (murder; prior difficulties, etc., excluded on the facts). 1905, *Brown (Tom) v. State*, 85 Miss. 511, 37 So. 957 ("where the State itself introduces the previous difficulty, the defendant should be permitted to show the details and character of such difficulty," — in this case, "in order to show who was the aggressor in the difficulty resulting in the killing"). 1906, *Brown (Tom) v. State*, 88 Miss. 166, 40 So. 737 (same case; held by the majority, per Calhoun, J., that "the nature and character of previous difficulties" is admissible for the accused, even when the State does not first introduce the subject, on the theory of uncommunicated threats, *ante*, § 111; the trial Court is rebuked for not following "the plain statement" in the former opinion; but the truth is that the trial Court did follow it literally, and that the Supreme Court itself is in error in confusing the principle and precedents for uncommunicated threats of the deceased, *ante*, § 111, with the present principle; the opinion of Whitfield, C. J., specially concurring, takes the correct ground, and admits the details of the prior quarrel "so far as essential to show the common motive"). 1905, *Hughes v. State*, — Miss. —, 38 So. 33 (details of a prior quarrel not connected with the present affray, not admitted for the defendant; preceding authorities not cited). 1906, *Brown (Leora) v. State*, 87 Miss. 800, 40 So. 1009 (homicide; another difficulty between the families of the parties thirty minutes before, admitted; following *Brown (Tom) v. State*, *supra*). *Oklahoma*: 1904, *Wells v. Terr.*, 14 Okl. 436, 78 Pac. 124 (former difficulty, admitted to show malice of defendant). 1906, *McHugh v. Terr.*, 17 Okl. 1, 86 Pac. 433 (assault with intent to kill; details of a prior difficulty, admitted for the defendant on the facts).

*Oregon*: 1906, *State v. Martin*, 47 Or. 282, 83 Pac. 849 (killing of the father of a girl M.; prior difficulty with the deceased, over the seduction of M. by defendant, admitted).

*South Carolina*: 1904, *State v. Adams*, 68 S. C. 421, 47 S. E. 676 (prior difficulty admitted, but not the details). 1905, *State v. Thraikill*, 71 S. C. 136, 50 S. E. 551 (details of a quarrel, just preceding, with a third person, admitted for the State).

*Washington*: 1905, *State v. Armstrong*, 37 Wash. 51, 79 Pac. 490 (details of prior quarrels admitted for the State in rebuttal of similar evidence for the accused).

[Text; at the end, add:]

(4) *former assaults* to show Intent (*ante*, § 363); (5) *former hostility of a witness* to show Bias (*post*, § 951).

### § 397. Hostility to Wife or Paramour.

[Note 8; add:]

1905, *Roberts v. State*, 123 Ga. 146, 51 S. E. 374 ("a long course of ill-treatment and cruelty," admitted).

## [Note 8 — continued]

1905, *Campbell v. State*, 123 Ga. 533, 51 S. E. 644 (husband-murder; the wife's prior expressions of ill-feeling, held admissible).

1905, *Parsons v. People*, 218 Ill. 386, 75 N. E. 993 (wife-murder; prior quarrels, disagreements, and expressions of ill-feeling, admitted).

1908, *State v. Moore*, 77 Kan. 736, 95 Pac. 409 (wife-murder; former cruelty and brutality, extending over seven years, excluded, but too strictly).

1912, *State v. Simon*, 131 La. 520, 59 So. 975 (wife-murder, prior violent acts of defendant admitted).

1908, *State v. Page*, 212 Mo. 224, 110 S. W. 1057 (murder; deceased's wife as paramour).

1908, *State v. McNamara*, 212 Mo. 150, 110 S. W. 1067 (wife-murder; lust for another woman).

1911, *State v. Whitsett*, 232 Mo. 511, 134 S. W. 555 (threat two years before, admitted).

1913, *State v. Overton*, — N. J. L. —, 88 Atl. 689 (murder of paramour and child; defendant's expressions eight months before, admitted).

1905, *Miera v. Terr.*, 13 N. M. 192, 81 Pac. 586 (paramour-murder; a threat of three years before, admitted).

For the principle that the *criminality* of conduct showing motive is no objection, see *ante*, §§ 216, 305, 363.

1913, *People v. Harris*, 209 N. Y. 70, 102 N. E. 546 (husband's intimacy with a prostitute, during separation from his wife, not admitted on the facts, on his trial for the killing of the wife).

1912, *State v. Wilkins*, 158 N. C. 603, 73 S. E. 992 (wife-murder; prior quarrels, admitted).

## [Note 8, col. 2, l. 9; change:]

For "*Kennedy v. Hensley*," read "*Bailey v. Bailey*."

## § 398. Sexual Passion at Other Times.

## [Note 1; add:]

*Adultery, Bigamy, Crim. Con., Fornication, Sodomy, Incest:*

*England*: 1910, *Allen's Case*, 4 Cr. App. 181 (incest in Nov. 1909; other incestuous acts between March and November, admitted). 1910, *Ball's Case*, 5 Cr. App. 238 (incest in 1910; incestuous acts in 1907, 1908, and 1909, excluded; "such evidence can only be receivable to show the *mens rea* in the doing of an act": the opinion ignores the distinction between moral character and specific incestuous passion); on appeal to the House of Lords, [1911] 1 K. B. 461, 6 Cr. App. 31, [1911] A. C. 47 (appeal allowed; evidence admitted, L. C. Loreburn pointing out the correct distinction). 1910, *Ball's Case*, 6 Cr. App. 89 (incest in December, 1909; incestuous acts some weeks later, admitted). 1913, *Bloodworth's Case*, 9 Cr. App. 80 (incest in 1912; intercourse in July, 1910, admitted). 1913, *Barrow's case*, 9 Cr. App. 236 (sodomy on July 18; sodomy on June 6 with the same boy, not admitted, because of insufficient evidence of the earlier act).

*Arkansas*: 1906, *Adams v. State*, 78 Ark. 16, 92 S. W. 1123 (incest; prior intercourse, beyond the period of limitations, admitted).

*California*: 1904, *People v. Stratton*, 141 Cal. 604, 75 Pac. 166 (incest; like *People v. Patterson*, *supra*, but the Court's opinion forgets to cite it). 1904, *People v. Koller*, 142 Cal. 621, 76 Pac. 500 (incest; subsequent and prior acts of intercourse or improper familiarity, admissible; "the only case in this State which has been called to our attention" is *People v. Stratton*, *supra*).

1906, *People v. Morris*, 3 Cal. App. 1, 84 Pac. 463 (preceding case followed). 1910, *People v. Harrison*, 14 Cal. App. 545, 112 Pac. 733 (sodomy; a series of former acts between the same parties, admitted).

*Dist. Columbia*: 1906, *Dodge v. Rush*, 28 D. C. App. 149, 156 (crim. con.; prior conduct, admitted).

[*Note 1 — continued*]

*Georgia*: 1906, *Lipham v. State*, 125 Ga. 52, 53 S. E. 817 (incest; prior intercourse in another county and another State, admitted). 1906, *Nobles v. State*, 127 Ga. 212, 56 S. E. 125 (adultery; improper conduct in another county, admitted).

*Illinois*: 1913, *People v. Turner*, 260 Ill. 84, 102 N. E. 1036 (incest; prior acts, covering a period of 4½ years, beyond the statute of limitations, admitted).

*Iowa*: 1906, *State v. Judd*, 132 Ia. 296, 109 N. W. 892 (incest; prior acts admitted). 1909, *State v. Brown*, — Ia. —, 121 N. W. 513 (adultery; adulterous relations up to the time of the indictment, admitted). 1912, *State v. Heft*, 155 Ia. 21, 134 N. W. 950 (incest; prior acts, admissible; subsequent acts, not decided).

*Kentucky*: 1908, *Robards v. Robards*, — Ky. —, 109 S. W. 422 (divorce for adultery; other acts prior and subsequent, admissible).

*Michigan*: 1911, *Merrill v. Leisenring*, 166 Mich. 219, 131 N. W. 538 (alienation of affections; the parties' relations after suit begun, admitted). 1913, *People v. Davis*, 175 Mich. 594, 141 N. W. 667 (adultery; subsequent acts, excluded; ignoring *Matthews v. Detroit Co.*; see the comments below, for *Rape under Age*, on *People v. Brown*, Mich., and *People v. Palmberg*, Mo.).

*Missouri*: 1907, *State v. Pruitt*, 202 Mo. 49, 100 S. W. 431 (incest; prior acts of intercourse and lascivious familiarity, admissible).

*Nebraska*: 1909, *Peterson v. State*, 84 Nebr. 76, 120 N. W. 1110 (incest; former acts here excluded, being offered by hearsay only).

*New Hampshire*: 1909, *Hoxie v. Walker*, 75 N. H. 308, 74 Atl. 183 (alienation of affections of plaintiff's husband; defendant's hostile conduct to the husband two months after suit brought, held not improperly admitted in discretion).

*Ohio*: 1914, *State v. Reineke*, Oh., 106 N. E. 52 (incest; subsequent incestuous acts, admissible; distinguishing *Rason v. State*, unreported, which excluded such evidence in rape).

*Oregon*: 1904, *State v. Eggleston*, 45 Or. 346, 77 Pac. 738 (adultery; intercourse between the parties at other prior times, admitted).

*Texas*: 1904, *Clifton v. State*, 46 Tex. Cr. 18, 79 S. W. 824 (incest; a series of subsequent acts, including some covered by other indictments, excluded; *Burnett v. State*, *supra*, overruled, on the authority of *Smith v. State*, *infra*, *Rape under Age*, and no other of the above cases cited; this opinion merits the censure of the Texas bar; it not only overthrows exact precedents, but in so doing it introduces, upon the scantiest consideration, a heretical and inferior rule, and creates unnecessary difficulties in the proof of this crime). 1905, *Wiggins v. State*, 47 Tex. Cr. 538, 84 S. W. 821 (rape and incest; prior acts of intercourse, excluded; *Clifton v. State* not cited). 1905, *French v. State*, 47 Tex. Cr. 571, 85 S. W. 4 (adultery; rule of *Clifton v. State* applied, but now held to admit acts of intimacy short of criminal intercourse, if not too remote). 1906, *Gillespie v. State*, 49 Tex. Cr. 530, 93 S. W. 556 (*Clifton v. State* followed; here excluding prior acts more than ten years before).

1909, *Barrett v. State*, 55 Tex. Cr. 182, 115 S. W. 1187 (incest; prior and subsequent acts admissible, following *Burnett v. State*).

1909, *Skidmore v. State*, 57 Tex. Cr. 497, 123 S. W. 1129 (incest; prior intercourse excluded; Davidson. P. J., this time again obtaining the upper hand, and declaring that as "*Barrett v. State* was decided upon the authority of *Burnett v. State*," which "had been overruled in *Clifton v. State* and followed in subsequent cases," and that as *Clifton v. State* "is correct," "the Barrett case therefore is overruled"; Ramsey, J., diss.; thus the seesaw goes on, and it would be amusing to await the result, if the seesawing were not harassing to trial judges and a detriment to justice; certainly no such persistency of dissent has been recorded outside of the Federal Supreme Court).

*Utah*: 1912, *State v. Hansen*, — Utah —, 122 Pac. 375 (adultery; subsequent acts inadmissible; *State v. Hilberg*, *infra*, followed).

*Washington*: 1903, *State v. Wood*, 33 Wash. 290, 74 Pac. 380 (incest; other prior acts of intercourse between them, admitted). 1905, *State v. Nelson*, 39 id. 221, 81 Pac. 72 (similar).

[*Note 1 — continued*]

*Seduction, Bastardy, Breach of Marriage-Promise:*

1905, *Walker v. State*, 165 Ind. 94, 74 N. E. 614 (bastardy; the defendant, alleging that B. was the father, was allowed to introduce the relatrix' admissions that she and B. had had intercourse on occasions prior to the time of conception).

1912, *State v. Holter*, 30 S. D. 353, 138 N. W. 953 (seduction; subsequent acts, admitted).

1914, *State v. Tilden*, — Wash. —, 140 Pac. 680 (seduction; prior intercourse admitted).

*Rape* (see the cases collected *ante*, § 357).

*Rape under Statutory Age:*

*England*: 1913, *Shellaker's Case*, 9 Cr. App. 240 (carnal knowledge of a girl under 16, prior to the six months limited by statute, admitted as evidence of an "amatory passion").

1913, *The King v. Shellaker*, [1914] 1 K. B. 414 (carnal knowledge under 16; previous acts of intercourse, admitted; St. 1885, 48-9 Vict., c. 69, § 5, limiting time of prosecution, held not to exclude conduct more than six months earlier).

*California*: 1909, *People v. Soto*, 11 Cal. App. 431, 105 Pac. 420 (other acts before and after, admissible).

*Connecticut*: 1907, *State v. Sebastian*, 81 Conn. 1, 69 Atl. 1054 (rape under age; intercourse three months later, admitted).

*Idaho*: 1904, *State v. Lancaster*, 10 Ida. 410, 78 Pac. 1081 (rape under age; prior acts of intercourse between the parties, admitted). 1911, *State v. Henderson*, 19 Ida. 524, 114 Pac. 30 (statutory rape; other intercourse before and after, admitted).

*Illinois*: 1910, *People v. Everham*, — Ill. —, 93 N. E. 373 (rape of a daughter under age; other acts with the same daughter, *semble*, admissible). 1911, *People v. Gray*, 251 Ill. 431, 96 N. E. 268 (rape under age; other intercourse with prosecutrix, admitted; also postal cards sent by defendant to her). 1912, *People v. Gibson*, 255 Ill. 302, 99 N. E. 599 (rape under age on C.; testimony of other young girls to the defendant's similar acts to them ranging over six months, excluded; also testimony of P. that at the same place and occasion and in the presence of C. defendant did the same act to P.; the latter ruling is absurd; such offences might almost as well be given immunity).

*Iowa*: 1905, *State v. Sheets*, 127 Ia. 73, 102 N. W. 415 (rape under age; assault on other girls in the same place and the same day, admitted). 1910, *State v. Neubauer*, 145 Ia. 337, 124 N. W. 312 (lascivious conduct with a male minor; former similar acts with the same minor, admitted).

*Kansas*: 1904, *State v. Borchert*, 68 Kan. 360, 74 Pac. 1108 (other acts of intercourse between the parties, admitted). 1905, *State v. Oswald*, 72 Kan. 84, 82 Pac. 513 (subsequent intercourse inadmissible). 1906, *State v. Stone*, 74 Kan. 189, 85 Pac. 808 (carnal knowledge under age; subsequent as well as prior acts of intercourse, etc., admitted; *State v. Borchert* approved). 1911, *State v. Brown*, 85 Kan. 418, 116 Pac. 508 (rape under age; subsequent intercourse, admitted).

*Michigan*: 1906, *People v. Brown*, 142 Mich. 622, 106 N. W. 149 (subsequent acts of intercourse, after the statutory age, excluded, approving *People v. Etter*, 81 id. 570, 45 N. W. 1109, and apparently disapproving *People v. Jamieson*, *supra*; no principle is stated, and the opinion entirely ignores the reasoning applicable to the question, and tends to confuse the precedents in this State).

*Minnesota*: 1912, *State v. Schneller*, 120 Minn. 26, 138 N. W. 937 (rape under age; prior acts, admitted; subsequent acts, not decided).

*Mississippi*: 1914, *Collier v. State*, — Miss. —, 64 So. 373 (rape on his own daughter aged 13; subsequent acts of rape during nearly a year, excluded; unsound, being misled by the Texas decisions).

*Missouri*: 1906, *State v. Palmberg*, 199 Mo. 233, 97 S. W. 566 (rape under age; subsequent acts are inadmissible, but prior acts are admissible; it is unfortunate that this Court, upon a careful consideration of the subject, should adopt this illogical and unpractical view, which makes the rule of evidence run counter to human nature; in selecting *People v. Clark*,

## [Note 1 — continued]

Mich., *supra*, as its guide, it took a Court which has been the most inconsistent on this subject and one whose precedents are therefore of small value).

*Nebraska*: 1904, *Blair v. State*, 72 Nebr. 501, 101 N. W. 17 (rape under age; improper familiarities between the two, admitted). 1904, *Woodruff v. State*, 72 Nebr. 815, 101 N. W. 1114 (subsequent intercourse with the prosecutrix, admitted). 1908, *Leedom v. State*, 81 Nebr. 585, 116 N. W. 496 (rape under age; subsequent acts of intercourse, admitted). *New York*: 1914, *People v. Thompson*, — N. Y. —, 106 N. E. 78 (rape under age; subsequent acts of intercourse, held admissible).

*Ohio*: 1906, *State v. Lawrence*, 74 Oh. 38, 77 N. E. 266 (rape under age; the defendant's confessions of other acts of intercourse with the child more than two years later, excluded). 1910, *Boyd v. State*, 81 Ohio 239, 90 N. E. 355 (rape under age; intercourses between defendant and prosecutrix within two months before, admitted).

*Oklahoma*: 1905, *Cecil v. Terr.*, 16 Okl. 197, 82 Pac. 654 (rape under age; prior acts of intercourse, admitted, but not subsequent ones; the Court's assertion that "it is just as well settled that such subsequent acts" are inadmissible is wholly unjustifiable; only Michigan decisions are cited for this, and in that jurisdiction the precedents are confused and inconsistent). 1913, *Morris v. State*, — Okl. Cr. —, 131 Pac. 731 (rape under age; subsequent acts, admitted; overruling *Cecil v. Terr.*, *supra*). 1913, *Allen v. State*, — Okl. Cr. App. —, 134 Pac. 91 (rape on the defendant's daughter aged 15; the prosecution's evidence that the girl had had a child by a negro was held improperly admitted; apparently this evidence was calculated to heighten the prejudice against the accused; moreover, the girl was apparently a degenerate and a maker of false charges). 1914, *Flowers v. State*, — Okl. Cr. —, 138 Pac. 1041 (rape under age; other intercourse during the next three years, admitted).

*So. Carolina*: 1911, *State v. Richey*, 88 S. C. 239, 70 S. E. 729 (rape under age, prior and subsequent acts, admissible).

*So. Dakota*: 1910, *State v. Sysinger*, 25 S. D. 110, 125 N. W. 879 (rape under age; former acts of intercourse, admitted). 1911, *State v. Rash*, 27 S. D. 185, 130 N. W. 91 (other intercourse with the prosecutrix, admitted).

*Tennessee*: 1904, *Sykes v. State*, 112 Tenn. 572, 82 S. W. 185 (rape under age; prior and subsequent intercourse, admitted).

*Texas*: 1904, *Henard v. State*, 46 Tex. Cr. 90, 79 S. W. 810 (rape under age; subsequent intercourse, excluded, following the foregoing cases; but the ruling is unsound on the facts, for the evidence tended to explain away a circumstance discrediting the prosecutrix). 1904, *Henard v. State*, 47 Tex. Cr. 168, 82 S. W. 665 (intimacy short of criminal intercourse is admissible). 1905, *French v. State*, 47 id. 571, 85 S. W. 4 (foregoing rule approved). 1911, *Battles v. State*, 53 Tex. Cr. 202, 109 S. W. 195, 63 Tex. Cr. 147, 140 S. W. 783 (rape under age; prior and subsequent intimacy, admissible; "it should be governed by the facts of each case" whether other acts of intercourse are admissible; prior cases examined, and a number declared to be overruled; Davidson, P. J., diss.).

*Utah*: 1911, *State v. Mattivi*, 39 Utah 334, 117 Pac. 31 (rape under age; subsequent acts of intercourse, inadmissible; McCarty, J., diss. on this point; this would have been a good opportunity to repudiate the unsound precedent of *State v. Hilberg*).

*Vermont*: 1905, *State v. Willett*, 78 Vt. 157, 62 Atl. 48 (rape under age; other acts of intercourse before and since, admitted).

*Washington*: 1903, *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810 (other acts of intercourse between the parties, admitted). 1906, *State v. Marselle*, 43 Wash. 273, 86 Pac. 586 (rape under age; defendant's attempt to seduce another girl, excluded). 1906, *State v. Mobley*, 44 Wash. 549, 87 Pac. 815 (rape under age; other acts of intercourse, admitted).

*Wisconsin*: 1905, *Grabowski v. State*, 126 Wis. 447, 105 N. W. 805 (indecent liberties; prior liberties, admitted). 1910, *Robinson v. State*, 143 Wis. 205, 126 N. W. 750 (rape under age; lascivious approaches to other minor females, admitted, on the facts, to rebut a defence).

For pregnancy, as evidence, see *ante*, § 168, n. 3.

§ 401. **Discriminations as to Seduction, etc.**

[*Note 1; add:*]

1908, *Lauer v. Banning*, 140 Ia. 319, 118 N. W. 446 (seduction is admissible to corroborate the woman's assertion of promise of marriage).

§ 406. **Malice in Defamation; Law in the Various Jurisdictions.**

[*Note 1; add:*]

1904, *Grant v. State*, 141 Ala. 96, 37 So. 420 (prior utterances of a similar tenor, admitted).  
1909, *Cox v. State*, 162 Ala. 66, 50 So. 398 (separate libelous letters, not admitted; foregoing cases not cited; a majority dissenting on this point).

1909, *Butler v. State*, 162 Ala. 71, 50 So. 400 (oral defamation; repetition since the date of indictment, admitted, solely to evidence malice, and not to evidence the uttering of the words charged; foregoing case not considered). 1913, *Webb v. Gray*, — Ala. —, 67 So. 194 (improved plea of truth, admissible, if not made in good faith, etc.).

1909, *Smith v. Singles*, 6 Pen. Del. 544, 72 Atl. 977 (subsequent utterance admitted, even when plea of truth accompanies plea of not guilty).

1909, *Ball v. Evening American Pub. Co.*, 237 Ill. 592, 86 N. E. 1097 (subsequent publication of similar "connected" libels, held admissible; whether admissible if unconnected, not decided, the opinion does not notice the numerous distinctions involved in the precedents of other Courts). 1910, *People v. Strauch*, 247 Ill. 220, 93 N. E. 126 (criminal libel; other libels by defendant; point not decided).

1906, *Smith v. Hubbell*, 142 Mich. 637, 106 N. W. 547 (subsequent similar utterance, admitted).

1906, *Yager v. Bruce*, 116 Mo. App. 473, 93 S. W. 307 (unproved plea of justification may be considered, but only if filed in bad faith).

1912, *Thomas v. Shea*, 90 Nebr. 823, 134 N. W. 933 (prior actionable utterances; not decided).

1911, *Ruskin v. Armn*, 82 N. J. L. 72, 81 Atl. 342 (withdrawn plea of truth may be considered).

1913, *Massee v. Williams*, 6th C. C. A., 207 Fed. 222 (another utterance on the same day, admitted).

1905, *Ott v. Press P. Co.*, 40 Wash. 308, 82 Pac. 403, *semble* (subsequent similar utterances about other persons in the same business, excluded).

1906, *Earley v. Winn*, 129 Wis. 291, 109 N. W. 633 (repetitions admissible). 1909, *Pfister v. Milwaukee F. P. Co.*, 139 Wis. 627, 121 N. W. 938 (an unsuccessful attempt to prove a justification is some evidence of malice, even under Wis. St. 1898, § 4201, similar to Mass. Rev. St. 1836; two judges diss.).

§ 411. **General Principle of Identity-Evidence.**

[*Text*, last line; *add* a new note 1:]

<sup>1</sup> 1906, *Webb v. Ritter*, 60 W. Va. 193, 54 S. E. 484 (the above principle cited, in identifying land by the payment of taxes, etc.).

§ 413. **Circumstances Identifying a Person.**

[*Note 1; add:*]

1908, *Wyatt v. State*, 55 Tex. Cr. 73, 114 S. W. 812 (robbery; another robbery on the same night, admitted).

[*Note 3; add:*]

*Finger-prints:*

1909, *Castleton's Case*, 3 Cr. App. 74.

1911, *People v. Jennings*, 252 Ill. 534, 96 N. E. 1077 (finger-imprints, as interpreted by the scientific system of dactyloscopy, admitted).

[*Note 3 — continued*]

The use of finger-prints is discussed in C. A. Mitchell's "Science and the Criminal" (1911), p. 51.

[*Note 8; add:*]

and *ante*, § 270, n. 4.

[*Note 9; add:*]

1905, *Smith v. State*, 165 Ind. 180, 74 N. E. 983 (the same witness need not testify to all the identifying circumstances; here the witness testified merely that she sold a revolver to a colored man, the defendant being colored).

#### § 414. Identity; Criminality of Act Immaterial.

[*Note 1; add:*]

1907, *State v. Toohey*, 203 Mo. 674, 102 S. W. 530 (burglary). 1910, *State v. Dunwoody*, 231 Mo. 48, 132 S. W. 227 (fraudulent registration; registration elsewhere, admitted to identify).

1908, *Vickers v. U. S.*, 1 Okl. Cr. 452, 98 Pac. 467 (rape; a burglary about the same time, admitted to identify accused).

#### § 416. Utterances used to Identify Time or Place.

[*Note 1; add:*]

1850, *Com. v. Webster*, Mass., Bemis' Rep. 269, 295 (fixing the time of seeing a person, by notes written and received on that day, allowed).

#### § 436. Occurrence of an Event.

[*Text*, p. 512; l. 1 from below; *add* a new note 1a:]

<sup>1a</sup> An example of the simple use of such evidence, offered in the form of an expert's assertion of a physical law, is this:

1909, *Cutts v. Boston Elev. R. Co.*, 202 Mass. 450, 89 N. E. 21 (whether a passenger's fall from a car-platform was caused by the motorman's sudden turning on of the power; the defendant contended that such a jerk would have tended to throw the plaintiff inwards, the plaintiff contended that it might equally throw him outwards).

#### § 437. Existence, from Prior or Subsequent Existence.

[*Text*, p. 514, l. 5 from below; *add* a new note 1a, after "origin":]

<sup>1a</sup> Quoted with approval in *Potlatch Lumber Co. v. Anderson*, C. C. A., 199 Fed. 742 (1912).

[*Note 2; add:*]

1908, *Williams v. Lansing*, 152 Mich. 169, 115 N. W. 961 (sidewalk a week or two afterward, admitted).

1904, *Norton v. Kramer*, 180 Mo. 536, 79 S. W. 699 (sidewalk).

1910, *Herrick v. Holland*, 83 Vt. 502, 77 Atl. 6 (condition of highway holes four days later, when substantially unchanged, admitted).

[*Note 4; add:*]

1906, *Redus v. Milner C. & R. Co.*, 148 Ala. 665, 41 So. 634 (condition of a railway track eighteen months later, excluded).

[*Note 4 — continued*]

1906, *Dean v. Kansas C. St. L. & C. R. Co.*, 199 Mo. 386, 97 S. W. 910 (condition of rails six months admitted; "we may be presumed to know that bad steel rails do not get any better by further use for six months or improve like wine with age").

[*Note 6; add:*]

1913, *Whiting-Middleton C. Co. v. Preston*, 121 Md. 210, 88 Atl. 110 (nature of excavation nineteen months later, admitted, no substantial change of conditions appearing).

[*Note 7; add:*]

1906, *Foley v. Pioneer M. & M. Co.*, 144 Ala. 178, 40 So. 273 (condition of mine ventilation, thirteen hours after an accident, admitted).

1904, *Dronney v. Doherty*, 186 Mass. 205, 71 N. E. 547 (condition of an elevator the next day, admitted, no change having been suggested).

1904, *Meyers v. Highland B. G. M. Co.*, 28 Utah 96, 77 Pac. 347 (position of a plank in a mine, several hours later, allowed).

[*Note 8; add:*]

1909, *Corcoran v. Albuquerque Traction Co.*, 15 N. M. 9, 103 Pac. 645 (car-step's condition seven months before, admitted).

[*Note 9; add:*]

1904, *Griffin v. Martel*, — Conn. —, 58 Atl. 788 (value of a stock of goods sixteen months before, admitted).

1904, *Union Hosiery Co. v. Hodgson*, 72 N. H. 427, 57 Atl. 384 (joint use of steam; to show the amount of coal used, the consumption in the two or three years preceding and the year following, was held not improperly excluded in the trial Court's discretion, for dissimilarity of conditions, etc.).

[*Text*, p. 517, l. 4; *insert:*]

The *presumption of continuity* (*post*, § 2530) is founded on this inference.

### § 438. Existence, from Concurrent Existence.

[*Text*, p. 518; *add* a new note 1a, at the end of par. (b) of the text:]

<sup>1a</sup> 1904, *Chicago & A. R. Co. v. Howell*, 208 Ill. 155, 70 N. E. 15 (size of a freight-car, evidenced by the size of the series to which it belonged).

[*Note 2; add:*]

1909, *Miller v. Mullan*, 17 Ida. 28, 104 Pac. 660 (street-crossing; opinion not clear).

1908, *Williams v. Lansing*, 152 Mich. 169, 115 N. W. 961 (other defects in vicinity of a sidewalk, admitted).

1903, *Kingfisher v. Altizer*, 13 Okl. 121, 74 Pac. 107 (defective bridge; "other defects in the bridge," admitted).

[*Note 4; add:*]

1907, *Lamb v. Philadelphia & R. R. Co.*, 217 Pa. 564, 66 Atl. 762 (condition of other parts of a roof, admitted).

### § 439. Samples as evidence of a Lot.

[*Note 2; add:*]

N. Y. St. 1913, c. 223, p. 392 (amending Consol. L. c. 45, St. 1909, c. 49, by inserting a new § 240a, as to the mode of taking samples for evidence in trials under the public health law).

§ 451. **Material Effects; Miscellaneous Instances.**

[Note 1; add:]

1904, *Attorney-General v. Nottingham*, 1 Ch. 673 (smallpox hospital as a nuisance; experience of other similar hospitals as to the risk of infection, admitted by consent, following *Hill v. Metrop. Asylum District*, *supra*, but Farwell, J., writing the opinion, suggesting that "the admission of such evidence in chief is wrong in principle," on the ground of surprise and confusion of issues).

[Note 2; add:]

1905, *Baltimore B. R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654 (smoke nuisance; the effects produced on other property in the immediate neighborhood, admitted).

[Note 3; add:]

1906, *Central of Ga. R. Co. v. Keyton*, 148 Ala. 675, 41 So. 918 (effect of prior overflows of a sewer admissible to show "the consequences of the overflow under similar circumstances"). 1914, *Hardin v. Cook*, — Ind. —, 105 N. E. 231 (whether a tile-ditch could drain a certain tract; the successful drainage of a similar tract by such a ditch admitted).

1904, *Burnside v. Everett*, 186 Mass. 4, 71 N. E. 82 (overflow of a sewer; an instance of overflow two years before, held not improperly excluded on cross-examination; but the Court cites *Collins v. Dorchester*, *post*, § 458, n. 2, which ought rather to be treated as discredited by later rulings).

[Note 4; add:]

1908, *Black Diamond C. & M. Co. v. Price*, — Ky. —, 108 S. W. 345 (subsequent mine explosions, not admitted; unsound; no authority cited).

1904, *Rowe v. Northport S. & R. Co.*, 35 Wash. 101, 76 Pac. 529 (injury to orchards, etc., by smelting furnaces; effect of the gases on vegetation in the vicinity, under similar conditions, admissible; but experiments before the jury as to the effect of sulphuric acid on different substances were excluded as not involving similar conditions; the partly dissenting opinion of Dunbar, J., is the preferable one).

[Note 5; add:]

1911, *Fountain v. Connecticut F. Ins. Co.*, — Cal. App. —, 117 Pac. 630 (whether a building wall fell before fire began; an earthquake being the alleged cause of the fall, the fall of other buildings in the same block was excluded, the conditions being not shown to be substantially similar). 1911, *Loomis v. Connecticut F. Ins. Co.*, 16 Cal. App. 532, 117 Pac. 642 (similar). 1905, *Castner v. Chicago B. & O. R. Co.*, 126 Ia. 581, 102 N. W. 499 (effect of fire upon land similarly situated, admitted). 1906, *Huggard v. Glucose S. R. Co.*, 132 Ia. 724, 109 N. W. 475 (former effects of wind in blowing objects similarly situated, held properly admitted, but experiments as to vibrations, etc., held properly excluded, in the trial Court's discretion). 1909, *Fishman v. Consumers' Brewing Co.*, 78 N. J. L. 300, 73 Atl. 231 (fire said to have been set by hot ashes in an adjacent stable; the occurrence of a fire at the same place from that cause in 1901, excluded).

[Note 6; add:]

1908, *Johnson v. State*, 55 Fla. 46, 46 So. 155 (experiments before the jury as to mark made by a spur, held not improperly rejected in discretion).

1913, *People v. Auerbach*, — Mich. —, 141 N. W. 869 (experiments as to a gun's discharge, held not improperly excluded in discretion).

1904, *State v. Ronk*, 91 Minn. 419, 98 N. W. 334 (experiments with a gun-target, excluded).

1913, *State v. Bass*, 251 Mo. 107, 157 S. W. 782 (results of observation and experiment as to conditions of powder-shells exploding, excluded, because not made under "similar conditions and circumstances"; the opinion's strict insistence on similarity is too nearly like

[Note 6 — *continued*]

the literal imitateness of the simple-minded Chinese who — in Charles Lamb's essay at least — learned how to make roast pig; in the case in hand, indeed, the defendant's house had been burned down and his wife's body found in the ruins, but with gunshot wounds; two judges diss.).

1911, *Gibbons v. Terr.*, 5 Okl. Cr. 212, 115 Pac. 129 (experiments as to bullet-marks on a door, held improperly admitted on the facts).

1904, *Cheetham v. Union R. Co.*, 26 R. I. 279, 58 Atl. 881 (derailment; experiments under similar conditions, admitted).

1912, *Hughes v. State*, 126 Tenn. 40, 148 S. W. 543 (experiments with pistols to show effects of powder-burn on cloth, allowed).

1913, *Otis Elevator Co. v. Luck*, 9th C. C. A., 202 Fed. 452 (defective hook; another accident with the same hook fifteen months before, admitted).

1908, *Richards v. Com.*, 107 Va. 881, 59 S. E. 1104 (shoe-tracks; substantially similar conditions required).

[Note 7; *add.*]

1904, *Birmingham R. L. & P. Co. v. Bynum*, 139 Ala. 389, 36 So. 736 (defective coupling; a witness allowed to state how often he had known cars with that coupling to break loose).

1904, *Watson v. Bigelow Co.*, 77 Conn. 124, 58 Atl. 741 (defective boiler; lack of complaint by other purchasers of plaintiff's boilers, excluded, for confusion of issues, absence of similar conditions, etc.).

1905, *Gregory v. American Thread Co.*, 187 Mass. 239, 72 N. E. 962 (former defective operation of a machine, excluded in the trial Court's discretion as too remote).

1903, *Saucier v. N. H. Spinning Mills*, 72 N. H. 292, 56 Atl. 545 (experiments with a carding-machine to test its operation, made under similar circumstances, admitted in the trial Court's discretion).

1913, *Curtis & G. Co. v. Pribyl*, — Okl. —, 134 Pac. 71 (injury from the belt of a rip-saw; experiments not admitted on the facts).

1908, *Chicago Gt. Western R. Co. v. McDonough*, 8th C. C. A., 161 Fed. 657, 667 (boiler explosion; four similar explosions of the same boiler within four years before, the conditions being substantially the same, admitted).

[Note 8; *add.*]

1906, *Standard C. Mills v. Cheatham*, 125 Ga. 649, 54 S. E. 650 (condition of other machines on the same floor, with reference to a pulley slipping, admitted).

1911, *Lehmann v. Minneapolis & St. L. R. Co.*, 153 Ia. 118, 133 N. W. 327 (other instances of the operation of handcars, admitted).

1905, *Fountaine v. Wampanoag Mills*, 189 Mass. 498, 75 N. E. 738 (injury by frame-gears; the defective operation of another frame, not shown to be similar, excluded). 1909, *Dulligan v. Barber Asphalt P. Co.*, 201 Mass. 227, 87 N. E. 567 (prior explosion in a tank, admitted).

1905, *Lander v. Sheehan*, 32 Mont. 25, 79 Pac. 406 (action for the price of a stove; plea that it was defective and worthless; worthlessness of a similar stove sold to a third person by plaintiff, excluded; following *Stockton C. H. & A. W. v. Ins. Co., Cal., supra*).

1912, *Guse v. Power & M. M. Co.*, 151 Wis. 400, 138 N. W. 195 (that similar hooks frequently broke or bent, admitted).

## § 454. Sparks as Cause of Fire; Same Locomotive.

[Note 1; *add.*]

1904, *Cheek v. Oak G. L. Co.*, 134 N. C. 225, 46 S. E. 488 (setting of fire by the same engine one year later, excluded, on the ground of confusion of issues).

[*Note 1 — continued*]

1906, *Johnson v. Atlantic C. L. R. Co.*, 140 N. C. 574, 53 S. E. 362 (emissions of fire by the same engine shortly before or after, admissible; but here not the mere fact of a freight car being on fire without any other evidence of the engine causing it).

1907, *Sherrill v. Louisville & N. R. Co.*, 148 Ala. 1, 44 So. 153 (like *Alabama G. S. R. Co. v. Clark*).

#### § 455. Sparks as Cause of Fire; Other Locomotives.

[*Note 8; add.*]

1906, *Birmingham R. L. & P. Co. v. Martin*, 148 Ala. 8, 42 So. 618 (prior emissions by the defendant's engines, admitted).

1908, *Osburn v. Oregon R. & N. Co.*, 15 Ida. 478, 98 Pac. 627 (other fires admitted; whether Pennsylvania rule applies, not decided; *Koontz v. O. R. & N. Co.* not cited). 1912, *Fodey v. Northern Pacific R. Co.*, 21 Ida. 713, 123 Pac. 835 (*Osburn v. R. Co.*, followed; admissible for other engines, even where the particular engine is identified).

1904, *Sprague v. Atchison, T. & S. F. R. Co.*, 70 Kan. 359, 78 Pac. 828 (to show the origin of the fire, where it is disputed, emissions by other engines of the defendant are receivable, whether the engine is identified or not).

1909, *Illinois Central R. Co. v. Hicklin*, 131 Ky. 624, 115 S. W. 752 ("The admissibility of such evidence is no longer an open question"). 1910, *Cincinnati N. O. & T. P. R. Co. v. Sadierville M. Co.*, 137 Ky. 568, 126 S. W. 118 (*Barrow Case* approved and followed). 1912, *Louisville & N. R. Co. v. Guttman*, 148 Ky. 235, 146 S. W. 731 (like *Ill. C. R. Co. v. Hicklin*). 1910, *St. Louis & S. F. R. Co. v. Shannon*, 25 Okl. 754, 108 Pac. 401 (fires set by other engines of the defendant, admitted).

1907, *Hawley v. Sumpter R. Co.*, 49 Or. 509, 90 Pac. 1106 (*Grand Trunk R. Co. v. Richardson* followed; but the mere occurrence of fires, without any connection shown with defendant's engines, is not enough).

1909, *American Ice Co. v. Pennsylvania R. Co.*, 224 Pa. 439, 73 Atl. 873 (emission of sparks at another time is not alone sufficient evidence of cause in the absence of emission at or near the time).

1872, *Burke v. Louisville & N. R. Co.*, 7 Heisk. 451, 456, 464 (emissions of sparks by other engines of defendant, admitted to show "the possibility of the building being fired in the manner alleged"). 1882, *Nashville & C. R. Co. v. Tyne*, 7 Am. & Eng. R. R. Cases, 515 (foregoing case approved). 1904, *Louisville & N. R. Co. v. Fort*, 112 Tenn. 432, 80 S. W. 429 (foregoing cases approved).

1909, *Ide v. Boston & Maine R.*, 83 Vt. 66, 74 Atl. 401 (remoteness of time of other instances is in trial Court's discretion).

#### § 456. Sparks as Evidence of Defective Construction.

[*Note 4; add.*]

1906, *Illinois C. R. Co. v. Bailey*, 222 Ill. 480, 78 N. E. 833 (rule of *First Nat'l Bank v. R. Co.* followed, but citing no authority).

1906, *Cleveland C. C. & St. Louis R. Co. v. Loos*, 38 Ind. App. 1, 77 N. E. 948 (where the engine is identified, fires by other engines are excluded).

1904, *Sprague v. Atchison, T. & S. F. R. Co.*, 70 Kan. 359, 78 Pac. 828 (where the engine is identified, emissions by other engines of the defendant is not admissible to show negligent construction or operation; the Court cites fourteen decisions from other jurisdictions, but pays no attention to the last two in its own records; the Court's logic is also fallacious).

1907, *Chesapeake & O. R. Co. v. Richardson*, — Ky. —, 99 S. W. 642 (spark-emissions by other engines under the same management and similarly equipped, admitted).

1906, *Knott v. Cape Fear & N. R. Co.*, 142 N. C. 238, 98 S. E. 150 (former emissions by the

[*Note 4 — continued*]

same engine, admitted). 1908, *Whitehurst v. Atlantic C. L. R. Co.*, 146 N. C. 588, 60 S. E. 648 (other fire set by the same train the week before, admitted).  
 1904, *Anderson v. Oregon R. Co.*, 45 Or. 211, 77 Pac. 119 (*Koontz v. R. Co.* cited).  
 1905, *Shelly v. Phila. & R. R. Co.*, 211 Pa. 160, 60 Atl. 581 (*Henderson Case* approved).  
 1909, *Byers v. Baltimore & O. R. Co.*, 222 Pa. 547, 72 Atl. 245 (*Henderson v. R. Co.* followed). 1911, *John Hancock Ice Co. v. Perkiomen R. Co.*, 231 Pa. 117, 80 Atl. 63 (other emissions of sparks, admitted where the engine causing the fire was identified).  
 1903, *Louisville & N. R. Co. v. Short*, 110 Tenn. 713, 77 S. W. 936 (fires set nine or ten months before, admitted, but not fires set when the engines were equipped differently; the rule as to identified engines, not passed upon). 1904, *Louisville & N. R. Co. v. Fort*, 112 Tenn. 432, 80 S. W. 429 (other emissions of sparks from other locomotives of the defendant, admitted, "to show habitual negligence"; Pennsylvania rule of identification repudiated).  
 1904, *Norfolk & W. R. Co. v. Briggs*, 103 Va. 105, 48 S. E. 521 (fires set by other unidentified engines, not shown to be of the same construction, excluded).

§ 457. **Corporal Effects and Symptoms.**

[*Note 1; add:*]

1906, *Hisler v. State*, 52 Fla. 30, 42 So. 692 (target-experiments, to show the scattering of shot, admitted).  
 1906, *State v. Nowells*, — Ia. —, 109 N. W. 1016 (experiments as to powder-marks from gunshots, admitted, in discretion). 1910, *Scott v. Homesteaders*, 149 Ia. 541, 129 N. W. 310 (experiments with pistol-shots on hog-flesh admitted).  
 1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127 (experiments as to cutting a body, excluded).  
 1904, *Lillie v. State*, 72 Nebr. 228, 100 N. W. 316 (experiments to show the distance of a pistol, as shown by powder-marks, admitted).  
 1908 *Pollock v. State*, 136 Wis. 136, 116 N. W. 851 (experiments with a pistol, admitted).

[*Note 2; add:*]

1908, *Hales v. Kerr*, 2 K. B. 601 (action against a barber for negligent use of razors, etc. by which he had cut the plaintiff and caused the plaintiff to have barber's itch, about October, 1907; the plaintiff never went to any other barber-shop; the fact that two other persons had acquired the itch at the defendant's shop, held admissible, as showing the uncleanly condition of the razors, etc.).  
 1912, *Boerner Fry Co. v. Mucci*, — Ia. —, 138 N. W. 866 (vanilla ice-cream; experiments as to the jury's tasting it, held not improperly excluded).  
 1912, *State v. Buck*, 88 Kan. 114, 127 Pac. 631 (murder by poisoning; the witnesses having smelled the doses given by defendant to deceased, a substance was mixed and presented to them at the trial for smelling, to testify whether it had the same odor).  
 1909, *Mountford v. Cunard S. S. Co.*, 202 Mass. 345, 88 N. E. 782 (whether the plaintiff had trachoma, a contagious eye-disease; the fact that other persons intimately associating with her did not contract such a disease, held admissible in discretion).  
 1903, *Bair v. Struck*, 29 Mont. 45, 74 Pac. 69 (killing and injuring sheep by dipping into a poisonous mixture for quarantine purposes; defendant's offer to show a similar dipping of other sheep without fatal results, excluded, because not based on similarity of effects).  
 1909, *Young v. Kinney*, 85 Nebr. 131, 122 N. W. 678 (identity of a brand on a horse; other horses bearing the defendant's brand, allowed to be examined to determine its features).

[*Note 3; add:*]

1904, *State v. Good*, 56 W. Va. 215, 49 S. E. 121 (sale of an intoxicating liquor called "Rikk"; the purchase and use of the same drink in similar bottles by other persons about the same time, without intoxicating effect, admitted; citing other rulings).

[*Note 4; add:*]

Compare the citations in § 439, *ante*.

### § 458. Similar Injuries to Other Persons.

[*Note 2; add:*]

1904, *Davis v. Kornman*, 141 Ala. 479, 37 So. 789 (injury at a machine; prior defects of operation, admitted).

1906, *Sheehan v. Hammond*, 2 Cal. App. 371, 84 Pac. 340 (injury at a telephone factory; that no such injury had been received before, excluded, but on the futile and absurd ground that "the owner cannot by way of excuse show that no prior injury had occurred").

1907, *Diamond Rubber Co. v. Harryman*, 41 Colo. 415, 92 Pac. 922 (injury at a sidewalk obstruction; that other persons also had tripped on it, excluded; an old-fashioned decision, citing *Collins v. Dorchester*, et al.).

1905, *Mobile & O. R. Co. v. Vallowe*, 214 Ill. 124, 73 N. E. 416 (injury at a coal chute; absence of injuries at that place for the several years it had been in use, offered to show its safety, excluded, on the ground of multifarious issues; the only "legitimate purpose of such evidence is to show notice," under § 252, *ante*). 1907, *Chicago, R. I. & P. R. Co. v. Rathneau*, 225 Ill. 278, 80 N. E. 119 (freight car injury; that the witness did not know of any prior instance of a "stake being high enough to strike the rail," allowed).

1907, *Chicago v. Jarvis*, 226 Ill. 614, 80 N. E. 1079 (fall at a coal-hole; prior falls of ten or eleven other people, admitted to show "that the common cause of the accidents was a dangerous and unsafe thing").

1909, *Laurie Co. v. McCullough*, 174 Ind. 477, 90 N. E. 1014 (personal injury by slipping on an oiled floor in a store; that no similar accidents had occurred during a number of years of user of such floor-dressing, admitted).

1910, *Laurie Co. v. McCullough*, 174 Ind. 477, 92 N. E. 337 (injury on a floor dressed with oil; that no accidents had occurred elsewhere from the use of such oil under similar circumstances, admitted; *Nave v. Flack* and other cases, distinguished).

1906, *Heinmiller v. Winston Bros.*, 131 Ia. 32, 107 N. W. 1102 (cited *post*, § 461, n. 2; *Hudson v. R. Co.*, *supra*, apparently approved, ignoring the intervening cases).

1904, *Cunningham v. Clay*, 69 Kan. 373, 76 Pac. 907 (*Topeka v. Sherwood* followed; admitting the fright of other teams to show the nature of a highway obstruction).

1904, *Yates v. Covington*, 119 Ky. 228, 83 S. W. 592 (defective sidewalk; frequent instances of falls by other persons at the same place, admitted; following *Dist. Columbia v. Armes*, U. S., etc.).

1904, *Cohen v. Hamblin & Russell Mfg. Co.*, 186 Mass. 544, 71 N. E. 948 (injury to a child at a machine; prior injuries to other children at the same machine, excluded). 1907, *Yore v. Newton*, 194 Mass. 250, 80 N. E. 472 (upsetting of a wagon in a highway; the effect of the highway on other wagons during five years, held not improperly excluded in the trial Court's discretion). 1910, *Walker v. Williamson*, 205 Mass. 514, 91 N. E. 885 (prior fall of a block, held not improperly excluded in discretion). 1913, *Williams v. Winthrop*, 213 Mass. 581, 100 N. E. 1101 (highway defect; *Collins v. Dorchester* followed). 1913, *Williams v. Holbrook*, 216 Mass. 239, 103 N. E. 633 (that other machines had skidded at that place, held admissible in discretion).

1904, *Gregory v. Detroit U. R. Co.*, 138 Mich. 368, 101 N. W. 546 (prior accidents at the same place, excluded; "such testimony is only admissible to show notice and knowledge of the defects," which was here conceded; the above cases prior to *Corcoran v. Detroit* are ignored). 1905, *Vander Velde v. Leroy*, 140 Mich. 359, 103 N. W. 812 (that others had fallen off the same sidewalk, excluded, the conditions having been materially changed). 1906, *Woodworth v. Detroit United R. Co.*, 153 Mich. 106, 116 N. W., 549 (similar prior wagon-accidents at the same place in a highway, admitted; overruling *Gregory v. Detroit U. R. Co.*; admitting the evidence not merely to show notice, but to show the defective condition of the highway).

[*Note 2 — continued*]

1906, *Charlton v. St. Louis & S. F. R. Co.*, 200 Mo. 413, 98 S. W. 529 (proximity of a crane; another person's former experience, admitted).  
 1909, *Fisher v. Boston & M. R. Co.*, 75 N. H. 184, 72 Atl. 212 (injury at a platform; passage of other persons without injury, admitted).  
 1907, *Bobbink v. Erie R. Co.*, 75 N. J. L. 913, 69 Atl. 204 (that other horses had caught their feet in a railroad frog, excluded). 1909, *Alcott v. Public Service Corp.*, 78 N. J. L. 482, 74 Atl. 499 (wagon caught in a track-switch; other incidents of a similar sort at the same place, from 3 to 13 days before, held admissible; Temperance Hall Ass'n distinguished, and impliedly disapproved).  
 1903, *Kingfisher v. Altizer*, 13 Okl. 121, 74 Pac. 107 (injury on a defective bridge; other prior accidents at the same place, admitted to show the "state of repair").  
 1901, *Hansen v. Seattle L. Co.*, 41 Wash. 349, 83 Pac. 102 (prior accidents at the same and similar cog-wheels, admitted). 1903, *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674 (trap-door in a sidewalk; falls of other persons at the same place, admissible to show the condition of the sidewalk; following *Elster v. Seattle and District v. Armes*, U. S., *supra*). 1904, *Franklin v. Engel*, 34 Wash. 480, 76 Pac. 84 (preceding cases followed). 1913, *Armstrong v. Yakima Hotel Co.*, 75 Wash. 477, 135 Pac. 233 (another fall at a step 47 days before, admitted, no change of conditions being shown; but improperly limited to the purpose of showing notice).  
 1905, *Garske v. Ridgeville*, 123 Wis. 503, 102 N. W. 22 (prior instances of safe driving at a highway defect, excluded).

#### § 459. Mental and Moral Effects; General Principle.

[*Note 2; add.:*]

In a few jurisdictions it is settled that the usual conduct of other persons is of itself a legal standard of care; *e.g.*: 1905, *Boop v. Laurelton L. Co.*, 212 Pa. 523, 61 Atl. 1021.

#### § 460. Measures of Time, Space, Light, etc.

[*Note 1; add.:*]

1905, *Spires v. State*, 50 Fla. 121, 39 So. 181 (whether a person could be recognized by the flash of a gun; an experiment for that purpose in the jury-room, held not improperly refused in the trial Court's discretion, chiefly because similarity of conditions was not shown).  
 1904, *Hauser v. People*, 210 Ill. 253, 71 N. E. 416 (burglary; whether the accused could be identified as testified to, allowed to be shown by tests of visibility made under the same conditions).  
 1905, *Chicago & E. I. R. Co. v. Crose*, 214 Ill. 602, 73 N. E. 865 (experiment as to seeing a railroad track, excluded, because the conditions were dissimilar).  
 1907, *Baker v. Harrington*, 196 Mass. 339, 82 N. E. 33 (fall on a hall-stairway; experiments and observations under conditions substantially the same, to test the light, held not improperly admitted in the trial Court's discretion).  
 1908, *Harrison v. Southern R. Co.*, 93 Miss. 40, 46 So. 408 (experiments as to distance at which a trespasser could be seen on the track, allowed).  
 1904, *Healey v. Bartlett*, 73 N. H. 110, 59 Atl. 617 (whether a testator was in such a position that he could see the attesting witnesses; experiments allowed in the trial Court's discretion).

[*Note 3; add.:*]

1909, *Johnson v. Chicago, R. I. & P. R. Co.*, 80 Kan. 456, 103 Pac. 90 (railway-crossing injury; experiments made under similar conditions to determine whether train noise would be deadened by adjacent land formation, etc., held admissible).

[Note 3 — continued]

1906, *Dow v. Bulfinch*, 192 Mass. 281, 78 N. E. 416 (experiments to show whether conversation could be distinguished in an adjacent room, held not improperly excluded in discretion).

[Note 8; add:]

1905, *State v. Donovan*, 128 Ia. 44, 102 N. W. 791 (seduction under hypnotism; defendant's power evidenced by other instances).

1906, *Tackman v. Brotherhood*, 132 Ia. 64, 106 N. W. 350 (suicide by hanging with a bridle; experiments with other persons under similar conditions, admitted to show the probability of accidental death).

1910, *State v. McKowen*, 126 La. 1075, 53 So. 353 (experiment as to the possibility of carrying a corpse in a wagon, allowed).

1904, *Zimmer v. Fox R. V. E. R. Co.*, 123 Wis. 643, 101 N. W. 1099 (experiments as to riding on a car, held allowable in the trial Court's determination as to similarity).

### § 461. Measure of Negligence, Danger, Insufficiency, etc.

[Note 1; add:]

It is sometimes said that a *statute* or *municipal ordinance* forbidding or enjoining certain conduct is *evidence* of negligence, on the question whether the doing or not doing of that kind of act was negligent; e.g.: 1904, *Frontier Steam Laundry Co. v. Connolly*, 72 Nebr. 767, 101 N. W. 995 (ordinance requiring fire-shutters).

1905, *Finnegan v. S. W. S. Mfg. Co.*, 189 Mass. 580, 76 N. E. 192.

Now it is true that such an ordinance might be used evidentially, on the same theory as the numerous instances cited *post*, because it is virtually a custom or usage having orthodox status. But in many of such opinions the Court has rather in mind the operation of the ordinance in substantive law, fixing a standard of negligence *per se*, on the theory explained in all treatises on Torts, and by the present writer in an article in the *Harvard Law Review* (VIII, 389). It seems unwise, therefore, to give any secondary status to such an ordinance, as evidence of negligence, whenever it is not to have the substantive status of a rule of negligence *per se*. No doubt some Courts, in referring to it as evidence, are virtually thinking of it as a rule of substantive law. Compare § 283, n. 8, and § 459, n. 2, *ante*.

The *regulations of a railroad* or *similar company* may have a bearing in cases like the present; but they are then virtually *admissions* by the company that certain conduct is or is not negligent (*ante*, §§ 282, 283, n. 8).

[Note 2; add:]

1906, *Heinmiller v. Winston Bros.*, 131 Ia. 32, 107 N. W. 1102 (horses frightened by a steam shovel; fright of two other horses on the same day at the same place, admitted). 1913, *Schmidt v. Dubuque Co.*, 136 Ia. 401, 113 N. W. 820 (fright of other horses at the same bridge, admitted).

1904, *Powell v. Nevada C. & O. R. Co.*, 28 Nev. 40, 78 Pac. 978 (fright of a horse at a whistle; fright of another horse at the same whistle, admitted).

1909, *Wilkie v. Chehalis Co. L. & T. Co.*, 55 Wash. 324, 104 Pac. 616 (one instance of another horse being frightened at fresh meat, excluded, apparently on the principle of § 41, *ante*; the present line of authorities not considered).

[Note 3; add:]

1904, *Mullin v. Boston Elev. R. Co.*, 185 Mass. 522, 70 N. E. 1021 (injury received, while a passenger, during a collision of cars; that no other passengers received any injury, admitted to show the force of the collision, etc.).

Distinguish the following: 1905, *Foss v. Portsmouth D. & Y. R. Co.*, 73 N. H. 246, 60 Atl. 747 (collision; that no other passenger had made complaint or claim, excluded).

[*Note 4; add:*]

1910, *Grand Trunk Western R. Co. v. Poole*, 175 Ind. 567, 93 N. E. 26 (contributory negligence in going in front of cars to make couplings; custom in defendant's yards to do so, admitted).

1906, *Wallace v. Seaboard A. L. R. Co.*, 141 N. C. 646, 54 S. E. 399 (custom as to coupling cars, adopted by the master carbuilders' association, admitted).

[*Note 5, p. 569; add:*]

1903, *Northern Ala. R. Co. v. Mansell*, 138 Ala. 548, 36 So. 459 (death at a stock-gap; the usage on other well-regulated roads, admitted, but not taken as a standard). 1909, *Birmingham R. L. & P. Co. v. Morris*, 163 Ala. 190, 50 So. 198 (rule and custom of a street railroad as to mode of stopping cars, admitted; approving the above distinction).

1906, *Denver & R. G. R. Co. v. Burchard*, 35 Colo. 539, 86 Pac. 749 (experience of other railroads as to the location of mail cranes, admitted).

1904, *Orient Ins. Co. v. Northern P. R. Co.*, 31 Mont. 502, 78 Pac. 1036 (relative quantity of spark-emissions of other engines, admitted).

1905, *Pittsburgh S. & N. R. Co. v. Lamphere*, 137 Fed. 20, 69 C. C. A. 542 (custom as to telltales on low bridges, admitted).

1906, *Southern R. Co. v. Blanford's Adm'x*, 105 Va. 373, 54 S. E. 1 (custom of other railroads in Virginia, and other parts of defendant's railroad, as to switchlights, admitted).

1912, *Egelston v. New York C. & St. L. R. Co.*, 205 N. Y. 579, 98 N. E. 748 (regulations of other railroads as to shunting, admitted).

[*Note 5, p. 571; change the note-number to 5a, and add:*]

1904, *Davis v. Kornman*, 141 Ala. 479, 37 So. 789 (injury at a machine; correct rule laid down).

1905, *Hazard P. Co. v. Somersville M. Co.*, 78 Conn. 171, 61 Atl. 519 (time of running of mills, on an issue as to unreasonable diversion of water; custom of other mills, admitted).

1905, *Clements v. Potomac E. P. Co.*, 26 D. C. App. 482, 495 (custom as to uninsulated wires, excluded because here an express municipal prohibition applied).

1904, *Illinois C. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435 (boiler-explosion; the custom of other companies as to inspection must be that of "well regulated and prudently managed" ones).

1905, *Hansell-Elcock F. Co. v. Clark*, 214 Ill. 399, 73 N. E. 787 (iron column causing injury; the Court ignore the distinction between admitting evidence and fixing a standard of care; "usual and customary manner" of construction, said to be inadmissible). 1905, *Siegel, Cooper & Co. v. Trcka*, 218 Ill. 559, 75 N. E. 1053 (usual manner of constructing elevator doors, excluded). 1908, *Franey v. Union Stockyard & T. Co.*, 235 Ill. 522, 85 N. E. 750 (injury in climbing over a fence between stock-pens; custom of others admitted as evidence of the degree of care required).

1908, *Knickerbocker Ice Co. v. Gray*, 171 Ind. 395, 84 N. E. 341 (oil pans and drains; custom "in most places," admitted). 1909, *Laurie Co. v. McCullough*, 174 Ind. 477, 90 N. E. 1014 (personal injury by slipping on an oiled floor in a store; the custom of using such floor-dressing in other stores in the same city, admitted; leading case).

1906, *Wilder v. Gt. Western C. Co.*, 134 Ia. 451, 109 N. W. 789 (usual method of fastening pile-drivers, admitted).

1905, *Mahan v. Daggett*, — Ky. —, 84 S. W. 525 (nuisance; manner of disposing of sawdust in other mills, admitted). 1906, *Louisville B. & I. Co. v. Hart*, — Ky. —, 92 S. W. 951 (custom in rolling-mills, admitted; good opinion, by O'Rear, J.).

1909, *Consolidated G. E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651 (electric linemen's practice).

1904, *Dolan v. Boott Cotton Mills*, 185 Mass. 576, 70 N. E. 1025 (uncovered machine-gearing; the condition of such gearing in other mills, held admissible, in the trial Court's discretion; distinguishing the rulings as to actions against towns for defective highways).

## [Note 5 — continued]

- 1909, *Anderson v. Pitt I. M. Co.*, 108 Minn. 261, 121 N. W. 915 (custom as to timbering mines, admitted).
- 1904, *Anderson v. Fielding*, 92 Minn. 42, 99 N. W. 357 (custom to use a certain tool, admitted, but not as conclusive).
- 1904, *Dell v. McGrath*, 92 Minn. 187, 99 N. W. 629 (customary number of men in skidding, admitted).
- 1903, *Saucier v. N. H. Spinning Mills*, 72 N. H. 292, 56 Atl. 545 (equipment of other machines not shown to be in common use, excluded, but equipment in general use, admitted).
- 1904, *Jenks v. Thompson*, 179 N. Y. 20, 71 N. E. 266 (injury on a scaffold; general custom as to building scaffolds, admitted).
- 1906, *Jones v. Reynolds T. Co.*, 141 N. C. 202, 53 S. E. 849 (general custom as to protecting a machine, admitted).
- 1909, *McGeehan v. Hughes*, 223 Pa. 524, 72 Atl. 856 (bucket).
- 1908, *Chicago Gt. Western R. Co. v. McDonough*, 8th C. C. A., 161 Fed. 657, 665 (boiler explosion; custom of other boiler owners as to annual inspection, admitted; careful opinion by Van Devanter, J.). 1913, *Stone & Webster E. Co. v. Melovich*, 9th C. C. A., 202 Fed. 438 (custom to guard cogwheels, admitted).
- 1904, *Pence v. California M. Co.*, 27 Utah 378, 75 Pac. 934 (custom as to using inexperienced miners, admitted).
- 1904, *Parlett v. Dunn*, 102 Va. 459, 46 S. E. 467 (usual method of putting up a derrick, allowed).
- 1904, *Richmond & P. E. R. Co. v. Rubin*, 102 Va. 809, 47 S. E. 834 (guard wires on telephone lines). 1906, *Norfolk & W. R. Co. v. Bell*, 104 Va. 836, 52 S. E. 700 (water-gauge; making a peculiar distinction against testimony that other appliances are safer).
- 1904, *Crooker v. Pacific L. & M. Co.*, 34 Wash. 191, 75 Pac. 632 (custom as to guarding rip-saws, admitted). 1905, *Dossett v. St. Paul & T. L. Co.*, 40 Wash. 276, 82 Pac. 273 (customs in other mills as to sawyers' duties, admitted). 1909, *Smith v. Hewitt-Lea L. Co.*, 55 Wash. 357, 104 Pac. 651 (machinery; the precise decision is here difficult to discover).
- 1905, *Rylander v. Laursen*, 124 Wis. 2, 102 N. W. 341 (spark-arrester of a mill; distinguishing between the evidence and the standard of care). 1908, *Hamann v. Milwaukee Bridge Co.*, 136 Wis. 39, 116 N. W. 854 (custom elsewhere as to safeguards for a machine, admitted).

## [Note 6; add:]

- 1904, *Norris v. Cudahy P. Co.*, 124 Ia. 748, 100 N. W. 853 (conduct of other people at a highway trench, admitted). 1904, *Kein v. Ft. Dodge*, 126 Ia. 27, 101 N. W. 443 (highway injury; that the mode of construction was similar to that in general use in the city, admitted, but only to show the plaintiff's knowledge).
- 1906, *Moynihan v. Holyoke*, 193 Mass. 26, 78 N. E. 742 (slippery cellar-lights in a sidewalk; usual use of similar lights in other sidewalks, held admissible or not in the trial Court's determination; good opinion by Knowlton, C. J.). 1906, *Erickson v. American S. & W. Co.*, 193 Mass. 119, 78 N. E. 761 (boiler-tests; similar ruling).
- 1904, *Comstock v. Georgetown*, 137 Mich. 541, 100 N. W. 788 (custom as to the load taken upon a bridge, admitted in an action for an injury to the driver of a traction engine).
- 1904, *Chaffin v. Fries M. & P. Co.*, 135 N. C. 95, 47 S. E. 226 (overflow by a dam; certain similar effects excluded and others admitted).
- 1903, *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674 (protected condition of other sidewalks in the same city, admitted, partly on the present ground and partly as negating contributory negligence).

## [Note 7; add:]

- 1905, *Pauksztis v. Raeder B. L. & P. Co.*, 212 Pa. 403, 61 Atl. 901 (customer's books burned at a book-binder's; the usage of book-binders to insure customers' books, admitted).

[*Note 8; add:*]

1907, *Long v. Athol*, 196 Mass. 497, 82 N. E. 665 (rescission for mutual mistake, the plaintiff being the accepted bidder on a contract based on erroneous engineer's estimates; that other bidders also relied on the estimate, held admissible on the issue of the plaintiff's negligence).

[*Note 12, col. 1, l. 2 from below; add:*]

how the case of *R. v. Hone* influenced this result is interestingly told in J. Routledge's "Chapters in the History of Popular Progress, chiefly in Relation to the Freedom of the Press and Trial by Jury," p. 433 (1876).

§ 462. **Business Patronage.** •

1907, *Hutchinson L. Co. v. Dickerson*, 127 Ga. 328, 56 S. E. 491 (that similar lumber sold to other sawmills was sound, not admitted).

1913, *Noyes v. Meharry*, 213 Mass. 598, 100 N. E. 1090 (false representations as to patronage-value of a theater; the falling off in receipts immediately after the purchase, admitted).

Compare the cases cited *ante*, § 377; there the question involves the variability of human conduct in forming contracts; here, the uniformity of quality of some inanimate substance; and in the present class of cases the doubt arises to the extent that the variability of human conduct in the performance of similar contracts is involved.

§ 463. **Value, from Sales of Similar Property.**

[*Note 1; at the end, add:*]

Whether an *offer* to purchase or sell, as distinguished from an actual sale, is admissible, is a question of the standard of value:

1906, *Yellowstone P. R. Co. v. Bridger C. Co.*, 34 Mont. 545, 87 Pac. 963 (collecting cases).

Whether business *profits* in one year may be evidenced by profits in another year:

1913, *Nelson Theater Co. v. Nelson*, — Mass. —, 102 N. E. 926 (value of a leasehold to an evicted theater operator; receipts and profits in prior years, held admissible).

[*Note 2; add:*]

1913, *Flemister v. Central Ga. P. Co.*, 140 Ga. 511, 79 S. E. 148 (similar sales, admissible; here excluded because of the form of the question).

1904, *Tennessee C. I. & R. Co. v. State*, 141 Ala. 103, 37 So. 433 (sales of other similar coal lands, received).

1904, *Comstock v. Conn. R. & L. Co.*, 77 Conn. 65, 58 Atl. 465 (corporal injury to a keeper of a boarding-house; profits before and after the injury, admitted).

1891, *O'Hare v. Chicago M. & N. R. Co.*, 139 Ill. 151, 157, 28 N. E. 923 ("voluntary sales of other lands, in the vicinity and similarly situated as affecting their value," are admissible; but here a mere deed reciting consideration was excluded). 1903, *Spohr v. Chicago*, 206 Ill. 441, 69 N. E. 515 (allowable on cross-examination). 1904, *Illinois I. & M. R. Co. v. Humiston*, 208 Ill. 100, 69 N. E. 880 (eminent domain; price paid for other lands, excluded).

1904, *Dady v. Condit*, 209 Ill. 488, 70 N. E. 1088 (breach of contract to sell land; sales of similar lands in the vicinity, admitted to show "the actual cash value of the land in controversy at a certain time"; prior rulings not noticed, except *St. Louis, V. & T. H. R. Co. v. Haller*). 1904, *Springer v. Borden*, 210 Ill. 518, 71 N. E. 345 (appraisal of valuation of lease; rental values in the vicinity, held not admissible; no authority cited). 1906, *Chicago & S. L. R. Co. v. Kline*, 220 Ill. 334, 77 N. E. 229 ("voluntary sales of other lands in the vicinity similarly situated" in locality and character, admissible). 1906, *Chicago & S. L. R. Co. v. Mines*, 221 Ill. 448, 77 N. E. 898 (sales of property not similar, excluded).

## [Note 2 — continued]

1907, *Chicago & A. R. Co. v. Scott*, 225 Ill. 352, 80 N. E. 404 (eminent domain; the amounts paid by this and other railroads for land in the vicinity, excluded). 1909, *West Skokie Drainage District v. Dawson*, 243 Ill. 175, 90 N. E. 377 (Peoria Gaslight Co. v. P. T. R. Co., followed). 1910, *Aledo Terminal R. Co. v. Butler*, 246 Ill. 406, 92 N. E. 909 (voluntary sales of similar lands, admitted, the trial Court to determine whether they are similar). 1913, *Smith v. Sanitary District*, 260 Ill. 453, 103 N. E. 254 (sales of similar property, admitted).

1912, *Cleveland C. C. & St. Louis R. Co. v. Smith*, 177 Ind. 524, 97 N. E. 164 (eminent domain; other purchases for the same right of way, excluded, on mixed grounds, citing no Indiana cases; loosely worded).

1905, *Simons v. Mason C. & F. D. R. Co.*, 128 Ia. 139, 103 N. W. 129 (eminent domain; price paid by the railway company for other rights of way, not similarly situated, excluded; but the ruling seems to apply to all prices paid under eminent domain).

1910, *Baltimore, City of, v. Hurlock*, 113 Md. 674, 78 Atl. 558 (sales etc. of property in the neighborhood, admitted, as the basis of the expert witness' testimony to value).

1904, *Chicago, St. L. & N. O. Co. v. Rottgering*, — Ky. —, 83 S. W. 584 (similar).

1912, *Fourth National Bank v. Commonwealth*, 212 Mass. 66, 98 N. E. 686 (dissimilarity not shown on the facts).

1909, *Rourke v. Holmes, St. R. Co.*, 221 Mo. 46, 119 S. W. 1094 (*Jamieson v. R. Co.*, N. Y., followed; foregoing cases ignored).

1904, *Union P. R. Co. v. Stanwood*, 71 Nebr. 150, 91 N. W. 191, 98 id. 656 (particular sales, excluded, except on cross-examination).

1906, *Hadley v. Board*, 73 N. J. L. 197, 62 Atl. 1132 (*Laing v. R. Co.* followed). 1908, *Brown v. New Jersey S. L. R. Co.*, 76 N. J. L. 795, 71 Atl. 271 (admissible in discretion).

1912, *Manda v. Orange*, 82 N. J. L. 686, 82 Atl. 869 (like *Laing v. R. Co.*).

1906, *Hindley v. Manhattan R. Co.*, 185 N. Y. 335, 78 N. E. 276 (damage by eminent domain, the defendant pleading prescription; the defendant's settlements with two hundred other abutters, excluded; following *Jamieson v. R. Co.*). 1907, *Shaw v. N. Y. Elev. R. Co.*, 187 N. Y. 186, 79 N. E. 984 (value of adjacent premises, admitted on the facts; three judges diss.).

1906, *Vidger Co. v. Great Northern R. Co.*, 15 N. D. 501, 107 N. W. 1083 (apples; not decided).

1906, *Gorgas v. Philadelphia H. & P. R. Co.*, 215 Pa. 501, 64 Atl. 680 (eminent domain; "a witness may qualify himself . . . by showing that he has a knowledge of sales in the community, . . . but he cannot be interrogated in chief as to the money values of similar properties"; on cross-examination he may be asked "his knowledge of particular sales and the prices asked"). 1906, *Davis v. Pennsylvania R. Co.*, 215 Pa. 581, 64 Atl. 774 (a witness to land-value may be cross-examined on *voire dire* to test his qualifications, by asking him as to values; compare § 654, *post*). 1907, *Schonhardt v. Pennsylvania R. Co.*, 216 Pa. 224, 65 Atl. 543 (cross-examination to other sales, not allowed where its object was "to have his testimony go to the jury on the question of value"). 1908, *Neely v. Western Allegheny R. Co.*, 219 Pa. 349, 68 Atl. 829 (cross-examination allowed to particular sales, but not to particular values; the rule of this State, being unsound to start with, is now leading to tweedle-dum and tweedle-dee distinctions). 1910, *Rea v. Pittsburg & C. R. Co.*, 229 Pa. 106, 78 Atl. 73 (cross-examination to a former sale of the same property, allowed).

1905, *Kean v. Landrum*, 72 S. C. 556, 52 S. E. 421 (value of timber on adjoining land, admitted).

1905, *Union R. Co. v. Hunton*, 114 Tenn. 609, 88 S. W. 182 (eminent domain; sales in the neighborhood, admitted).

1912, *Telluride Power Co. v. Bruneau*, — Utah —, 125 Pac. 399 (not decided).

1909, *American States S. Co. v. Milwaukee N. R. Co.*, 139 Wis. 199, 120 N. W. 844 (sales of similar land, admissible).

§ 478. *Analysis of Elements of a Testimonial Assertion.*

[*Note 1; add.:*]

1906, Train, *The Prisoner at the Bar*, 224 ("The probative value of all honestly given testimony depends, naturally, first, upon the witness' original capacity to observe; second, upon the extent to which his memory may have played him false; and third, upon how far he really means exactly what he says. . . . The authoritativeness of everything these witnesses have to say must lie in their ability to see, remember, and describe accurately what they have seen").

§ 488. *Statutes Affecting Testimonial Qualifications.*

[*Notes 1; add.:*]

ENGLAND: 1898, St. 61-2 Vict. c. 36, *Criminal Evidence Act*: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:—

"(a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application;

"(b) The failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution;

"(c) The wife or husband of the person so charged shall not, save as in this Act mentioned, be called as a witness in pursuance of this Act except upon the application of the person so charged;

"(d) Nothing in this Act shall make a husband compellable to disclose any communication made by him to his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage;

"(e) A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged;

"(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

"(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

"(ii) he has personally or by his advocate asked questions of the witnesses or the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

"(iii) he has given evidence against any other person charged with the same offence:

"(g) Every person called as a witness in pursuance of this Act shall, unless otherwise ordered by the Court, give his evidence from the witness box or other place from which the other witnesses give their evidence:

"(h) Nothing in this Act shall affect the provisions of section eighteen of the *Indictable Offences Act, 1848*, or any right of the person charged to make a statement without being sworn.

"2. Where the only witnesses to the facts of the case called by the defence is the person charged, he shall be called as a witness immediately after the close of the evidence for the prosecution.

"3. In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness shall not of itself confer on the prosecution the right of reply.

[*Note 1 — continued*]

"4. (1) The wife or husband of a person charged with an offence under any indictment mentioned in the schedule to this Act may be called as a witness either for the prosecution or defence and without the consent of the person charged.

"(2) Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person."

1904, St. 4 Edw. VII, c. 15, § 12 (Prevention of Cruelty to Children Act; in trials of any person for offences under this act, "such persons shall be competent but not compellable to give evidence, and the wife or husband of such person may be required to attend to give evidence as an ordinary witness in the case and shall be competent but not compellable to give evidence").

St. 1908, 8 Edw. VII, c. 67, § 27 (Children Act; the provisions of the Criminal Evidence Act to apply).

St. 1912, 2-3 Geo. V, c. 20, § 7 (vagrancy offences; wife or husband "may be called as a witness either for the prosecution or for the defence and without the consent of the person charged," saving cases where at common law the same might be done).

CANADA: *Dominion*: St. 1906, 6 Edw. VII, c. 10 (amending the Evidence Act 1893, c. 31, § 4, by inserting in subsect. 1, after the first "and," the words "except as hereinafter provided," and after "competent witness" the words "for the defence"; in subsect. 2, by omitting the words "in addressing the jury"; and by adding new subsections 3 and 4 as follows: "3. Subject to the provisions of subsection 1 of this section, the wife or husband of a person charged with an offence against any of the sections of the Criminal Code 1892, mentioned in schedule C to this act, shall be a competent and also a compellable witness for the prosecution without the consent of the person charged. 4. Nothing in this act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of a person"; this statute seems to have been enacted in consequence of the divided opinions in *Gosselin v. King*, 1903, 33 Can. Sup. 255, cited *post*, § 2245, n. 10).

*Alberta*: St. 1910, 2d sess., c. 3, Evidence Act, § 4 (no witness to be excluded for "any alleged incapacity from crime or interest"); § 5 ("every person offered as a witness shall be admitted to give evidence notwithstanding" interest or conviction of crime); § 6 ("the parties to an action," etc., shall be "competent and compellable to give evidence on behalf of themselves or of any of the parties"; "husbands and wives of such parties and persons shall, except as hereinafter otherwise provided, be competent and compellable to give evidence on behalf of any of the parties"); § 8 (like Eng. St. 1869, St. 32-33 Vict. c. 68, § 3); § 9 (like Eng. St. 1853, 16-17 Vict. c. 83, § 3).

*British Columbia*: St. 1908, 8 Edw. VII, c. 15, § 73 (on trial of offences under the Factories Act, the defendant is "competent and compellable to give evidence").

*Manitoba*: St. 1912, 2 Geo. V, c. 101, § 10 (family desertion; "the wife shall be a competent and compellable witness against the husband").

*New Brunswick*: St. 1905, c. 7, § 41 (offences under the factory act; the person charged shall be "competent and compellable to give evidence in or with respect to such complaint, proceeding, matter, or question").

*Northwest Territory*: Can. Rev. St. 1886, c. 50, § 31 (interest as executor or as legatee of a will is not to disqualify a person as witness in proving the will).

*Ontario*: St. 1909, c. 43, Witnesses and Evidence, § 2 (like R. S. 1897, c. 73, § 2); § 3 (like *ib.* § 3); § 4 (like *ib.* § 4); § 8 (like *ib.* § 7); § 9 (like *ib.* § 8).

*Prince Edward Island*: St. 1906, 6 Edw. VII, c. 12 (St. 1889, c. 9, § 10, amended by striking out the words "not being a crime").

*Saskatchewan*: St. 1907, c. 12, Evidence Act, § 23 (like Can. St. 1893, c. 31, § 3); § 24 (like Ont. Rev. St. 1897, c. 73, § 4); § 25 (like Eng. St. 1853, c. 83, § 3).

*Yukon*: St. 1904, c. 5 (Evidence Ordinance), § 34 (like N. Sc. Rev. St. 1900, c. 163, § 34); *ib.* § 35 (like N. Sc. Rev. St. 1900, c. 163, § 35); *ib.* § 36 (like N. Sc. Rev. St. 1900,

[*Note 1 — continued*]

c. 163, § 36); ib. § 37 (like N. Sc. Rev. St. 1900, c. 163, § 37); ib. § 38 (like N. Sc. Rev. St. 1900, c. 163, § 38).

UNITED STATES: *Alabama*: St. 1903, No. 9, Feb. 2 ("in all cases where a husband is charged with abandoning his family and leaving them in danger of becoming a burden to the public, the wife shall be a competent witness against her husband").

*California*: St. 1905, c. 139 (amending P. C. § 1322 by adding to the exceptions: "or in cases of criminal actions or proceedings brought under the provisions of § 270 of this Code, or in cases of criminal actions or proceedings for bigamy").

St. 1907, c. 68, p. 87, Mar. 1 (adds to C. C. P. § 1881, par. 1: "or in an action brought by husband or wife against another person for the alienation of affections of either husband or wife; or in an action for damages against another person for adultery committed by husband or wife"); id. c. 230, p. 290, Mar. 15 (adds, to P. C. § 1322, exceptions for cases under P. C. §§ 270, 270a and criminal cases of adultery or bigamy).

*Colorado*: St. 1911, c. 179, p. 527, May 26, § 5 (non-support of family; wife to be competent against husband); St. 1911, c. 229, p. 676, June 2 (amending Annot. St. 1891, § 4816, Rev. St. 1908, § 7267).

*Columbia (District)*: St. 1906, Mar. 23, § 2, c. 1131, U. S. Stat. L. vol. 34, p. 87 (offence of failing to support one's family; "in all prosecutions under this act any existing provisions of law respecting confidential communications between husband and wife shall not apply, and both husband and wife shall be competent and compellable witnesses to testify to any and all relevant matters, including the fact of such marriage and the parentage of such child or children").

*Delaware*: St. 1887, c. 230, § 21, 18 Laws, p. 447 (desertion of family; "any wife so deserted shall be a competent witness in any proceeding under this act to prove the fact of desertion or neglect to maintain her or any minor children under the age of ten years"; this Act seems to have been omitted from the Revised Statutes of 1852, ed. 1893, and thus was not inserted in the first edition of the present work).

St. 1907, c. 243, p. 647, Mar. 14 (husband or wife may "testify for or against each other in both civil and criminal causes").

*Georgia*: St. 1911, No. 207, p. 68, Aug. 25 (amending Code, 1910, vol. II, § 379, prosecutions for seduction, by omitting the last part after "husband," and substituting, "in all such cases, whether the marriage to suspend said prosecution was before or after indictment of said defendant").

*Hawaii*: St. 1913, No. 83, p. 103, Apr. 15, § 6 (in prosecutions for family desertion, etc., no rule "prohibiting the disclosure of confidential communications between husband and wife shall apply"; "both husband and wife shall be competent and compellable witnesses" as to any relevant fact).

*Indiana*: Rev. St. 1897, § 1004, Rev. St. 1852, pt. 4, c. 3, § 1, Burns' Rev. St. 1901, § 990 (in a bastardy charge, "the mother of the child, if of sound mind, shall be a competent witness," and her written examination on making complaint before the justice may be used "to sustain or impeach the testimony of such witness"); ib. § 1008 (on the death of the complainant in bastardy, her written examination before the justice "may be read in evidence").

St. 1905, p. 584, §§ 235, 241 (re-enacts the above Rev. St. 1897, §§ 1889, 1895).

St. 1911, c. 174, p. 439, Mar. 4 (pandering; female who marries accused before or after the offence's date shall be competent for or against him).

*Iowa*: St. 1907, c. 170, § 2 (desertion of family; husband or wife to be competent for the State, "and may testify to any relevant acts or communications between them," but neither is "compelled to testify against the other under this Act," except by consent).

*Kansas*: 1905, May v. May, 71 Kan. 317, 80 Pac. 567 (St. 1903, cc. 387, 388, applied to admit a husband's testimony to his wife's admissions).

St. 1911, c. 163, p. 247, Mar. 13, § 6 (family desertion; like Haw. St. 1913, No. 83)

[*Note 1 — continued*]

St. 1911, c. 228, p. 405, Mar. 13 (amending Gen. St. 1909, § 5914, C. C. P. 1909, § 320, in an unspecified respect).

*Kentucky*: St. 1912, c. 103, p. 295 (adding a new exception to Ky. C. C. P. § 606, par. 1, for divorce on the ground of cruelty).

*Louisiana*: St. 1904, No. 41 (amending St. 1902, No. 185, *supra*, by adding to § 1, c. 29, St. 1886, *supra*, the words "and except in cases where either the husband or wife is on trial for bigamy"; also amending St. 1902 by inserting, in § 2 of St. 1886, *supra*, instead of the words "jointly indicted," the words "jointly tried").

St. 1912, No. 105, p. 123, July 8 (family desertion; "the wife shall be a competent witness for or against her husband").

*Maryland*: St. 1904, c. 661 (amends Art. 35, § 2, *supra*, keeping the clause that "it shall not be competent for any party to the cause, etc., to corroborate, etc."; but substituting, for all the remainder, the following: "In acts or proceedings by or against executors, administrators, heirs, devisees, legatees or distributees of a decedent as such, in which judgments or decrees may be rendered for or against them, and in proceedings by or against persons incompetent to testify by reason of mental disability, no party to the cause shall be allowed to testify as to any transaction had with, or statement made by the testator, intestate, ancestor, or party so incompetent to testify, either personally or through an agent since dead, lunatic, or insane, unless called to testify by the opposite party, or unless the testimony of such testator, intestate, ancestor, or party incompetent to testify shall have [been ?] already given in evidence, concerning the same transaction or statement, in the same cause, on his or her own behalf or on behalf of his or her representative in interest; . . . [here re-enacting as above stated]").

Compare the decisions cited *post*, § 2065, n. 5, applying St. 1902, c. 495, *supra*

*Massachusetts*: St. 1913, c. 81 (amending Rev. L. c. 175, § 21; cited more fully, *post*, § 987).

*Michigan*: St. 1901, No. 239, *supra* (amending Comp. L. § 101, amended by St. 1903, No. 30, by adding: "and provided further that whenever the deposition, affidavit, or testimony of such deceased party taken in his lifetime shall be read in evidence in such suit or proceeding, that the affidavit or testimony of the surviving party shall be admitted in his own behalf on all matters mentioned or covered in such deposition, affidavit, or testimony; and provided further that when the testimony or deposition of any witness has once been taken and used (or shall have heretofore been taken and used) upon the trial of any cause, and the same was, when so taken and used, competent and admissible under this act, the subsequent death of such witness or of any other person, shall not render such testimony incompetent under this act, but such testimony shall be received upon any subsequent trial of such cause").

St. 1905, No. 136 (in prosecutions for illegal marriage of persons sexually diseased, "a husband shall be examined as a witness against his wife and a wife shall be examined as a witness against her husband whether such husband or wife consent or not").

St. 1907, No. 144, p. 182, June 12, § 3 (family-desertion; wife may testify against husband-defendant, "in all complaints under this Act").

*Missouri*: St. 1909, p. 99, June 4, § 3 (repealing Rev. St. 1899, §§ 265-267; where the presumption of death applies, in applications for administration of estates, "no person shall be disqualified by reason of his or her relationship as husband or wife to the supposed deceased, or by reason of his or her interest in the estate of the person supposed to be dead.")

*Montana*: St. 1909, c. 66, p. 80, Mar. 4 (amending C. C. P. 1895, § 3162, Rev. C. 1907, § 7891; by omitting the last clause, and substituting: "as to the facts of direct transactions or oral communications between the proposed witness and the deceased excepting where the executor or administrator first introduces evidence thereof, or where it appears to the Court that without the testimony of the witness injustice will be done").

St. 1913, c. 41, p. 57, Feb. 28 (amending the foregoing statute by adding a subdiv. 4: "Parties or assignors of parties to an action or proceeding, or persons in whose behalf an

[*Note 1 — continued*]

action or proceeding is prosecuted against any person or corporation, as to the facts of direct transaction or oral communication between the proposed witness and the deceased agent of such person or corporation, and between the proposed witness and any deceased officer of such corporation"; this is a vicious provision, and shows the sinister mark of the legislative influence of interests seeking special privilege; why should not the saving proviso of the judge's discretion be here equally appropriate?).

*Nebraska*: St. 1905, c. 172 (amending § 331, C. C. P., being Comp. St. 1897, § 5905, *supra*, by adding: "provided, however, that a wife shall be a competent witness against the husband in all prosecutions arising under § 2375a of Cobbey's Annotated Statutes for 1903").

St. 1911, c. 177, p. 554 (pandering; any female enticed, etc., shall be competent, "including conversation with the accused or by him with third persons in her presence, notwithstanding her having married the accused either before or after" the offence).

*Nevada*: St. 1909, c. 80, p. 85 (family desertion; wife to be competent "against her husband with or without his consent").

St. 1911, c. 179, p. 359 (amending Gen. St. § 3401, by inserting after "representative of such deceased person," in the first proviso, the words, "or when persons other than the parties to the transaction, and claiming to have been present when the transaction took place, testify as witness or witnesses in favor of the representative of such deceased person").

St. 1913, c. 272, p. 445 (family desertion; to prove marriage or parentage, no other evidence required than "to prove said facts in a civil action"; the wife to be competent to all relevant matters, including marriage and parentage).

*New Mexico*: St. 1907, c. 26, p. 24 (repealing St. 1901, c. 58, and restoring the original text of Comp. L. § 3016).

St. 1909, c. 98, p. 256 (in any prosecution for "incest, bigamy, polygamy, unlawful cohabitation, or adultery," the accused's husband or wife is competent, "and may be called, but shall not be required to testify without the consent of such husband or wife so called as a witness").

*New York*: St. 1909, c. 66, § 1, p. 85 (re-enacting St. 1876, c. 182, § 1, as C. Cr. P., § 393a). St. 1909, c. 240, § 61, p. 408 (re-enacting P. C. § 714, now Consol. L. c. 88, § 2444, with unspecified amendments).

St. 1912, c. 420, p. 816 (amending Greater New York Charter, § 685; desertion of family; in all complaints hereunder, wife is to be competent "against her husband as to all matters embraced in said complaint").

*North Carolina*: Revision 1905, §§ 870-872 (like Code 1883, §§ 585-587; it does not appear why these sections should be any longer preserved in the law); Rev. 1905, § 1628 (like Code §§ 589, 1350); Rev. 1905, § 1630 (like Code § 1351); Rev. 1905, § 1631 (like Code § 590); Rev. 1905, § 1636 (like Code § 588); Rev. 1905, § 1634 (like Code § 1353); Rev. 1905, § 1635 (like Code § 1354); Rev. 1905, § 1564 (like Code § 1288; omitting the proviso as to divorce for pregnancy at marriage; St. 1889, p. 422, *supra*, seems also to be omitted); Rev. 1905, §§ 1632, 1633 (provision for the testimony of interested persons in actions on judgments rendered before Aug. 1, 1868); Code, 1883, § 1192, is omitted, being superfluous.

*North Dakota*: St. 1907, c. 119, p. 174 (amending Rev. C. 1905, § 7253, in unspecified details); St. 1909, c. 109, p. 117 (amending the foregoing in unspecified particulars; who is the legislative tinker that keeps patching this statute? *Ne sutor ultra crepidam*).

*Ohio*: St. 1909, p. 49, Mar. 12 (amending Rev. St. § 7284 in unspecified particulars).

*Pennsylvania*: St. 1907, No. 146, p. 284 ("in all civil actions brought by the husband, the wife shall be a competent witness in rebuttal, when her character or conduct is attacked upon the trial thereof, but only in regard to the matter of her character or conduct"; a good example of *ad hoc* legislation, procured by some one who happened to feel the pinch in this particular point; could no larger idea than this occur to the legislators while they were contemplating the subject?).

[*Note 1 — continued*]

St. 1909, No. 128, p. 182, § 1 (wife-desertion; amending St. 1907, May 23; "husband and wife shall be fully competent witnesses"; this is sensible; most such statutes make only the wife competent).

St. 1909, No. 126, p. 179 (amending St. 1887, May 23; making husband and wife competent in a criminal proceeding for bodily injury etc. upon minor children).

St. 1911, May 11, p. 269 (amending St. 1887, May 23, Witnesses, § 2, Clause B; husband and wife may testify to fact of marriage on a charge of bigamy).

St. 1911, June 8, p. 720 (divorce on ground of desertion; libellant to be competent to prove desertion, etc.).

St. 1913, Mar. 27, p. 14 (amending St. 1893, June 8, § 4; in separate property suits "brought by either husband or wife," both are competent).

*South Dakota*: St. 1911, c. 249, p. 429 (amending C. C. P. 1903, § 486, in unspecified particulars); St. 1913, c. 371, p. 610 (same section again amended).

St. 1913, c. 370, p. 609 (repealing P. C. 1903, § 803, and transferring its provisions to § 802).

*United States*: St. 1906, June 29, c. 3608, Stat. L. vol. 34, p. 618 (Rev. St. 1878, § 858, is amended so as to read as follows: "The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the State or Territory in which the court is held").

St. 1910, Mar. 26, No. 107, 61st Cong., p. 263 (amending St. 1907, Feb. 20, § 3; importation of aliens for prostitution; in such prosecutions husband or wife shall be admissible against wife or husband).

St. 1911, Mar. 3, c. 231, 61st C., 3d Sess., p. 1087, Judicial Code, § 297 (repealing Rev. St. §§ 1078, 1079; St. 1883, Mar. 3, c. 116; St. 1887, March 3, c. 359, § 8, and consolidating and reenacting them as Jud. Code, § 186; "No person shall be excluded as a witness in the Court of Claims on account of color [or] because he or she is a party to or interested in the cause or proceeding; and any plaintiff or party in interest may be examined as a witness on the part of the government"); amended by St. 1912, Feb. 5, c. 28, 62d C., p. 59 (inserting the "or" as above).

*Utah*: St. 1909, c. 37, p. 34 (amending Comp. L. 1907, § 5014, by adding an exception for "crimes referred to in § 4224, Comp. L. 1907").

St. 1911, c. 105, p. 149, § 5 (amending the same § 5614, by re-wording the new exception thus, "or in case of crimes defined in an Act relating to pandering and in an Act making it a misdemeanor to abandon" the family, both being Acts of 1911).

St. 1909, c. 39, p. 42 (amending similarly Comp. L. 1907, § 3414).

St. 1911, c. 109, p. 180 (amending similarly Comp. L. 1907, § 3414).

St. 1911, c. 62, p. 84, § 5 (bastardy cases; "the mother and defendant shall be admitted as competent witnesses").

*Vermont*: St. 1904, Nov. 9, c. 60 ("Husband and wife shall be competent witnesses for or against each other in all cases civil or criminal, except that neither shall be allowed to testify against the other as to any statement, conversation, letter, or other communication made to the other or to another person; nor shall either be allowed in any case to testify as to any matter which in the opinion of the Court would lead to a violation of marital confidence").

St. 1908, No. 64, p. 63, § 1 (amending Pub. St. § 1589, by omitting, after "against him," the clause "as to facts . . . party"); § 2 (amending Pub. St. § 1590, by omitting the same clause at the end); § 3 (amending Pub. St. § 1591, by omitting the same clause at the end).

St. 1910, No. 158, p. 151 (banks; "in actions against a bank by a husband to recover for moneys deposited by his wife in her name or as her money," the wife is competent; will the Vermont legislators explain why the wife is so peculiarly less liable to falsify in actions against banks? Why not admit her in all cases?).

St. 1910, No. 85, p. 92 (amending Pub. St. § 1589, by adding, "provided however that where such deceased or insane party, while living or before becoming insane, made entries in a book of accounts or cash book relating to the transactions involved in such action and

[*Note 1 — continued*]

showing the receipt or payment of money, in due course of business and before any controversy arose respecting the transactions to which such entries relate," such entries are admissible, "and the adverse party in all such actions may meet the evidence of such entries by any proper evidence"; it is pitiful to find that legislators believe that the petty details of such an amendment have any relation to the revelation of truth; they are merely rules of legislative logomachy).

*Virginia*: St. 1902, Extra, c. 22 (bribery offences; similar to Code 1887, § 3899, *supra*).

*Washington*: St. 1907, c. 103, p. 199, § 3 (family-desertions; existing rules "prohibiting the disclosure of confidential communications between husband and wife shall not apply"; "both husband and wife shall be competent witnesses to testify for or against each other," to all facts, including marriage and parentage).

St. 1909, c. 249, p. 900, § 38 ("Every person convicted of a crime shall be a competent witness in any civil or criminal proceeding; but his conviction may be proved for the purpose of affecting the weight of his testimony"; "he shall answer any proper question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer thereto").

*West Virginia*: St. 1911, c. 22, p. 65, § 3 (pandering; the female shall be competent "to testify for or against the accused as to any transaction or as to [any?] conversation with the accused, or by him with another person or persons in her presence," notwithstanding her marriage to him before or after the offence and whether called during the marriage relation or afterwards).

St. 1911, c. 23, p. 67, § 2 (pimping; similar provision).

*Wisconsin*: St. 1905, c. 131 (offence of abandonment of family; the wife of the defendant "shall be competent to testify for or against him").

St. 1907, c. 197 (amending Stats. § 4069).

St. 1911, c. 576, p. 731 (family-desertion; like Wash. St. 1907, c. 103; with a proviso against self-incrimination).

*Wyoming*: St. 1909, c. 145, p. 191 (amending Stats. 1899, § 3682, Stats. 1887, § 2589, in unspecified particulars).

#### § 492. Mental Derangement; General Principle.

[*Note 3; add:*]

1906, *State v. Simes*, 12 Ida. 310, 85 Pac. 914.

1911, *McKinstry v. Tuscaloosa*, 172 Ala. 344, 54 So. 629 (*Worthington v. Mercer* followed)

1907, *Cuesta v. Goldsmith*, 1 Ga. App. 48, 57 S. E. 983 (following *Pittsburg & W. R. Co. v. Thompson*).

1912, *People v. Enright*, 256 Ill. 221, 99 N. E. 936.

1909, *State v. Berberick*, 38 Mont. 423, 100 Pac. 209 (applied to a confession).

#### § 495. Capacity of Communication.

[*Note 1; add:*]

1909, *State v. Berberick*, 38 Mont. 423, 100 Pac. 209 (insanity at the time of a confession).

*State v. Church*, 199 Mo. 605, 98 S. W. 16 (confession admitted, subject to impeachment by evidence of insanity).

#### § 496. Trial Court's Discretion.

[*Note 1; add:*]

1912, *People v. Harrison*, 18 Cal. App. 238, 123 Pac. 200.

1906, *State v. Crouch*, 130 Ia. 478, 107 N. W. 173.

1909, *Covington v. O'Meara*, 133 Ky. 762, 119 S. W. 187.

§ 497. **Methods of Ascertainment of Capacity.**

[Note 1; add:]

1909, *Covington v. O'Meara*, 133 Ky. 762, 119 S. W. 187.

1908, *Williams v. State*, 52 Tex. Cr. 430, 107 S. W. 825.

[Note 2; add in accord:]

1909, *Covington v. O'Meara*, 133 Ky. 762, 119 S. W. 187 (judgment of lunacy four years before).

[Note 3; add:]

It would seem that it is not the *judge's duty* to examine, if he does not choose to; so that if the opponent himself declines to examine on *voir dire*, the judge's refusal to do so is proper in his discretion; *contra*: 1906, *State v. Simes*, 12 Ida. 310, 85 Pac. 914.

[Note 6; add:]

*Accord*: 1912, *People v. Enright*, 256 Ill. 221, 99 N. E. 936.

1911, *State v. Whitsett*, 232 Mo. 511, 134 S. W. 555 (citing the above text).

*Contra*: 1908, *Williams v. State*, 52 Tex. Cr. 430, 107 S. W. 825. It is strange that these *contra* Courts did not see how preposterous it is to bind the jury by a legal definition of admissibility. The jury's only inquiry ought to be the general credibility of the witness, which is distinct (*ante*, § 12) from admissibility. Times seem degenerate when such fundamentals can be ignored.

§ 498. **Deaf-and-Dumb Persons.**

[Note 2; add:]

1906, *State v. Simes*, 12 Ida. 310, 85 Pac. 914 (rape of a female mentally incapable of consent; the woman held not thereby also incompetent as a witness).

1906, *State v. Crouch*, 130 Ia. 478, 107 N. W. 173.

[Note 4; add:]

1907, *State v. Smith*, 203 Mo. 695, 102 S. W. 526 (rape on a deaf-and-dumb woman).

§ 499. **Intoxication.**

[Note 4; add:]

1904, *State v. Sejours*, 113 La. 676, 37 So. 599 (intoxication at the time of the shooting, held not to disqualify on the facts).

[Note 5, col. 1; add:]

1904, *R. v. Lai Ping*, 11 Br. C. 102 (confession while depressed by opium, admitted).

1914, *Lindsay v. State*, — Fla. —, 63 So. 832.

1906, *State v. Hogan*, 117 La. 863, 42 So. 352.

1914, *McCleary v. State*, — Md. —, 89 Atl. 1100 ("greater or less absence of mental faculty, as the result of intoxication" held not to exclude).

1906, *State v. Church*, 199 Mo. 605, 98 S. W. 16 (insanity).

1902, *State v. Haworth*, 24 Utah 398, 68 Pac. 155 (intoxication).

§ 500. **Disease, etc.**

[Note 2, l. 4; add:]

1891, *State v. Morgan*, 35 W. Va. 260, 13 S. E. 385 (soliloquy at night while on a couch, admitted; *semble*, admissible even though made while asleep).

[*Note 2 — continued*]

The following case raises an interesting question :

1913, *State v. Strong*, 83 N. J. L. 177, 83 Atl. 506 (confession to a clairvoyant, held inadmissible, *semble*).

#### § 505. Infancy; General Principle.

1909, *Chavigny v. Hava*, 125 La. 710, 51 So. 696 (boy of 10 years, admitted).

1913, *New Orleans & N. E. R. Co. v. Mobly*, — Miss. —, 63 So. 665 (child of 6, admitted).

1909, *Evers v. State*, 84 Nebr. 708, 121 N. W. 1005.

#### § 506. Infancy; Capacity, etc.

[*Note 4; add:*]

1907, *Clinton v. State*, 53 Fla. 98, 43 So. 312.

1905, *Bright v. Com.*, 120 Ky. 298, 86 S. W. 527.

#### § 507. Standard of Intelligence; Trial Court's Discretion.

[*Note 1; add:*]

1906, *Birmingham R. L. & P. Co. v. Wise*, 149 Ala. 492, 42 So. 821.

1910, *Crosby v. State*, 93 Ark. 156, 124 S. W. 781.

1904, *People v. Stouter*, 142 Cal. 146, 75 Pac. 780.

1904, *Shannon v. Swanson*, 208 Ill. 52, 69 N. E. 869.

1912, *Tyrrel v. State*, 177 Ind. 14, 97 N. E. 14 (child of 8).

1907, *State v. Meyer*, 135 Ia. 507, 113 N. W. 322.

1910, *Merchant v. Com.*, — Ky. —, 130 S. W. 793 (child of 8, admitted).

1913, *New Orleans & N. E. R. Co. v. Mobly*, — Miss. —, 63 So. 665.

1908, *State v. Brown*, 209 Mo. 413, 107 S. W. 1068. 1909, *State v. Headley*, 224 Mo. 177, 123 S. W. 577. 1913, *State v. Anderson*, 252 Mo. 83, 158 S. W. 817 (Why should this Court pay any more attention to this simple, settled point? It has burdened the books with five needless rulings in seven years).

1905, *State v. Tolla*, 72 N. J. L. 515, 62 Atl. 675.

1914, *State v. Pitt*, — N. C. —, 80 S. E. 1060.

1907, *State v. Werner*, 16 N. D. 83, 112 N. W. 60.

1914, *State v. Jensen*, — Or. —, 140 Pac. 740 (rape; child of 4, admitted).

1905, *Com. v. Furman*, 211 Pa. 549, 60 Atl. 1089 (good opinion).

1913, *Piepkke v. Philadelphia & R. Co.*, 242 Pa. 321, 89 Atl. 124.

1905, *Freasier v. State*, — Tex. Cr. —, 84 S. W. 360.

1911, *Johnson v. Com.*, 111 Va. 877, 69 So. 1104.

1909, *State v. Myrberg*, 56 Wash. 384, 105 Pac. 622. 1911, *Kalberg v. Bon Marche*, 64 Wash. 452, 117 Pac. 227.

[*Note 2; add:*]

1913, *Penny v. State*, — Ark. —, 159 S. W. 1127 (child of 9, held qualified).

1904, *Sokel v. People*, 212 Ill. 238, 72 N. E. 382 (a girl of nine, admitted). 1911 *People v. Lewis*, 252 Ill. 281, 96 N. E. 1005 (child of 6, admitted).

1907, *State v. Meyer*, 135 Ia. 507, 113 N. W. 322 (child of 6, admitted).

1905, *State v. Tolla*, 72 N. J. L. 515, 62 Atl. 675 (child of six years, admitted).

1907, *State v. Werner*, 16 N. D. 83, 112 N. W. 60 (child of 8 years, admitted).

1913, *Piepkke v. Philadelphia & R. Co.*, 242 Pa. 321, 89 Atl. 124 (boy of 7, held improperly rejected).

§ 508. Capacity Presumed.

[Note 2; add:]

1905, *Clark v. Finnegan*, 127 Ia. 644, 103 N. W. 970 (child of seven, admitted).

[Note 3; add:]

1904, *Shannon v. Swanson*, 208 Ill. 52, 69 N. E. 869 (at fourteen there is a presumption of competency; below that age, there is to be an inquiry into his qualifications).

§ 509. Policy of Abolishing Disqualification by Infancy.

[Note 1; add:]

This advanced step has in effect been taken by the modern English statutes of 1889 and 1904, cited *post*, § 1828.

§ 516. Alienage, Race, or Color.

[Note 1, l. 1; add:]

"*Nullum valere fœdus cum hostibus religionis.*" Different phases are seen in the following works: Hallam, *Middle Ages*, II, 103; Laurent, *Histoire du droit des gens*, ed. 1865, X, 439.

[Note 5; add:]

*Circa* 1300, Waterford Customal, c. 8 ("No foreigner shall be a witness against a citizen, unless he has no other witness, or unless he has come in a ship, etc."), in *Bateson's Borough Customs*, I, 168, Selden Society Pub., vol. XVIII, 1904).

The early discrimination against Jews (Riggs' *Select Pleas, Starrs, and Records of the Jewish Exchequer*, p. 1; *Selden Soc.*, vol. XV, 1902) was another phase of the same attitude.

[Note 7; add:]

U. S. St. 1906, June 29, § 4, c. 3592, Stat. L. vol. 34, p. 598 (naturalization laws revised; beside the applicant's oath is required "the testimony of at least two witnesses, citizens of the U. S., as to the facts of residence, moral character, and attachment to the principles of the Constitution"); *ib.* § 10 (in case of less than five years' residence in the State where petition is filed, etc., etc., the residence there may be established by two witnesses, and the residence elsewhere by "two or more witnesses who are citizens of the U. S.," upon notice to the Bureau, etc., and the U. S. attorney for the district of their residence).

[Note 12; add:]

U. S. Rev. St. 1878, § 1078, was repealed and replaced by St. 1911, Mar. 3, c. 231, *Judicial Code*, § 186.

[Note 15, l. 6; insert:]

1909, *Pumphrey v. State*, 84 Nebr. 636, 122 N. W. 19 (a Japanese presumed competent under this statute).

§ 518. Religion.

[Note 5; add:]

There was a discrimination against Jews in Norman times; but this was probably due to their alien character (*ante*), 516, n. 5.

**§ 519. Infamy; History.**[Note 2; *add*.:]

The earlier class-distinctions seem to have had some such disqualification attached; weavers and fullers, in the 1200s, could not bear witness against a free man: Beverly Town Documents, ed. Leach, *Introd.* p. xlv, text p. 134 (1209 A.D., Selden Society Pub., vol. XIV, 1900).

**§ 520. Kind of Crime that Disqualifies.**[Note 6, at the end; *add*.:]

1910, *Hawkins v. U. S.*, 3 Okl. Cr. 651, 108 Pac. 561 (murder-conviction disqualifies; here on a case arising from Indian Territory).

1908, *U. S. v. Sims*, C. C. N. D. Ala., 161 Fed. 1009 (embezzlement; careful opinion by Hundley, J.).

1912, *Keliher v. U. S.*, C. C. A., 193 Fed. 8 (conviction of a misdemeanor subjecting to imprisonment for more than a year, held not to disqualify).

*Disqualifying crimes:*

1913, *Maxey v. U. S.*, 8th C. C. A., 207 Fed. 327 (conviction for fraudulent use of the mails held to disqualify).

**§ 521. Infamy; Judgment, not Guilt, Disqualifies.**[Note 2, col. 2, l. 17; *add*.:]

1907, *Rice v. State*, 50 Tex. Cr. 648, 100 S. W. 771 (verdict without sentence does not disqualify).

**§ 522. Infamy; Conviction in Another Jurisdiction.**[Note 3; *add*, under *Accord*.:]

1905, *Robinson v. State*, 50 Fla. 115, 39 So. 465 (conviction not shown to be in a court of the State, held not to disqualify under Rev. St. 1892, § 1096).

1908, *In re Ebbs*, 150 N. C. 44, 63 S. E. 190 (*State v. Candler* discussed, in a proceeding for disbarment; point not decided).

1909, *Samuels v. State*, 110 Va. 901, 66 S. E. 222 (conviction of perjury in a Federal court sitting in Virginia does not disqualify in a Virginia court). 1910, *Kain v. Angle*, 111 Va. 415, 69 S. E. 355 (same).

**§ 523. Disqualification Removed by Pardon, etc.**[Note 2; *add*.:]

1913, *Roberson v. Woodfork*, 155 Ky. 206, 159 S. W. 793.

1834, *Perkins v. Stevens*, 24 Pick. 277 (a general pardon restores competency).

1904, *Miller v. State*, 46 Tex. Cr. 59, 79 S. W. 567 (here a question as to the application of a pardon to a different conviction).

1913, *Thompson v. U. S.*, 9th C. C. A., 202 Fed. 401 (perjury).

1853, *Anglea v. Com.*, 10 Gratt. 696 (except for perjury, under the Virginia Code).

[Note 5; *add*.:]

1909, *State v. Blount*, 124 La. 202, 50 So. 12.

1906, *Quillin v. Com.*, 105 Va. 874, 54 S. E. 337 (confinement for sixty days in a jail on a *capias pro fine* is not a satisfaction of a punishment of fine).

1910, *Davidson v. Watts*, 111 Va. 394, 69 S. E. 328.

§ 524. **Statutory Changes.**

[*Text*, p. 654, last line; *add.*]

Where a statute *removing a disqualification, e. g. of an accused*, and a statute defining a disqualification by infamy, apply to the same person, the former statute should of course by implication prevail.<sup>1a</sup>

<sup>1a</sup> 1911, *Turner v. State*, 100 Ark. 199, 139 S. W. 1124 (a defendant in a criminal trial is not disqualified by prior conviction of crime).

[*Note 1*; *add.*]

1904, *Illinois C. R. Co. v. McManus' Adm'r*, 118 Ky. 780, 82 S. W. 399 (conviction for burglary does not exclude).

1904, *Martin v. Terr.*, 14 Okl. 593, 78 Pac. 88 (convict, admissible).

1905, *Wells v. Terr.*, 15 Okl. 195, 81 Pac. 425 (similar).

§ 526. **Accomplice.**

[*Note 1*; *add.*, at the end:]

It is surprising to see the point raised nowadays:

1905, *Miller v. State*, 165 Ind. 566, 76 N. E. 245 (receiving stolen goods; the thief may prove the theft).

§ 527. **Witness retracting Former Perjured Testimony.**

[*Note 2*, par. 1; *add.*]

*Accord.*: 1906, *Trafton v. Osgood*, 74 N. H. 98, 65 Atl. 397 (a witness admitting prior perjury on the same point is not excluded).

1906, *Chandler v. State*, 124 Ga. 821, 53 S. E. 91 (retracting a self-confessed perjury).

1887, *U. S. v. Thompson*, 31 Fed. 331 (subornation of perjury; disapproving *People v. Evans*, N. Y., *infra*).

1905, *State v. Pearson*, 37 Wash. 405, 79 Pac. 985 (witness admitting perjury at a former trial of himself, held competent).

*Contra.*: 1869, *People v. Evans*, 40 N. Y. 1, 6 (subornation, following *Dunlop v. Patterson*; *supra*, and ignoring *Dunn v. People*).

§ 528. **Attesting Witness Contradicting his Attestation.**

[*Note 1*; under *Accord*, *add.*]

*Goodisson v. Goodisson*, Ir. R. 1913, I, 31, 218 (witness to a will; testimony not to be rejected because contradictory of his attestation and a prior affidavit).

1905, *Theriot's Succession*, 114 La. 611, 38 So. 488 (notary and attesting witnesses allowed to testify to non-observance of formalities).

§ 529. **Invalidating One's Own Instrument.**

[*Note 9*; *add.*]

1909, *Merck v. Merck*, 83 S. C. 329, 65 S. E. 347 (a grantee who afterwards conveys may in a suit between his grantee and a third person testify that the deed to himself was never duly executed; the contrary statement in *Garrett v. Weinberg*, 54 S. C. 127, 31 S. E. 341, distinguished).

**§ 530. Contradicting One's Own Official Certificate.**

[*Note 1; add:*]

1895, *Shapleigh v. Hull*, 21 Colo. 419, 41 Pac. 1108 (notary public not allowed to impeach his certificate of acknowledgment).

1904, *First Nat'l Bank v. Glenn*, 10 Ida. 224, 77 Pac. 623 (acknowledgment of a mortgage by an Indian married woman; the notary not allowed to deny the taking of the acknowledgment; placed on the ground of vested rights).

1858, *Stone v. Montgomery*, 35 Miss. 83 (an offer certifying to a married woman's acknowledgment cannot be admitted to impeach the correctness of the certificate).

1890, *Hockman v. McClanahan*, 87 Va. 33, 39, 12 S. E. 230 (approving *Hawkins v. Forsyth*, *supra*).

1905, *Winn v. Itzel*, 125 Wis. 19, 103 N. W. 220 (notary allowed to impeach his certificate of acknowledgment of an aged woman's deed).

**§ 555. General Theory of Experiential Capacity.**

[*Text*, p. 668, par. (2), at the end; *add* a new note 2:]

<sup>2</sup> This principle is expressly approved by Powers, J., in *Conley v. Portland G. L. Co.*, 99 Me. 57, 58 Atl. 61 (1904).

**§ 556. Different Kinds of Expert Capacity.**

[*Text*, p. 670, l. 2; *add* a note 1:]

Approved in the following cases:

1907, *Crosby v. Wells*, 73 N. J. L. 790, 67 Atl. 295 (an oil-driller).

1909, *Crosby v. Portland R. Co.*, 53 Or. 496, 100 Pac. 300.

**§ 560. Qualifications must be Expressly Shown.**

[*Note 1*, l. 3; *add:*]

and the cases cited *post*, § 654, n. 1 (knowledge qualifications).

**§ 561. Discretion of the Trial Court.**

[*Note 1; add:*]

1905, *Braham v. State*, 143 Ala. 28, 38 So. 919. 1910, *Stewart v. Sloss-Sheffield S. & I. Co.*, 170 Ala. 544, 54 So. 48.

1905, *Hamilton v. U. S.*, 26 D. C. App. 382, 391 (medical men).

1904, *Schley v. State*, 48 Fla. 53, 37 So. 518.

1904, *Conley v. Portland G. L. Co.*, 99 Me. 57, 58 Atl. 61.

1909, *State v. Flanagan*, 111 Md. 481, 74 Atl. 818.

1904, *Muskeget Island Club v. Nantucket*, 185 Mass. 303, 70 N. E. 61 (conclusive, unless "erroneous in law"). 1910, *Martin v. Boston & N. St. R. Co.*, 205 Mass. 16, 91 N. E. 159 (but where the qualifying facts are undisputed, the upper Court may review). 1909, *Carroll v. Boston Elev. R. Co.*, 200 Mass. 527, 86 N. E. 793. 1912, *Com. v. Spencer*, 212 Mass. 438, 99 N. E. 266 (physician).

1905, *Corse & Co. v. Minnesota Grain Co.*, 94 Minn. 331, 102 N. W. 728.

1905, *Paterson v. Chicago, M. & St. P. R. Co.*, 95 Minn. 57, 103 N. W. 621.

1904, *State v. Arthur*, 70 N. J. L. 425, 57 Atl. 156.

1904, *Burns v. Del. & A. T. & T. Co.*, 70 N. J. L. 745, 59 Atl. 220.

1906, *State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016 ("if there be any legal evidence to support the finding" of admissibility, this suffices).

1913, *Atchison T. & S. F. R. Co. v. Baker*, 37 Okl. 48, 130 Pac. 577 (emergency breaks).

[*Note 1 — continued*]

1906, *State v. White*, 48 Or. 416, 87 Pac. 137. 1909, *Crosby v. Portland R. Co.*, 53 Or. 496, 100 Pac. 300.

1912, *Eastman v. Dunn*, 34 R. I. 416, 83 Atl. 1057 (value witness).

1905, *Borneman v. Chicago, St. P. M. & O. R. Co.*, 19 S. D. 459, 104 N. W. 208.

1908, *Inland & S. C. Co. v. Tolson*, 139 U. S. 551, 559, 11 Sup. 653.

1891, *Chateaugay O. & I. Co. v. Blake*, 144 id. 476, 484, 12 Sup. 731. 1913, *Matheson v. U. S.*, 227 U. S. 540, 33 Sup. 355 (trial judge's discretion).

1905, *Virginia I. C. & C. Co. v. Tomlinson*, 104 Va. 249, 51 S. E. 362. 1909, *Hot Springs L. M. Co. v. Revercomb*, 110 Va. 240, 65 S. E. 557.

1913, *Bogart v. Pitchless L. Co.*, 72 Wash. 417, 130 Pac. 490 (lumbering).

§ 562. **Sundry Principles; Securing Unbiased Experts.**

[*Text*, par. (2), l. 2; after "experience," add a new note 1a:]

<sup>1a</sup> Cases cited *post*, § 655; which include also rulings on experiential qualifications.

Of course, the *witness* is not to decide his own qualifications: 1907, *Glover v. State*, 129 Ga. 717, 59 S. E. 816 (even where, as in this extraordinary case, he disclaims being an expert).

[*Text*, p. 677, l. 2; add a new par. (4):]

(4) In the *Admiralty practice*, where skilled assessors are summoned to form a part of the tribunal, special expert nautical witnesses are not permitted to be used by the parties.<sup>2</sup>

<sup>2</sup> 1842, *The Gazelle*, 1 W. Rob. 471.

1907, *Bryce v. Canadian Pacific R. Co.*, 13 N. Br. 96, 108 (citing other cases).

[*Note 1*, at the end; add:]

The first attempt at legislative reform in this subject has now been made in Michigan, by St. 1905, No. 175 (Sect. 1: No expert shall receive a sum "in excess of the ordinary witness fees," unless by court order; and to pay or receive such a fee is made a misdemeanor; Sect. 2: "No more than three experts shall be allowed to testify on either side as to the same issue in any given case, except in criminal prosecutions for homicide," unless the trial Court permits additional ones; Sect. 3: "In criminal cases for homicide where the issues involve expert knowledge or opinion, the Court shall appoint one or more suitable disinterested persons, not exceeding three, to investigate such issues and testify to the trial"; the compensation is to be paid by the county, "and the fact that such witness or witnesses have been so appointed shall be made known to the jury"; but "this provision shall not preclude either prosecution or defence from using other expert witnesses at the trial"; Sect. 4: "This act shall not be applicable to witnesses testifying to the established facts or deductions of science, nor to any other specific facts, but only to witnesses testifying to matters of opinion"). But this statute was held unconstitutional in *People v. Dickerson*, 164 Mich. 148, 129 N. W. 189. To refute the reasoning of this extraordinary opinion would here take too much space. Moreover, it is doubtful whether reasoning would avail with any one who is disposed to balk at the constitutionality of such a statute.

See also Va. St. 1914, c. 313 (amending Code § 1682; insanity experts.)

The Medico-Legal Society, of New York, at its March and May meetings (1907), discussed the subject, and the March, June, and September numbers (1907) of the Society's Journal published contributions. A Committee was appointed, under the chairmanship of Chief Justice Emery, of the Maine Supreme Court, to prepare a memorial to the Legislatures of the various States. The following bill was drawn under his advice, and has been introduced into the Legislature of Maine: "Section 1. In any case, civil or criminal, in the supreme judicial court, or any superior court, when it appears that questions may arise therein upon which expert or opinion evidence would be admissible, the court, or any justice thereof in

[*Note 1 — continued*]

vacation, may appoint as examiner one or more disinterested persons qualified as experts upon the questions. The examiner, at the request of either party, or of the court or justice appointing him, shall make such examination and study of the subject matter of the questions as he deems necessary for a full understanding thereof, and such further reasonable pertinent examination as either party shall request. Reasonable notice shall be given each party of physical examination of persons, things and places, and each party may be represented at such examinations. Section 2. At the trial of the case either party or the court may call the examiner as a witness, and if so called he shall be subject to examination and cross-examination as other witnesses. For his time and expenses incurred in the examination and in attending court as a witness he shall be allowed by the court a reasonable sum, to be paid from the county treasury as a part of the court expenses. The court may limit the witnesses to be examined as experts to such number on each side as it shall adjudge sufficient for an understanding of the contention of the parties on the question. Section 3. When upon the trial of any case in either of said courts questions arise upon which expert or opinion evidence is offered, the court may continue the case and appoint an examiner for such questions as provided in Section 1. Section 4. In all cases in said courts where a view by the jury may be allowed, the court, instead thereof, may appoint one or more disinterested persons to make the desired inspection in the manner and under the same rules and restrictions as in the case of a view by the jury. The viewer thus appointed may be called as a witness by either party or by the court, and shall be subject to examination and cross-examination like other witnesses. He shall be allowed by the court a reasonable sum for time and expenses incurred, to be paid by the party asking for the view and taxed in his costs, or to be paid by the county as a part of the court expenses, at the discretion of the court."

The literature of this topic has now become extensive, and is partly collected by the author in the following list (published in Bulletin No. 5, vol. XV, Northwestern University, "List of References on Problems of Contemporary Legislation"):

J. F. Stephen, "Expert Testimony" (Juridical Society Papers, II, 236).

Willard Bartlett, "Medical Expert Evidence: The Obstacles to Radical Change in the Present System" (American L. Rev., XXXIV, I).

G. A. Endlich, "Proposed Changes in the Law of Expert Testimony" (Amer. L. Rev., XXXII, 851).

W. L. Foster, "Expert Testimony — Prevalent Complaints and Proposed Remedies" (Harvard L. R., XI, 169).

Learned Hand, "Historical and Practical Considerations Regarding Expert Testimony" (Harv. L. R., XV, 40).

L. A. Emery, "Medical Expert Evidence" (Amer. Law Rev., XXXIX, 481).

S. S. Cohen, "The Proper Scope of Scientific (So-Called Expert) Testimony in Trials Involving Pharmacologic Questions" (*id.*, XXXIX, 187).

Various Articles in the Medico-Legal Society's Journal (New York).

H. M. Somerville, and others (American Lawyer, XV, 309).

Massachusetts Legislature, 1908, Hearing before the Judiciary Committee on Bill of Massachusetts Medical Society.

Michigan Bar Association, Report of Committee (Proceedings of 1905; Judge W. B. Perkins, chairman; containing a bibliography, including articles in medical journals).

Maryland Bar Association, Report of Committee (Proceedings of 1909; containing a summary of arguments, with the text of the laws and proposed bills to date; C. W. Sams, Chairman of Committee).

Persifor Frazer, "Expert Testimony: Its Abuses and Uses" (American Law Register, 1902, XLI N. S., L O. S., 87).

Lee M. Friedman, "Expert Testimony: Its Abuses and Reformation" (Yale L. J., XIX, 247).

[Note 1 — continued]

"Expert Testimony — A Discussion" (Amer. L. Rev., L, 346).

Various Articles in the Journal of Criminal Law and Criminology (Northwestern University Building, Chicago), Vol. I and later.

Edward J. McDermott, "Expert Testimony" (Amer. L. Rev., XLVII, 35).

American Institute of Criminal Law and Criminology, Committee on Insanity and Crime, Edwin R. Keedy, Chairman, Reports of 1913, 1914 (published in the Journal of the Institute).

American Medical Association, Committee on Expert Testimony, Report of 1914.

Wisconsin Branch of the American Institute of Criminal Law and Criminology, Report of Committee on Procedure, 3d Annual Meeting, 1911 (Journal of Criminal Law, etc., II, 724).

The report of the above Committee (Edwin R. Keedy, chairman) of the Institute of Criminal Law and Criminology was presented and accepted at the annual meeting of the Institute, held at Washington, D. C., in October, 1914, and its draft bill promises at last to furnish a platform on which all can agree; and there is now substantial hope of legislation to remedy the present unsatisfactory conditions; see the Committee's report printed in the *Journal* of the Institute for January, 1915, and an editorial in the *Illinois Law Review* for December, 1914 (vol. IX). The Committee's bill will be laid before corresponding committees of the American Bar Association, American Medical Association, American Neurological Society, and National Conference of Commissioners on Uniform State Laws, for further indorsement. The bill is as follows:

"Section 1. Where the existence of mental disease or derangement on the part of any person becomes an issue in the trial of a case, the judge of the trial court may summon one or more disinterested qualified experts, not exceeding three, to testify at the trial. In case the judge shall issue the summons before the trial is begun, he shall notify counsel for both parties of the witnesses so summoned. Upon the trial of the case, the witnesses summoned by the court may be cross-examined by counsel for both parties in the case. Such summoning of witnesses by the court shall not preclude either party from using other expert witnesses at the trial.

"Section 2. In criminal cases, no testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine the accused.

"Section 3. Whenever in the trial of a criminal case the existence of mental disease on the part of the accused, either at the time of the trial or at the time of the commission of the alleged wrongful act, becomes an issue in the case, the judge of the court before which the accused is to be tried or is being tried shall commit the accused to the State Hospital for the Insane, to be detained there for purposes of observation until further order of court. The court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for purposes of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of said chief physician, who may be cross-examined regarding the report by counsel for both sides.

"Section 4. Each expert witness may prepare a written report upon the mental condition of the person in question, and such report may be read by the witness at the trial. If the witness presenting the report was called by one of the opposing parties, he may be cross-examined regarding his report by counsel for the other party. If the witness was summoned by the court, he may be cross-examined regarding his report by counsel for both parties.

"Section 5. Where expert witnesses have examined the person whose mental condition is an element in the case, they may consult with or without the direction of the court, and may prepare a joint report to be introduced at the trial."

§ 564. **Foreign Law.**

[Note 3; add:]

1912, *The King v. Bleiler*, 4 Alta. 321, 1 D. L. R. 878 (Wisconsin clergyman, acting there for seven years, admitted to testify to Wisconsin marriage law; following *Sussex Peerage Case*).  
 1911, *R. v. Naoum*, 24 Ont. L. R. 306 (bigamy; marriage in Macedonia; one who had studied in a Greek school and Servian college (ecclesiastic?) held not sufficient).

§ 568. **Medical and Chemical Matters; Lay Witness.**

[Note 1; add:]

*Laymen held admissible*: 1906, *Green v. State*, 125 Ga. 742, 54 S. E. 724 (smell of carbolic acid).  
 1904, *Chicago City R. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28 (that the plaintiff was "in a nervous condition").  
 1907, *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 170 Ind. 204, 82 N. E. 1025 (corporal injury; sundry questions allowed).  
 1908, *Federal Betterment Co. v. Reeves*, 77 Kan. 111, 93 Pac. 627 (a person's appearance as to health and strength, before and after injuries, layman allowed).  
 1904, *State v. Lyons*, 113 La. 959, 37 So. 890 (coroner's clerk allowed to identify the organs struck by the bullet).  
 1906, *Krapp v. Metrop. L. Ins. Co.*, 143 Mich. 369, 106 N. W. 1107 (whether certain persons had died of consumption).  
 1912, *Norris v. St. Louis I. M. & S. R. Co.*, — Mo. —, 144 S. W. 783 (appearance as to health, allowed).  
 1907, *Soucek v. Karr*, 78 Nebr. 488, 111 N. W. 150 (a professional nurse, as to the development of a child at birth, etc.; allowed).  
 1907, *State v. Megorden*, 49 Or. 259, 88 Pac. 306 (effect of a blow).  
 1909, *Crosby v. Portland R. Co.*, 53 Or. 496, 100 Pac. 300 (that the plaintiff's apparent health and physical condition had changed since the accident, allowed).  
 1906, *Semet-Solway Co. v. Wilcox*, 143 Fed. 839, C. C. A. (plaintiff's ability to work, as affected by his health).  
 1906, *Davis v. Oregon S. L. R. Co.*, 31 Utah 307, 88 Pac. 2 (ability to work, etc.).  
*Laymen held inadmissible*: 1910, *Clemmons v. State*, 167 Ala. 20, 52 So. 467 (time of blood-coagulation after death; layman excluded). 1906, *State v. Nowells*, — Ia. —, 109 N. W. 1016 (whether a dying declarant was "delirious," excluded, but whether he was "wild" or "incoherent," allowable; this is indeed a valuable morsel of quibbling, — a veritable ensemble of Carlyle's "owl-eyed Pedantry").

§ 569. **Special Medical Experience Necessary.**[Note 1; add under *admitted*:]

1906, *Rice v. State*, 49 Tex. Cr. 569, 94 S. W. 1024 (medical experts who had had no personal experience in cases of strychnine poison, allowed to testify to its symptoms).  
 1909, *Copeland v. State*, 58 Fla. 26, 50 So. 621 (strychnine poisoning).  
 1909, *Towaliga Falls P. Co. v. Sims*, 6 Ga. App. 749, 65 S. E. 844 (malarial fever from mosquitoes).  
 1909, *State v. Kannuel*, 23 S. D. 465, 122 N. W. 420 (arsenic poisoning).

[Note 2, l. 1; add:]

1911, *Odom v. State*, 172 Ala. 683, 55 So. 820; 174 Ala. 4, 56 So. 913 (an officer in charge of the transfer of insane persons, held not an expert).  
 1906, *Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695 (like *Toomes' Estate*).  
 1913, *In re Whiting*, 110 Me. 232, 85 Atl. 79 (specialist not needed).  
 1909, *United R. & E. Co. v. Corbin*, 109 Md. 442, 72 Atl. 606 (specialist not needed).

[*Note 3; add:*]

1909, *Kimic v. San Jose L. G. I. R. Co.*, 156 Cal. 379, 104 Pac. 986 (graduate nurse, allowed to testify as to reasons for giving a dose).

1905, *Hamilton v. U. S.*, 26 D. C. App. 382, 391 (medical student excluded).

[*Note 4; add:*]

1905, *Macon R. & L. Co. v. Mason*, 123 Ga. 773, 51 S. E. 569 (personal injury; a graduated but unlicensed osteopath, admitted to testify to the nature of the injury).

[*Note 5; add:*]

*La.*: Acts 1894, No. 49, p. 55, § 16 (no practitioner of medicine who has not obtained a certificate from the State Board of Medical Examiners shall "be allowed to testify as a medical or surgical expert in any court of this State").

1907, *State v. Howard*, 120 La. 311, 45 So. 260 (statute applied to exclude a witness to bullet-wounds).

*Wis.*: 1907, *Hocking v. Windsor S. Co.*, 131 Wis. 532, 111 N. W. 685 (St. 1903, c. 426 held not applicable to a physician not testifying as an expert); St. 1903, c. 426, p. 689 (like Stats. 1898, § 1436, but extended to testimony "in a professional capacity as a physician or surgeon or insanity expert," and narrowed so that it shall not prevent a Court from receiving the testimony of any person in a criminal action).

1912, *State v. Law*, 150 Wis. 313, 136 N. W. 803, 137 N. W. 457 (the statute does not apply to exclude testimony on topics of bacteriology etc. by unlicensed professors in a medical school).

## § 570. Handwriting and Paper Money.

[*Note 1, l. 8, before "where, however," insert:*]

In *Com. v. Borasky*, 214 Mass. 313, 101 N. E. 377 (1913) an illiterate was allowed to identify checks by the picture on them.

[*Note 1, at the end; add:*]

Compare the cases cited *post*, § 2012.

[*Note 5; add:*]

1913, *Cardwell v. Breckenridge*, Ont. S. C., 11 D. L. R. 461 (St. 1909, 1 Geo. V, c. 41, now Rev. St. 1914, c. 165, §§ 3, 25, held not to exclude a surveyor other than an Ontario surveyor).

[*Note 6; add:*]

1905, *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668 (bank-officers, and a court-clerk, admitted to testify to the sameness of ink and the relative age of writings).

On the above points, compare the cases cited *post*, § 2024.

## § 571. Miscellaneous Instances (Speed of a Train, etc.).

[*Note 2; add:*]

1906, *Colorado & S. R. Co. v. Webb*, 36 Colo. 224, 85 Pac. 683.

1903, *Metropolitan R. Co. v. Blick*, 92 D. C. App. 194, 213.

1904, *Cronk v. Wabash R. Co.*, 123 Ia. 349, 98 N. W. 884. 1904, *Gregory v. Wasbash R. Co.* 126 Ia. 230, 101 N. W. 761. 1906, *Line v. Grand Rapids & I. R. Co.*, — Ia. —, 106 N. W. 719. 1911, *Sayne v. Waterloo C. F. & N. R. Co.*, 153 Ia. 445, 133 N. W. 781.

1905, *Atchison, T. & S. F. R. Co. v. Holloway*, 71 Kan. 1, 80 Pac. 31. 1909, *Johnson v. Chicago R. I. & P. R. Co.*, 80 Kan. 456, 103 Pac. 90.

[*Note 2 — continued*]

- 1906, *Garran v. Michigan C. R. Co.*, 144 Mich. 26, 107 N. W. 284.  
 1906, *Stotler v. Chicago & A. R. Co.*, 200 Mo. 107, 98 S. W. 509 (reviewing the cases).  
 1903, *Omaha St. R. Co. v. Larson*, 70 Nebr. 591, 97 N. W. 824.  
 1910, *Sherman v. Southern Pacific Co.*, 33 Nev. 385, 111 Pac. 416.  
 1911, *Dugan v. Arthurs*, 230 Pa. 299, 79 Atl. 626.  
 1905, *Borneman v. Chicago St. P. M. & O. R. Co.*, 19 S. D. 459, 104 N. W. 206 ("any person may become proficient").  
 1906, *Porter v. Buckley*, 147 Fed. 140, C. C. A. (speed of an automobile).

[*Note 5; add:*]

- 1906, *Halliday M. Co. v. Louisiana & N. W. R. Co.*, 80 Ark. 536, 98 S. W. 374 (railroad rates).  
 1904, *Conley v. Portland G. L. Co.*, 58 Me. 61, 58 Atl. 61 (water-gas).  
 1903, *U. S. v. Hung Chang*, 126 Fed. 400, — D. C. — (whether a person was of Chinese race).  
 1909, *Harris v. Consolidation Coal Co.*, 111 Md. 209, 73 Atl. 805 (defect in mine-pipes).

### § 575. Interest-Disqualification; History.

[*Note 28; add:*]

Further details are given in Bateson's "Borough Customs," vol. II, *Introd.* pp. 29-32 (Selden Society Pub., XXI, 1906).  
 For some references upon the later history of other forms of the party's decisory oath, see *post*, § 1815, n. 2.

In the *Boston Globe* of Aug. 21, 1907, is noted a pending lawsuit in Lynn, Mass., the settlement of which was, by consent, to be left to the defendant's decisory oath, taken according to the Jewish law before a rabbi.

### § 576. Interest-Disqualification.

[*Note 11; add:*]

Distinguish, however, the rule for a valid *attestation* by a credible witness (*post*, §§ 582, 1292).

### § 578. Survivor's Disqualification.

[*Text*, p. 709, l. 3 from above; after "adopted in," *insert:*]

Illinois, Oregon.

[*Text*, p. 768, l. 3 from below, after "mere words"; *add* a footnote 1a:]

<sup>1a</sup> Approved in the following opinion:

- 1907, *Omlie v. O'Toole*, 16 N. D. 126, 112 N. W. 677.

### § 579. Accused in Criminal Cases.

[*Note 7; add:*]

- 1912, *Lindsay v. State*, 138 Ga. 818, 76 S. E. 369 (whether the defendant's counsel may elicit his evidence by questions is in the trial Court's discretion).  
 1912, *Jones v. State*, 12 Ga. App. 133, 76 S. E. 1070 (whether the accused may make a second statement, after rebuttal evidence by the State, is in the trial Court's discretion).

[*Text*, p. 710; at the end of the quotation from *People v. Tyler*, *add*, as note 7a:]

<sup>7a</sup> The apprehensions of conservative lawyers, at the time of enacting this reform, as to its ill consequences upon interests of the innocent accused, may be seen forcibly set forth in an article on "Testimony of Persons accused of Crime," 1 *Amer. Law Rev.* 443 (1866); and it

[Text, p. 710 — *continued*]

was even argued by some of the obstinate ones that the reform was unconstitutional: Wm. A. Maury, in 14 *Amer. Law Rev.* 752 (1880).

[Note 9; *add.*]

1894, *Serjeant Robinson, Bench and Bar*, 4th ed., 296.

A rational statement of the American experience under the modern rule will be found in Mr. (Assistant District Attorney) C. C. Nott's article, "In the District Attorney's Office," *Atlantic Monthly*, 1905, p. 481. The best survey of the question, from the point of view of experience, is found in Mr. (Assistant District Attorney) Arthur Train's invaluable and entertaining book, "The Prisoner at the Bar" (1906), pp. 161-164.

[Text, p. 711, at the end of the quotation from Sir J. Stephen, *add.*]

1908, Hon. E. J. Sherman, Justice of the Superior Court of Massachusetts, in "Recollections of a Long Life," p. 234: "James H. Vahey, during the trial [of Charles L. Tucker for murder, in 1904] entered the judge's lobby, after the adjournment of court, Judges Sherman and Sheldon, Sheriff John R. Fairbairn and Mr. Vahey, being present, the following conversation took place:

"Mr. Vahey. 'Judge Sherman, you having had a large experience as attorney general and as a justice of this court in capital trials, I want to ask your advice, as I have had little or no experience in such cases and am a good deal embarrassed.'

"Judge Sherman. 'If I can properly advise you, I will.'

"Mr. Vahey. 'Shall I put the prisoner on the witness stand?'

"Judge Sherman. 'I do not think it would be proper for me to answer that question.'

"Perhaps I can tell you what the rule and practice is among the best lawyers in such cases. If the attorney believes his client innocent, put him on the witness stand without hesitation. If, however, he believes him guilty, never put him on the witness stand. If the prisoner insists on being a witness and the attorney believes him guilty, the attorney should say to him: "I advise you not to testify," but as you have more interest in the case than I have, I shall not interfere.'

"What do you say, Judge Sheldon?'

"Judge Sheldon — 'I fully concur in what you say about the practice among the best lawyers in such cases.'

"Mr. Vahey — 'I thank you, gentlemen, for advising me.'

"Some days after, Mr. Vahey again entered the judges' office and said:

"After our interview the other evening, I told Tucker what you said to me concerning his being a witness.

"After talking with him a long time, I told him to think it over carefully and then to decide what to do.

"Subsequently he told me that he had decided not to be a witness, and thereby he relieved me of a great responsibility, and I did not have to advise him.'

"I did not ask Mr. Vahey if he wanted to ask me about Tucker's wanting to be a witness. The only conversation I ever had with him on that subject is stated in the above memorandum."

## § 580. Co-Indictees and Co-Defendants.

[Note 3; *add.*]

1906, *Barbe v. Terr.*, 16 Okl. 562, 86 Pac. 61.

*Contra.*: 1912, *State v. Case*, 61 Or. 265, 122 Pac. 304 (following *State v. White*).

[Note 4; *add.*]

1905, *State v. Cobby*, 128 Ia. 114, 103 N. W. 99 (admitted for the State).

1906, *State v. Myers*, 198 Mo. 225, 94 S. W. 242 (same; here an accomplice separately charged and convicted).

[*Note 11; add, under Pro:*]

1863, *R. v. Jerrett*, 22 U. C. Q. B. 499, 511. 1906, *R. v. Blais*, 11 Ont. L. R. 345.

[*Note 12; add:*]

*Accord*: 1910, *Menefee v. State*, 59 Fla. 316, 51 So. 555 (Rev. St. § 2905, Gen. St. § 3975, excluding approvers, held not applicable to the witness offered). 1905, *State v. Knudston*, 11 Ida. 524, 83 Pac. 226 (pleading guilty, but not yet discharged from the information).

1907, *Simpson v. Com.*, 126 Ky. 441, 103 S. W. 332.

1909, *State v. Shelton*, 223 Mo. 118, 122 S. W. 732.

1906, *State v. Myers*, 198 Mo. 225, 94 S. W. 242 (convicted).

1905, *Wells v. Terr.*, 15 Okl. 195, 81 Pac. 425 (pleading guilty but not sentenced).

1910, *State v. Kennedy*, 85 S. C. 146, 67 S. E. 152.

1907, *Burdett v. State*, — Tex. Cr. —, 101 S. W. 988 (after plea of guilty and before sentence).

1905, *Wong Din v. U. S.*, 135 Fed. 702, 68 C. C. A. 340 (conspiracy to evade immigration law).

*Contra*: 1906, *State v. White*, 48 Or. 416, 87 Pac. 137.

[*Note 13; add:*]

*Accord*: 1855, *People v. Labra*, 5 Cal. 184.

1862, *People v. Newberry*, 20 id. 439.

1905, *State v. Knudston*, 11 Ida. 524, 83 Pac. 226.

La. St. 1902, No. 185 (quoted *ante*, § 488).

*Contra*: 1884, *State v. Drake*, 11 Or. 396, 402, 4 Pac. 1204.

1906, *State v. White*, 48 Or. 416, 87 Pac. 137 (the trial Court has discretion as to the one discharged).

1907, *Burdett v. State*, 51 Tex. Cr. 345, 101 S. W. 988 (for a misdemeanor).

[*Note 15; add:*]

1909, *Macdonnell's Case*, 2 Cr. App. 322 (under St. 1898, c. 36, § 1, "a prisoner is a competent, though not a compellable, witness for a co-prisoner jointly indicted with him for the same offence").

There is a peculiar doctrine in Texas as to the right of a defendant to insist on the State's guaranty of immunity to a co-defendant thus dismissed, in order that the defendant may call him without the obstacle of his claim of privilege.

1906, *Puryear v. State*, 50 Tex. Cr. 454, 98 S. W. 258.

[*Note 16; add:*]

In Louisiana, St. 1904, No. 41 (quoted *ante*, § 488) now removes all disqualification on the above grounds.

### § 581. Testifying to One's Own Intent.

[*Note 3; add:*]

1909, *Fanning v. Green*, 156 Cal. 279, 104 Pac. 309 (husband's gift to wife; the husband-plaintiff's testimony to his intent held admissible, the intent being here material in the substantive law). 1912, *Runo v. Williams*, 162 Cal. 444, 122 Pac. 1082 (malicious prosecution; whether defendant was actuated by malice, etc., allowed).

1906, *Boulder & W. R. D. Co. v. Leggett D. & R. Co.*, 36 Colo. 455, 86 Pac. 101 (by a party, whether he intended to abandon a water-right, allowed).

1904, *Eatman v. State*, 48 Fla. 21, 37 So. 576 (embezzlement; defendant allowed to speak as to his belief in his right to the money).

1906, *Huggard v. Glucose S. R. Co.*, 132 Ia. 724, 109 N. W. 475 (to an employee, whether he relied on a promise to repair, allowed). 1906, *Helm v. Anchor F. Ins. Co.*, 132 Ia. 177,

[*Note 3 — continued*]

109 N. W. 605 (fraud in insurance, by the plaintiff, that he had no intent to deceive the defendant, admitted). 1909, *Larson v. Thoma*, 143 Ia. 338, 121 N. W. 1059 (intent to purchase).

1911, *State v. Hetrick*, 84 Kan. 157, 113 Pac. 383 (false pretenses; whether the cashier would have paid if he had not believed the defendant to be the party personated, allowed).

1906, *State v. Morin*, 102 Me. 290, 66 Atl. 650 (intention in taking a Federal liquor-license).

1907, *Pelkey v. Hodgdon*, 102 Me. 426, 67 Atl. 218 (motive in placing a mortgage, admitted; quoting the above text).

1874, *Knight v. Peabody*, 116 Mass. 362 (false representations; "What induced you to sign, etc.?" allowed). 1906, *Toole v. Crafts*, 193 Mass. 110, 78 N. E. 775 (false representations inducing a waiver by defendant; defendant's testimony to his state of mind as to knowledge, allowed). 1912, *Kapigian v. Der Minassian*, 212 Mass. 412, 99 N. E. 264 (intent as to domicile).

1912, *Isbell v. Anderson C. Co.*, 170 Mich. 304, 136 N. W. 457 (good faith in declaring a forfeiture).

1905, *Grout v. Stewart*, 96 Minn. 230, 104 N. W. 966 (intent in delivering a deed in performance of a contract; allowed).

1910, *Oakes v. State*, 98 Miss. 80, 54 So. 79 (by a defendant in libel, what was his motive in publishing, allowed).

1912, *Noonan v. Luther*, 206 N. Y. 105, 99 N. E. 178 (defendant's intent in expelling a licensee).

1909, *Crawford v. U. S.*, 212 U. S. 183, 29 Sup. 260 (an accused having taken surreptitiously certain letters from a third person's file, with apparent intent to suppress inculpatory evidence, it was held proper for him to state that his intent was not to suppress them, but to preserve them for use in his trial). 1912, *Hedderly v. U. S., C. C. A.*, 193 Fed. 561 (intent of entrymen in filing upon public lands, allowed).

1908, *Taplin v. Marcy*, 81 Vt. 428, 71 Atl. 72 (intent of a vendor in taking lien notes on lumber, allowed).

1904, *Strasser v. Goldberg*, 120 Wis. 621, 98 N. W. 554 (estoppel; whether the other party relied on the statement, allowed). 1906, *Brown v. State*, 127 Wis. 193, 106 N. W. 536 (rape; to the prosecutrix, "Was it against your will?", allowed).

Compare the cases cited *post*, § 1963 (opinion rule).

#### § 582. Testamentary Attesting Witness.

[*Note 4; add:*]

1907, *Gump v. Gowans*, 226 Ill. 635, 80 N. E. 1086. 1909, *Jones v. Griesler*, 238 Ill. 183, 87 N. E. 295 (executor). 1909, *Fearn v. Postlethwaite*, 240 Ill. 626, 88 N. E. 1057 (wife of executor).

1908, *Hiatt v. McColley*, 171 Ind. 91, 85 N. E. 772. 1909, *Wishart v. Applegate*, 172 Ind. 313, 88 N. E. 501.

1904, *Lanning v. Gay*, 70 Kan. 353, 78 Pac. 810, 85 Pac. 407.

1903, *Savage v. Bulger*, — Ky. —, 76 S. W. 361, 77 S. W. 717.

1908, *Swanzy v. Kolb*, 94 Miss. 10, 46 So. 549 (opinion by Whitfield, C. J.).

1905, *Mann v. Balfour*, 187 Mo. 290, 86 S. W. 103.

1904, *Wheelock's Will*, 76 Vt. 235, 56 Atl. 1013.

Compare also the cases cited *post*, § 1510, n. 4 ("credible" attesting witnesses).

#### § 584. Burden of Proving Disqualification.

[*Note 1; add:*]

1903, *Terr. v. Cheong Kwai*, 15 Haw. 280 (wife).

§ 586. **Time of Making Objection.**

[*Note 1; add:*]

1909, *Chicago Title & T. Co. v. Sagola L. Co.*, 242 Ill. 468, 90 N. E. 282.

[*Note 7; add:*]

1905, *Vickery v. State*, 50 Fla. 144, 38 So. 907 (the trial Court in discretion may let all the witnesses be sworn to testify, and postpone their *voir dire* examination till each one is called).

[*Note 10, l. 3 from the end; add:*]

In Missouri, a cross-examination is a waiver as to new matter only: 1907, *McCune v. Goodwillie*, 204 Mo. 306, 102 S. W. 997.

§ 600. **Marital Relationship; History.**

[*Note 3; add:*]

1904, *Brown v. State*, 142 Ala. 287, 38 So. 268 (father).

1848, N. Y. Commissioners' Report (quoted *ante*, § 576).

§ 605. **Mistress; Bigamous Marriage.**

[*Note 4, l. 1; add:*]

1905, *State v. Wilson*, 5 Penn. Del. 77, 62 Atl. 227 (assault with intent; a woman who had signed a bond, etc., as defendant's wife, not excluded).

[*Note 4; add, in a new paragraph:*]

So, also a marriage *since the time* of the transaction or crime will disqualify.

1904, *Elmore v. State*, 140 Ala. 184, 37 So. 156 (wife excluded). Compare § 2239, notes 9-11, *post*.

§ 607. **Interest in the Cause; Nominal Party.**

[*Note 2; add:*]

1904, *Lanning v. Gay*, 70 Kan. 353, 78 Pac. 810, 85 Pac. 407 (husband of a legatee, allowed to testify at probate as a subscribing witness).

§ 608. **Effect of Statutes Qualifying Parties.**

[*Note 2; add:*]

*Accord*: 1904, *Schneider v. Sulzer*, 212 Ill. 87, 72 N. E. 19.

[*Note 4, par. 1; add:*]

*Accord*: 1905, *Hiskett v. Bozarth*, 75 Nebr. 70, 105 N. W. 990 (distinguishing, but not soundly, between husband and wife as witness).

1912, *Freeman v. Freeman*, 71 W. Va. 303, 76 S. E. 657.

*Contra*: 1906, *Bentley v. Jun*, — Nebr. —, 107 N. W. 865 (husband of plaintiff admitted, where the plaintiff's success would give her property "in which her husband would have no direct legal interest").

1906, *White v. Poole*, 74 N. H. 71, 65 Atl. 255.

1906, *Guillaume v. Flannery*, 21 S. D. 1, 108 N. W. 255 (under a statute expressly qualifying husband and wife in general, a wife not pecuniarily interested may testify).

**§ 609. Co-Defendants.**

[*Note 1; add:*]

1904, *Henning v. Stevenson*, 118 Ky. 318, 80 S. W. 1135 (wife of one of several will-contestants, not admissible for the others). 1903, *Dovey v. Lam.*, 117 Ky. 19, 77 S. W. 383 (action for battery against five jointly; the wife of one of them, admitted to testify for the other four; cases cited from Idaho and Indiana, but not the preceding ones in this State). 1904, *State v. Sargood*, 77 Vt. 80, 58 Atl. 971 (killing of colts; wife of a co-respondent, jointly tried, excluded for the defendant).

**§ 610. Death and Divorce.**

[*Note 2; add, under Accord:*]

1878, *Jaquith v. Davidson*, 21 Kan. 341, 347 (action by G. D., revived after his decease; his widow and executrix admitted for his estate; "Mr. D. being dead, she was no longer testifying for or against him"). 1909, *Brown v. Patterson*, 224 Mo. 639, 124 S. W. 1 (widow admitted on behalf of her husband's grantee). 1903, *McDowell v. McDowell's Est.*, 75 Vt. 401, 56 Atl. 99 (wife of a deceased mortgagee, admitted in a foreclosure suit). 1905, *Schultz v. Culbertson*, 125 Wis. 169, 103 N. W. 234 (widow admitted in an action against the executor on a contract).

[*Note 3; add:*]

1904, *Turner's Trustee v. Washburn*, — Ky. —, 80 S. W. 480.

**§ 612. Necessity, as Creating Exceptions.**

[*Note 1; add:*]

In Louisiana, under St. 1898, No. 190 (quoted *ante*, § 488), in actions for personal injuries to a wife, the wife is admissible, but not the husband: 1899, *Dunning v. West*, 51 La. An. 618, 623, 25 So. 306 (here both were admitted). 1906, *Martin v. Derenbecker*, 116 La. 495, 40 So. 849 (modifying the preceding case, in the light of St. 1902, No. 68, amending Civ. Code, § 2402).

**§ 613. Statutory Exceptions; Joint Parties.**

[*Note 4; add, under Louisiana:*]

1904, *Schoppel v. Daly*, 112 La. 201, 36 So. 322 (husband admitted, in an action by the wife for personal injuries). 1906, *Bianchi v. Del Valle*, 117 La. 587, 42 So. 148 (in the wife's suit for personal injuries, the husband, being joined, may not testify for her); but the effect of these rulings is altered, for actions for *personal injuries to a wife*, by the statute and cases cited *ante*, § 612, n. 1.

**§ 614. Separate Estate.**

[*Note 1; add, under Illinois:*]

1904, *Booker v. Booker*, 208 Ill. 529, 70 N. E. 709. 1907, *Linkemann v. Knepper*, 226 Ill. 473, 80 N. E. 1009. 1913, *Marks v. Madsen*, 261 Ill. 51, 103 N. E. 625.

**§ 615. Wife as if Unmarried.**

[*Note 1; add:*]

1904, *Henning v. Stevenson*, 118 Ky. 318, 80 S. W. 1135. 1907, *Taylor v. Johnson*, — Ky. —, 99 S. W. 320 (action to cancel shares of stock). 1908, *Walker's Assignees v. Walker*, — Ky. —, 114 S. W. 338 (note by partnership). 1911, *Weber v. Lape*, 145 Ky. 769, 141 S. W. 67 (joint liability).

§ 616. **Agents.**

[*Note 1; add:*]

*Arkansas*: 1908, *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405.

*Kentucky*: 1904, *Logsdon v. Stern*, 117 Ky. 217, 77 S. W. 927 (St. 1898, c. 1, construed to mean that each may testify to the matters within his or her knowledge, but not both to the same matters).

*Louisiana*: 1905, *Shepherd v. Schomaker*, 115 La. 542, 39 So. 554.

*Vermont*: 1905, *Miller v. Stebbins*, 77 Vt. 183, 59 Atl. 844. 1906, *Boyce v. Bolster*, 79 Vt. 40, 64 Atl. 79 (wife not admitted to prove a book account; the trial took place before St. 1904, No. 60, p. 78, quoted *ante*, § 488).

*Illinois*: 1907, *Donk Bros. C. & C. Co. v. Stroetter*, 229 Ill. 134, 82 N. E. 250.

*Oklahoma*: 1912, *Fish v. Bloodworth*, 36 Okl. 586, 129 Pac. 32. 1913, *Western N. L. Ins. Co. v. Williamson H. F. Co.*, 37 Okl. 213, 131 Pac. 691.

*Wisconsin*: 1911, *Karlen v. Hadinger*, 147 Wis. 78, 132 N. W. 591.

§ 617. **Sundry Statutory Provisions.**

[*Note 1; add:*]

1902, *Corkum v. Corkum*, 40 N. Sc. 488 (crim. con. by force; plaintiff's wife not admitted in his favor, under Rev. St. c. 163, § 36).

1905, *Graves v. Rivers*, 123 Ga. 224, 51 S. E. 318 (under Code § 5272, the parties to an action for breach of promise of marriage are disqualified).

1913, *Anderson v. Anderson*, 140 Ga. 802, 79 S. E. 1124 (cited *post*, § 2245, n. 5).

1904, *Floore v. Green*, — Ky. —, 83 S. W. 133 (under Civ. C. § 606, a husband is admissible in a probate contest where his wife is interested but does not testify).

1905, *Com. v. Woelfel*, 121 Ky. 48, 88 S. W. 1061 (preliminary issue of an accused's sanity; the wife not admissible for him).

1907, *Mitchell v. Brady*, 124 Ky. 411, 99 S. W. 286 (under Civ. C. § 606, a wife may testify for the administrator-husband in an action for the death of their child).

1914, *Hirdes v. Ottawa Circuit Judge*, — Mich. —, 146 N. W. 646 (action for having intercourse with the plaintiff's wife after making her intoxicated; if this was adultery, the wife was not competent under Comp. L. § 10213; if it was rape, she was competent; what loud Jovian laughter must resound when Mercury calls attention to us mortals making rules of credibility depend on the varieties of criminality in issue!).

1905, *Grabowski v. State*, 126 Wis. 447, 105 N. W. 805 (lascivious conduct; defendant's wife excluded).

§ 620. **Statutory Express Abolition.**

[*Note 1; add:*]

*Ind. T.*: 1913, *Birdwell v. U. S.*, — Okl. Cr. App. —, 135 Pac. 445 (under Ind. T. St. 1899, § 1974, a defendant's wife cannot testify for him).

*Kan.*: 1911, *Harris v. Brown*, C. C. A., 187 Fed. 6 (Kansas Gen. Stats. 1909, § 5915, C. C. P. § 321, held to abolish all marital incompetency except for marital communications).

§ 650. **Observation and Knowledge.**

[*Text*, p. 764, l. 14 from above; *add* a note 1]:

<sup>1</sup> On the function of Perception, as affecting testimonial credit, the reader may consult the passages from scientific works, collected in the present author's "Principles of Judicial Proof" (Boston, 1913, pp. 426-461).

**§ 654. Burden of Proof of Knowledge Qualification.**

[*Note 1; add:*]

1903, *Friday v. Pennsylvania R. Co.*, 204 Pa. 405, 411, 54 Atl. 339 (a witness to land-values may be subjected to cross-examination as to his qualifications before expressing an opinion on direct examination).

1904, *Davis v. Pennsylvania R. Co.*, 215 Pa. 581, 64 Atl. 774 (similar).

Compare the general rule for *voir dire* as to *interest* (*ante*, § 585) and as to *experience* (*ante*, § 560, n. 1).

[*Note 2; add:*]

1904, *Norman P. S. Co. v. Ford*, 77 Conn. 461, 59 Atl. 499 (where a deposition shows that the witness speaks from hearsay only, the answer may be struck out; though "if the witness had been present to testify, the Court could have received these answers on the assumption that he was speaking of what he knew; leaving it to the defendants to show the contrary if they could, on cross-examination or otherwise").

**§ 655. Witness Specifying the Grounds of his Knowledge.**

[*Note 1, par. 1; add:*]

1905, *Braham v. State*, 143 Ala. 28, 38 So. 919 (insanity).

1907, *Salmon v. Rathjens*, 152 Cal. 290, 92 Pac. 733.

1914, *Alford v. State*, 47 Fla. 1, 36 So. 436 (occurrence of a fire, as the reason for fixing a date of seeing defendant, allowed).

1908, *Albany Phosphate Co. v. Hugger*, 4 Ga. App. 771, 62 S. E. 533 (witness testified to present recollections based on a marked calendar, now lost; "the weather bureau reports verified what I had on my calendar"; the last reference held doubtful, but admitted).

1910, *Mayor of Baltimore v. Hurlock*, 113 Md. 674, 78 Atl. 558 (value-witness).

1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127 (certain experiments, not admitted under the present rule).

1911, *Brown v. Chicago B. & O. R. Co.*, 88 Nebr. 604, 130 N. W. 265 (child's exclamation directing witness' attention).

1913, *Miller v. Pearce*, — Vt. —, 85 Atl. 588 (recollecting an act of defendant by a remark made about it).

But he is not *obliged* on direct examination to state his reasons:

1905, *Com. v. Johnson*, 188 Mass. 382, 74 N. E. 939.

**§ 657. Knowledge must be founded on Personal Observation.**

[*Text*, p. 751, at the bottom, after the *Ayliffe*, add a new note <sup>1a</sup>].

<sup>1a</sup> "An old woman in the witness-box had been rattling on in the most voluble manner, until it was impossible to make head or tail of her evidence. The judge [Hawkins], thinking he would try his hand, began with a soothing question. But the old woman would not have it at any price. She replied testily, 'It's no use your bothering me. I have told you all I know.' 'That may be,' said his lordship; 'but the question rather is — Do you *know* all you have told us?'" (Hon. A. C. Plowden, "Grain or Chaff; the Autobiography of a Police Magistrate," 1903, p. 155).

[*Note 1; add:*]

1907, *Moore v. Dozier*, 128 Ga. 90, 57 S. E. 110 (whether a mother was financially able to support her children, allowed, for a person familiar with the family).

**§ 657. Knowledge founded on Personal Observation.**

[*Note 1; add.:*]

- 1905, *Davis v. Arnold*, 143 Ala. 228, 39 So. 141 (ownership).  
 1905, *King v. Bynum*, 137 N. C. 491, 49 S. E. 955 (proceedings at an auction).  
 1906, *Rouss v. King*, 74 S. C. 251, 54 S. E. 615 (accounts, etc.).

**§ 659. Knowledge involving Rational Inferences.**

[*Text*, par. 1, at the end; *add* a new note 1:]

<sup>1</sup> For the use of testimony based on *vacuum-rays*, *phonograph*, *telepathy*, etc., see *post*, § 795.

**§ 660. Identity of a Person, etc.**

[*Note 1*, par. 1; *add.:*]

- 1912, *Rhea v. State*, 104 Ark. 162, 147 S. W. 463 (voice distinguishing a white from a negro).  
 1907, *Mack v. State*, 54 Fla. 55, 44 So. 706.  
 1904, *Com. v. Kelley*, 186 Mass. 403, 71 N. E. 807 (assault by night).  
 1910, *State v. Vanella*, 40 Mont. 326, 106 Pac. 364.  
 1906, *Waggoner v. State*, — Tex. Cr. —, 98 S. W. 254.

[*Note 2*, par. 1; *add.:*]

1904, *Alford v. State*, 47 Fla. 1, 36 So. 436 (identification from clothes, etc., allowed; but the witness must have had personal knowledge).

[*Note 7; add.:*]

- 1905, *Bryce v. Chicago, M. & St. P. R. Co.*, 129 Ia. 342, 105 N. W. 497 (by a brakeman, that he could tell by the sensation, etc., that the emergency brake was set, allowed; good opinion by Weaver, J.).  
 1905, *Wright v. Crane*, 142 Mich. 508, 106 N. W. 71 (speed of an automobile; witness not qualified on the facts).

**§ 661. Another Person's State of Mind.**

[*Note 1*, par. 1; *add*, under *Contra:*]

1906, *Sneed v. Marysville G. & E. Co.*, 149 Cal. 704, 87 Pac. 376 (boy killed by electrical contact; his mother's testimony that he did not know of electrical dangers, excluded; unsound on the facts; *McLaughlin, J.*, diss.).

**§ 662. Improbabilities in Scientific Testimony.**

[*Note 2*, l. 2; *add.:*]

- 1905, *Sun Ins. Office of London v. Western W. M. Co.*, 72 Kan. 41, 82 Pac. 513 (spontaneous combustion).  
 1905, *Post v. U. S.*, 135 Fed. 1, 11, 67 C. C. A. 569 (fraud in mental healing; good opinion by *Shelby, J.*).

**§ 663. Speculative Testimony to Personal Injuries.**

[*Note 1; add.:*]

- 1907, *Cordiner v. Los Angeles Traction Co.*, 5 Cal. App. 400, 91 Pac. 436 (personal injury).  
 1911, *Cross v. Syracuse*, 200 N. Y. 393, 94 N. E. 184 (the *Strohm* case explained and limited).

[*Note 1 — continued*]

1909, *Bucher v. Wisconsin Central R. Co.*, 139 Wis. 597, 120 N. W. 518 (permanence of impotency).

[*Note 2; add.:*]

1908, *Donnelly v. Chicago City R. Co.*, 235 Ill. 35, 85 Ill. 233 (probable effect of injury, admitted).

§ 664. **Negative Knowledge.**

[*Note 1; add.:*]

1906, *Kastor Advertising Co. v. Coleman*, 11 Ont. L. R. 262, 267 (whether certain advertisements were published, etc.).

1904, *Hart v. Taylor*, 37 N. Sc. 155 (conversations).

1913, *Thompson v. Los Angeles & L. D. B. R. Co.*, 165 Cal. 748, 134 Pac. 709 (witnesses who heard no motorman's signal, admitted).

1912, *Colorado & S. R. Co. v. Lauter*, 21 Colo. App. 101, 121 Pac. 137 (locomotive whistle).

1910, *Grand Trunk Western R. Co. v. Reynolds*, 175 Ind. 161, 92 N. E. 733 (railroad signals).

1913, *Philadelphia B. & W. R. Co. v. Gatta*, — Del. —, 85 Atl. 721 (careful opinion by Woolley, J.).

1906, *Warrick v. State*, 125 Ga. 133, 53 S. E. 1027 (murder).

1905, *Northern C. R. Co. v. State*, 100 Md. 404, 60 Atl. 19 (bystanders not hearing an engine-bell, said to be some evidence).

1904, *McDonald v. N. Y. C. & H. R. R. Co.*, 186 Mass. 474, 72 N. E. 55 (railroad signals).

1909, *Slaterry v. New York N. H. & H. R. Co.*, 203 Mass. 453, 89 N. E. 622.

1906, *Cotton v. Willmar & S. F. R. Co.*, 99 Minn. 366, 109 N. W. 835 (ringing of bell).

1910, *People v. Faber*, 199 N. Y. 256, 92 N. E. 674 (approving the above passage).

1904, *Chicago & N. W. R. Co. v. Andrews*, 130 Fed. 65, 70, 64 C. C. A. 399 (railroad train).

1909, *Ide v. Boston & Maine R.*, 83 Vt. 66, 74 Atl. 401 (that no other cause for a fire was seen than engine-sparks, allowed). 1912, *Barney's Adm'x Quaker Oats Co.*, 85 Vt. 372, 82 Atl. 113 (that the deceased and others had never been heard to say anything about the danger of a dust explosion, admitted). 1911, *Comstock's Admir. v. Jacobs*, 84 Vt. 277, 78 Atl. 1017 (wife's not hearing of directions given by husband).

1911, *Kahaley v. Frye*, 62 Wash. 43, 113 Pac. 247 (injury by a runaway team).

1911, *Brown v. Milwaukee E. R. L. Co.*, 148 Wis. 98, 133 N. W. 589. 1913, *Marinette v. Goodrich T. Co.*, 153 Wis. 92, 140 N. W. 1094 (whistle).

This kind of evidence usually gives rise to a quibbling and futile discussion as to the *relative weight* of positive and negative testimony; the rule of law, however, has really nothing to say on such subjects, which go to the jury for determination. In the following cases, and many cited *supra*, the Supreme Court was improperly asked to hold that an instruction on the relative weight of negative knowledge should be given:

1906, *Dillman v. McDanel*, 222 Ill. 276, 78 N. E. 591.

1905, *State v. Murray*, 139 N. C. 540, 51 S. E. 775.

A rule-of-thumb for measuring testimonial weight has here grown up: "Where two witnesses, unimpeached, contradict each other, the presumption is in favor of the witness who swears affirmatively." This rule-of-thumb can be seen to be childish in its ignoring of the complex elements of all testimony, if one will consult the numerous passages from psychological works collated in Part II of the present writer's "*Principles of Judicial Proof*" (1913). The rule is a discredit to the science of law, and should be discarded. The vain lucubrations to which it leads (*e.g.* in *Anderson v. Horlick M. M. Co.*, 137 Wis. 569, 1908, 119 N. W. 342) have no relation to the real probative value of specific testimony.

§ 665. **Hearsay Knowledge from Experts.**

[*Note 4, l. 2; add:*]

The cases on different forms of *lenses* are placed *post*, § 795, and on the *telephone* and the *dictagraph*, *post*, § 669.

[*Note 4; add:*]

N. Y. St. 1851, c. 134, § 33, amended St. 1893, c. 101, § 1, re-enacted in St. 1909, c. 65, p. 22, Feb. 17 (adding § 841a to the C. C. P.; no surveyor shall testify to a survey of lands without oath or other evidence, on demand, that "the chain or measure used by him was conformable to the standards of the State" at the time of survey; official sealer's certificate, admissible).

[*Note 6; add:*]

1906, *Remsburg v. Iola P. C. Co.*, 73 Kan. 66, 84 Pac. 548 (expert on explosives, speaking partly from book learning, admitted).

§ 667. **Testifying to One's Own Age.**

[*Note 1; add, under Accord:*]

1904, *McCollum v. State*, 119 Ga. 308, 46 S. E. 413 (selling liquor to A., a minor; A. allowed to testify to his own age, though he knew it only from his mother, who was living and in the county).

1905, *State v. Miller*, 71 Kan. 200, 80 Pac. 51 (even though parents are available).

1905, *People v. Colbath*, 141 Mich. 189, 104 N. W. 633 (rape under age; the prosecutrix being permitted to testify to her own age, a cross-examination as to what others, not members of the family, had told her, was held properly excluded; three judges diss.).

1906, *Curry v. State*, 50 Tex. Cr. 158, 94 S. W. 1058.

1903, *Loose v. State*, 120 Wis. 115, 97 N. W. 526.

*Undecided*: 1910, *R. v. Farrell*, 21 Ont. 540 (liquor-selling to a minor).

Of course, as *admissions* such statements are receivable:

1910, *The King v. Turner*, 1 K. B. 346, 362 (accused's statement of his age, as given for entry on the prison record; here the issue was whether he had been convicted three times since the age of 16, so as to be sentenced as an habitual criminal).

[*Text*, p. 764, at the end; add a new par. (6)a:]

(6)a. A person's *non-residence* or *non-existence* in a *place* is in the practical affairs of life constantly ascertained by inquiries made and answers received in the region of alleged residence. Testimony based on such inquiries should be received. But many Courts have perversely applied here the strict rule. The frequent uses of such testimony occur in proof of a *witness' non-residence* and a *document's loss*.<sup>4a</sup>

<sup>4a</sup> The cases are found in the following places: §§ 668, 1196, 1313, 1405, 1725, 1789.

The following case may serve as the lecturer's "horrible example" of extreme perversity; it shows the possibilities of non-common-sense which to-day can be exhibited by our courts; 1909, *Chambers v. Morris*, 159 Ala. 606, 48 So. 687; "*Dowdell, J.* The witness John W. Chambers, having testified on his direct examination that one Colin S. Varnum, who had been examined as a witness on a former trial of the case, was dead, was then permitted to testify as to what the said Varnum had sworn on the former trial. On the cross-examination of Chambers he was asked by counsel how he knew that Varnum was dead, in answer to which he said: 'I went to Varnum's former home in Houston County, Ala., and he was not there. His family was there, and they told me he was dead, and that he died at the time named. I saw

[Text, p. 764 — *continued*]

his family physician, who told me that he attended him in his last sickness, and that he (Varnum) was dead. His former neighbors told me that Varnum was dead. I did not see him myself after death, and know that he is dead only from what these persons told me.' Thereupon the court, on motion of the plaintiff, excluded all of the testimony of the witness Chambers as to what Varnum swore on the former trial. In this there was no error. Evidence of the declarations of the physician and the neighbors as to the death of Varnum were hearsay, and by no rule of evidence admissible."

**§ 669. Information received by Telephone.**

[Note 2; *add*, as par. 3.]

Distinguish also the following: 1904, *McCarthy v. Peach*, 186 Mass. 67, 70 N. E. 1029 (contract; the plaintiff conversed by telephone with the defendant, and a person present with the plaintiff was allowed to testify to the plaintiff's words, as a part of the conversation of the defendant, there being other evidence that the defendant was the person conversing from the other end of the line; this rests on the principle of § 2115, *post*).

[Text, p. 765, l. 23; after "the principle of § 665, *ante*," *add* a new note 1a:]

<sup>1a</sup> The *dictagraph*, as a form of telephone, is equally available:

1913, *State Minneapolis Milk Co.*, — Minn. —, 144 N. W. 416 (detective's testimony to conversations heard by a dictagraph installed in the room where the conversers were, admitted; point not disputed).

1914, *People v. Eng Hing*, N. Y., 106 N. E. 96 (affidavits based on dictagraph listening, received on a motion for a new trial).

**§ 672. Hypothetical Questions; General Theory.**

[Text, p. 767, l. 4 from below; after "founded," *insert* a new note a:]

• Approved in *Kearner v. Tanner Co.*, 31 R. I. 203, 76 Atl. 833 (1900).

**§ 675. Where Personal Observation is had, Hypothetical Presentation is Unnecessary.**

[Note 1; *add*:]

1914, *Southern Iron & E. Co. v. Smith*, — Mo. —, 165 S. W. 804 ("In what condition were the engines?" "They were good," not allowed for the very persons who had overhauled them; this is absurd, and Graves, J., rightly dissents).

**§ 676. Where Personal Observation is Lacking, Hypothetical Presentation is Necessary.**

[Note 1; *add*:]

1906, *Federal B. Co. v. Reeves*, 73 Kan. 107, 84 Pac. 560 ("From the history of the case, as you learned it [from others], and from your diagnosis," excluded; Porter, J., diss.).

1911, *Weibert v. Hanan*, 202 N. Y. 328, 95 N. E. 688 (opinion as to capacity of heating-apparatus).

**§ 677. Personal Observation not Necessary, when Hypothetical Presentation is Used.**

[Note 1; *add*, under *Accord*:]

1904, *Parrish v. State*, 139 Ala. 16, 36 So. 1012.

**§ 678. Some Skilled Witness may testify from both Personal Observation and Hypothetical Presentation.**

[*Note 1; add.*]

*Accord*: 1909, *Washington A. & M. V. R. Co. v. Lukens*, 32 D. C. App. 442 (physician's answer based on a hypothetical question plus the facts as examined by him, admitted, because he had already stated the facts as examined by him).

*Contra*: 1908, *Cobb v. United E. & C. Co.*, 191 N. Y. 475, 34 N. E. 395, *semble*.

**§ 679. Only Skilled Witnesses, etc.**

[*Note 1; add.*]

1906, *Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695.

1912, *Chicago & W. I. R. Co. v. Heidenreich*, 254 Ill. 231, 98 N. E. 567 (hypothetical opinion of value, based on lists of sales of other property, submitted to the witness, held improper, on the singular ground that value testimony is not expert testimony).

Even on *cross-examination* to test the opinion already expressed:

1912, *Lang v. Lang*, — Ia. —, 135 N. W. 604.

**§ 680. If the Premises Fail, etc.**

[*Note 1; add.*]

1904, *Stutsman v. Sharpless*, 125 Ia. 335, 101 N. W. 105.

[*Note 2; add.*]

1909, *Peterson v. Brackey*, 143 Ia. 75, 119 N. W. 967 (phrasing of the instruction, discussed).

*Contra*: 1909, *Burk v. Reese*, — Nebr. —, 121 N. W. 1016 (here the Court lays down the unpractical and logic-beridden rule that if any one assumption, however unimportant, is not established, the opinion must be rejected).

**§ 681. Form and Scope of Question; Particularized Premises.**

[*Note 1; add.*]

1913, *Prewitt v. State*, — Miss. —, 63 So. 330 (question based partly on unspecified personal knowledge, partly on unspecified testimony, and partly on specified data, held improper on the facts).

[*Note 2; add.*]

1913, *State v. Reilly*, — N. D. —, 141 N. W. 720, 734.

[*Note 3; add.*]

1907, *Decker v. Chicago, M. & St. P. R. Co.*, 102 Minn. 99, 112 N. W. 901.

[*Note 4; add, under Contra.*]

1907, *Chicago Union Traction Co. v. Roberts*, 229 Ill. 481, 82 N. E. 401 (here allowed, only because proper objection was not made).

[*Note 5; add, under Admitted.*]

1905, *Com. v. Johnson*, 188 Mass. 382, 74 N. E. 939 ("From all you have observed of this man, and from all you have heard in court," allowed, where the only evidence as to insanity consisted of the defendant's own witnesses and admissions, accepted as true, and the expert's personal observation; the trial Court's discretion to control).

[*Note 7; add:*]

1909, *People v. LeDoux*, 155 Cal. 535, 102 Pac. 517 (question based on testimony of "certain other witnesses," excluded).

1904, *Burnside v. Everett*, 186 Mass. 4, 71 N. E. 82 (question based on the testimony of several witnesses not conflicting, held proper).

1908, *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511 (allowed, but disapproved).

[*Note 8; add, under Excluded:*]

*Ill.*: 1905, *Elgin A. & S. Traction Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436 (opinion based in part on the testimony of the plaintiff, excluded).

*Ind.*: 1911, *Ditton v. Hart*, 175 Ind. 181, 93 N. E. 961 (opinion based on a clause in the will and a letter from the draughtsman, excluded; opinion obscure).

*Minn.*: 1906, *State v. Cowing*, 99 Minn. 123, 108 N. W. 851, *semble*.

*Mo.*: 1903, *State v. Dunn*, 179 Mo. 95, 77 S. W. 848 (testimony of defendant himself).

*N. J.*: 1904, *Shoemaker v. Elmer*, 70 N. J. L. 710, 58 Atl. 940.

[*Note 8; add, under Admitted:*]

1913, *Latourette v. Miller*, — Or. —, 135 Pac. 327 (but here excluded, because the witness had heard only a part).

*U. S.*: 1912, *M'Intyre v. Modern Woodmen*, 6th C. C. A., 200 Fed. 1 (distinguishing *Manuf. A. I. Co. v. Dorgan*, *infra*; the two cases illustrate the degree of weird logic and dream-reasoning which some Courts have developed on this topic).

[*Note 9; add:*]

1904, *Smith v. Minneapolis St. R. Co.*, 91 Minn. 239, 97 N. W. 881 (excluded where it did not appear that the witness had heard the testimony referred to in the question).

### § 682. Kind of Data that may be Assumed.

[*Note 1; add:*]

1904, *Chicago City R. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28.

1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127 (*Anderson v. Albertstamm*, approved).

1909, *Carroll v. Boston Elev. R. Co.*, 200 Mass. 527, 86 N. E. 793.

1904, *State v. Brown*, 181 Mo. 192, 79 S. W. 1111.

1904, *McDonald v. Rhode Island Co.*, 26 R. I. 467, 59 Atl. 391 (the evidence must be offered before stating the question; unless in the discretion of the trial Court).

1910, *State v. Swanson*, 26 S. D. 589, 129 N. W. 119.

[*Text*, p. 777, last line; *add:*]

It is sometimes said <sup>1a</sup> that "an opinion of an expert cannot be based upon

<sup>1a</sup> 1910, *Kearner v. Tanner Co.*, 31 R. I. 203, 76 Atl. 833.

opinions expressed by other experts," but this is quite unsound. Keeping in mind that the distinction between "fact" and "opinion" has here no value (*ante*, § 672, *post*, § 1919), it will be seen that the basis for a hypothetical opinion may be either data observed or data inferred, and that inferred data presented by expert testimony may equally well become a part of the basis for a hypothetical question; *e. g.* (as in the case cited) a fireman may testify to coal in the furnace, and a chemist may testify that the gas generated would be carbon monoxide, and then another expert may be asked what would be the effect of an explosion of carbon monoxide on starch dust in the oven room.

[Text, p. 777 — *continued*]

There is no mysterious logical fatality in basing "one expert opinion upon another"; it is done every day in business and in applied science.

[Note 2; *add*.:]

1906, *Ince v. State*, 77 Ark. 426, 93 S. W. 65 (approving the above passage). 1911, *Missouri & N. A. R. Co. v. Daniels*, 98 Ark. 352, 136 S. W. 651 (subject to the trial Court's discretion). 1909, *Perkins v. Sunset Tel. & T. Co.*, 155 Cal. 712, 103 Pac. 190. 1909, *State v. Crowe*, 39 Mont. 174, 102 Pac. 579. 1909, *Landis & Schick v. Watts*, 84 Nebr. 671, 121 N. W. 980 (but here a special and not very clear rule of restriction is laid down). 1909, *Crosby v. Portland R. Co.*, 53 Or. 496, 100 Pac. 300 (enough for "forming an intelligent opinion on the subject considered"). 1909, *Gillman v. Media M. A. & C. E. R. Co.*, 224 Pa. 267, 73 Atl. 342 (but here stating too narrow a limitation). 1904, *State v. Underwood*, 35 Wash. 558, 77 Pac. 863. 1904, *Schissler v. State*, 122 Wis. 365, 99 N. W. 593.

[Note 3, l. 2; *add*.:]

1912, *Williams v. Fulkens*, 103 Ark. 196, 146 S. W. 480. 1910, *Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984. 1906, *Pyke v. Jamestown*, 15 N. D. 157, 107 N. W. 310.

[Note 4; *add*.:]

1908, *Taylor v. McClintock*, 87 Ark. 243, 112 S. W. 405 (question held here improper). 1904, *Aledo v. Honeyman*, 208 Ill. 415, 70 N. E. 338. 1909, *Miller v. Leib*, 109 Md. 414, 72 Atl. 466.

[Note 7; *add*.:]

1909, *Burk v. Reese*, — Nebr. —, 121 N. W. 1016 (question of 8000 words held improper, because introducing the opponent's case on cross-examination).

### § 683. Form of Question must be expressly Hypothetical.

[Note 2; *add*.:]

1907, *Parrish v. High Point R. A. & S. R. Co.*, 146 N. C. 125, 59 S. E. 348 (cause of an injury).

[Note 3; *add*.:]

1910, *Nolan v. Newton St. R. Co.*, 206 Mass. 384, 92 N. E. 505 (an electrical expert's testimony, referring to a car jumping "in the way that has been described" by the plaintiff when testifying, held proper).

### § 684. Hypothetical Questions on Cross-examination.

[Note 1; *add*.:]

1910, *Pensacola Electric Co. v. Bissett*, 59 Fla. 360, 52 So. 367.

### § 687. Physician's Knowledge based on Books.

[Note 2; *add*.:]

*Admitted*: 1905, *State v. Donovan*, 128 Ia. 44, 102 N. W. 791 (possibility of a surgical operation under hypnotism).

[*Note 2 — continued*]

1909, *United R. & E. Co. v. Corbin*, 109 Md. 442, 72 Atl. 606 (approving the above passage). *Excluded*: 1904, *Kath v. Wisconsin C. R. Co.*, 121 Wis. 503, 99 N. W. 217 ("what he learns entirely from medical works, unsupported by practical experience of his own," is inadmissible).

For analogous cases, under a slightly different principle, see *ante*, § 569.

[*Text*, p. 782, at end of section; *add*:]

The great dramatist knew this well enough:

*Pericles*, III, 2 (Cermion explains his skill in physic):

". . . I ever  
Have studied physic, through which secret art  
By turning o'er authorities, I have —  
Together with my practice — made familiar  
To me and to my aid the blest infusions."

### § 688. Physician's Knowledge based on Hearsay.

[*Note 2*; *add*:]

*Accord*: 1913, *Washington A. & M. U. R. Co. v. Fincham*, 40 D. C. App. 412 (examination for vision, by using a perimeter and the patient's statements as to its effect on him; admitted).

1907, *Chicago v. McNally*, 227 Ill. 14, 81 N. E. 23 (testimony admitted on the facts).

1908, *Walters v. Rock*, 18 N. D. 45, 115 N. W. 511.

1911, *Myhra v. Chicago M. & P. S. R. Co.*, 62 Wash. 1, 112 Pac. 939.

*Contra*: 1905, *Stevens v. People*, 215 Ill. 593, 74 N. E. 786 (abortion; physician's opinion based in part on "information derived from the patient," excluded; unsound). 1905, *Chicago City R. Co. v. McCaughna*, 216 id. 202, 74 N. E. 818 (personal injury; similar ruling). 1907, *Chicago U. Traction Co. v. Giese*, 229 Ill. 260, 82 N. E. 232 (ignoring the above Illinois cases). 1908, *Greinke v. Chicago City R. Co.*, 234 Ill. 564, 85 N. E. 327 (this opinion, while carefully avoiding mention of physician's diagnosis as ordinarily obtained, confines itself to excluding testimony of a physician who (a) has not treated the injured party, but (b) has examined him solely to qualify as a witness in a personal injury trial, and (c) bases his opinion upon the statements of the injured party; and applies this rule to exclude an opinion based on voluntary acts such as walking, hand-pressing, etc.). 1908, *Shaughnessy v. Holt*, 236 Ill. 485, 86 N. E. 256 (personal injury; physician's opinion based on tests involving the patient's sensations and answers, at an examination solely to qualify as witness, excluded).

1904, *Holloway v. Kansas City*, 184 Mo. 19, 82 S. W. 89 (not appreciating the precise nature of the question).

1909, *Chesapeake & O. R. Co. v. Wiley*, 134 Ky. 461, 121 S. W. 402 (applied to testimony of physicians called solely to qualify as witnesses, and not for treatment; yet this should make no difference to exclude the testimony; how unpractical Courts continue to be, in thinking that the way to get at the truth is to exclude all testimony which may often be based upon a lie; that is the old-fashioned notion, applied in the disqualification of a witness for interest, but now exploded; it is a helpless, mechanical rule, which is suited for a solemn game, but not to a practical virile determination to get at the facts).

1906, *Federal B. Co. v. Reeves*, 73 Kan. 107, 84 Pac. 560 (Porter, J., diss.). 1910, *Dean v. Wabash R. Co.*, 229 Mo. 425, 129 S. W. 953 (objective and subjective symptoms may be distinguished; though of course not when the physician is testifying on a hypothetical question). 1909, *People v. Hill*, 194 N. Y. 16, 87 N. E. 813 ("an expert witness cannot be permitted to give an opinion as to the mental condition of a person at the time of the commission of a criminal act, based upon a statement not in evidence, made by a party in his own behalf

[*Note 2 — continued*]

after the commission of the act, which pertains to his past conduct"; this may be not in itself logically unreasonable, but the judicial tendency to lay down impractical rules which are preposterously opposed to ordinary medical practice ought to be checked if justice is to maintain the respect of the other learned professions).

1913, *Lee v. Kansas C. S. R. Co.*, D. C. W. D. Ark. 206 Fed. 765 (physician called in to qualify as a witness may testify to an opinion based on objective symptoms only, not on the patient's statements in part or entirely; it is regrettable to see a Federal Court giving in to this modern heresy, which commits the exploded fallacy of totally prohibiting weak evidence instead of merely ensuring the exhibition of its weaknesses).

*Not decided*: 1913, *Cooper v. Lenboard A. L. R. Co.*, 163 N. C. 150, 79 S. E. 418.

[*Note 5; add, under Contra:*]

1904, *Schissler v. State*, 122 Wis. 365, 99 N. W. 593 (opinion based on the patient's statement of a past illness, excluded).

[*Note 6; add, under Accord:*]

1908, *Federal Betterment Co. v. Reeves*, 77 Kan. 111, 93 Pac. 627 (following *A. T. & S. F. R. Co. v. Frazier*).

1913, *Hintz v. Wagner*, — S. D. —, 140 N. W. 729.

1912, *Union Pacific R. Co. v. M'Mican*, C. C. A., 194 Fed. 393 (physician's opinion based in part on the plaintiff's history of the injury as given to the physician and not stated hypothetically, excluded; opinion confuses this principle and that of § 1918, *post*).

[*Note 7; add:*]

1910, *Davis v. State*, 96 Ark. 7, 130 S. W. 547.

### § 689. Layman's or Physician's Acquaintance with Person Insane.

[*Note 2, add:*]

*Ala.*: 1905, *Braham v. State*, 143 Ala. 28, 38 So. 919 (witness held not qualified by observation). 1911, *Odom v. State*, 174 Ala. 4, 56 So. 913. 1913, *Jones v. State*, — Ala. —, 61 So. 434.

*Cal.*: 1904, *People v. Manoogian*, 141 Cal. 592, 75 Pac. 177 (*Holland v. Zollner* and *People v. McCarthy*, *supra*, followed; this distinction is now a settled and important one in this court). 1904, *People v. Suesser*, 142 Cal. 354, 75 Pac. 1093 (trial Court's determination controls as to who are "intimate acquaintances"). 1904, *McKenna's Estate*, 143 id. 580, 77 Pac. 461 (same). 1906, *Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695 (question based in part upon "the facts you have learned" by hearsay, excluded). 1907, *People v. Clark*, 151 Cal. 200, 90 Pac. 549 (trial Court's discretion controlled). 1910, *People v. Vaughn*, 14 Cal. App. 201, 111 Pac. 620 (the Code requirement of "intimate acquaintance" does not apply where the injury is only as to the appearance at a certain time; apart from this, a jailer who has had an accused in custody for three months is qualified; following *People v. McCarthy*). 1910, *People v. Loper*, 159 Cal. 6, 112 Pac. 720.

*Ill.*: 1904, *Chicago U. T. Co. v. Lawrence*, 211 Ill. 373, 71 N. E. 1024 (certain witnesses held qualified on the facts). 1912, *Martin v. Beatty*, 254 Ill. 615, 98 N. E. 996 (largely left to trial Court's discretion).

*Ia.*: 1904, *Stutsman v. Sharpless*, 125 Ia. 335, 101 N. W. 105.

*Kan.*: 1906, *Kempf v. Koppa*, 74 Kan. 153, 85 Pac. 806. 1909, *State v. Rumble*, 81 Kan. 16, 105 Pac. 1 (no general rule).

*Ky.*: 1904, *Irvine v. Gibson*, 117 Ky. 306, 77 S. W. 1106.

*La.*: 1904, *State v. Lyons*, 113 La. 959, 37 So. 890 (there must be an adequate opportunity of observation).

[*Note 2 — continued*]

*Md.*: 1910, *Grill v. O'Dell*, 113 Md. 625, 77 Atl. 984.

*Mont.*: 1907, *State v. Penna*, 35 Mont. 535, 90 Pac. 787 (trial Court's discretion controls; but here two reporters who had interviewed the party for a half hour only were held not qualified). 1911, *State v. Leakey*, 44 Mont. 354, 120 Pac. 234.

*Nebr.*: 1912, *Larson v. State*, 92 Nebr. 24, 137 N. W. 894 (a bizarre opinion; Rose, J., diss., and Letton and Fawcett, JJ., declining to join in the reasoning).

*Or.*: 1911, *State v. Hassing*, 60 Or. 81, 118 Pac. 195 (like *State v. Feister*).

*Tenn.*: 1907, *Atkins v. State*, 119 Tenn. 458, 105 S. W. 353.

*U.S.*: 1909, *Turner v. American Security & T. Co.*, 213 U. S. 257, 29 Sup. 420 ("We are asked to review that discretion [of the trial Court]. . . . We have no hesitation in declining to do this").

### § 690. Knowledge of Foreign Law.

[*Note 2; add:*]

*Accord*: *Brailey v. Rhodesia Consolidated* [1910], 2 Ch. 95, 102 (lecturer on Roman-Dutch law in London, admitted to testify on the law of Rhodesia, though "he is not actually practising in Rhodesia").

[*Note 3, par. 1; add:*]

1905, *Massucco v. Tomassi*, 78 Vt. 188, 62 Atl. 57 (an Italian priest, allowed to testify that a religious ceremony alone was not valid in Italy).

### § 691. Character-Witness must appear Qualified.

[*Note 1, par. 1; add:*]

1907, *Moore v. Dozier*, 128 Ga. 90, 57 S. E. 110 (testimony based merely on hearing witnesses at a former trial, excluded).

1906, *State v. Rester*, 116 La. 985, 41 So. 231.

### § 692. Knowledge based on Residence.

[*Note 1; add, under Accord:*]

1907, *Tingley v. Times M. Co.*, 151 Cal. 1, 89 Pac. 1097 (a witness from Arkansas who went to Newburyport, Mass., and stayed a few days to make the inquiries, excluded).

[*Note 2; add, in col. 1:*]

*Ind.*: 1904, *South Bend v. Turner*, 163 Ind. 194, 71 N. E. 657 (a witness who has heard only one person speak to the repute of another, and does not know the latter personally, is not qualified).

*U. S.*: 1912, *Young v. Corrigan*, D. C. N. D. Ohio, 208 Fed. 43 (detective employed to inquire into reputation, excluded, citing the text above).

[*Note 2, col. 2, l. 3, from below; add:*]

*Contra*: *South Bend v. Turner*, Ind., *supra*, *semble*.

### § 693. Handwriting; Identifying Illiterate's Mark.

[*Note 2, par. 2; add, under Accord:*]

1904, *Ballow v. Collins*, 139 Ala. 543, 36 So. 712 (an illiterate mortgagor may identify his own mark, but perhaps not the attestation of the witness thereto; but here the execution was held not sufficiently proved, because it appeared that the illiterate mortgagor was not

[*Note 2 — continued*]

actually testifying from a knowledge of the peculiarity of his mark, but from having been told by C. that this was the mortgage he signed).

1910, *Ausmus v. People*, 47 Colo. 167, 107 Pac. 204

1895, *Little v. Rogers*, 99 Ga. 95, 24 S. E. 856.

**§ 694. Handwriting ; Number of Times.**

[*Note 1 ; add :*]

1910, *Derrick's Case*, 5 Cr. App. 162.

1906, *State v. Bond*, 12 Ida. 424, 86 Pac. 43 (general principle approved).

1905, *Frank v. Berry*, 128 Ia. 223, 103 N. W. 358, *semble*.

1910, *Murphy v. Murphy*, 146 Ia. 255, 125 N. W. 191 (a blind girl who before blindness had once seen an autograph 19 years before and then the disputed letter a year later when 13 years of age ; the testimony held to be of little value).

1906, *State v. Freshwater*, 30 Utah 442, 85 Pac. 447.

1909, *State v. Kent*, 83 Vt. 28, 74 Atl. 389

**§ 695. Length of Time Beforehand.**

1910, *Murphy v. Murphy*, 146 Ia. 255, 125 N. W. 191 (cited *supra*, § 694, n.).

**§ 696. Quantity of Writing Seen.**

[*Note 1 ; add :*]

1907, *Rinker v. U. S.*, 151 Fed. 755, 760, C. C. A. (witnesses of "limited acquaintance" admitted).

**§ 697. Writing Post Litem Motam ; After-Acquired Knowledge.**

[*Note 4, par. 2 ; add :*]

*Accord* : 1912, *Cochran v. Stein*, 118 Minn. 323, 136 N. W. 1037.

*Contra* : 1910, *Murphy v. Murphy*, 146 Ia. 255, 125 N. W. 191 (here the witnesses had seen, 15 years before, a letter purporting to be from M., and material as an admission, but now lost ; they were shown three signatures proved to be M.'s, and testified that the writing was the same ; this was held improper, on the ground of § 2004, *post*, that lay testimony based on comparison is inadmissible ; but the opinion misses the point that the real reason for that rule is that comparison may equally well be made by the jury and hence lay testimony is not needed, and that here the disputed letter was lost, hence the jury would not compare it ; the unsoundness of the decision may be seen by its result, viz. that all testimony to the lost letter's handwriting was virtually shut out, at least, if it be assumed that the witnesses were not qualified by the mere perusal of the lost letter to state that it was in M.'s hand).

**§ 698. Quality of Witness' Opinion.**

[*Note 1 ; add :*]

Of course, on the principle of § 655, *ante*, the witness may *point out* the peculiarities that affect his opinion.

1909, *Nagle v. Schnadt*, 239 Ill. 595, 88 N. E. 178.

**§ 701. Implied Admissions.**

[*Note 1, par. 1 ; add :*]

1913, *Langley v. Joudrey*, N. Sc. S. C., 13 D. L. R. 563 (forgery of two notes ; bank manager admitted, through whose bank had been negotiated paper given by the parties).

1904, *Shaffer v. U. S.*, 24 D. C. App. 417, 430 (various persons held qualified on the facts).

[*Note 1, par. 2; add:*]

1906, *State v. McBride*, 30 Utah 422, 85 Pac. 440 (here the offer was treated as being in effect a comparison of specimens; Straup, J., correctly dissents).

§ 702. **Mere Exchange of Correspondence.**

[*Note 3; add:*]

1909, *Turner's Case*, 3 Cr. App. 103, 155 [1910], 1 K. B. 348 (document of consent signed by Director of Public Prosecutions; "it is sufficient if somebody, for instance, who has been in correspondence with the Director of Public Prosecutions says, 'I received this in ordinary course, and I believe it to be signed by the Director of Public Prosecutions.' . . . All that the Court say is, that there must be some kind of proof of it, but it must not necessarily be proof of somebody who says, 'I have seen the gentleman write,' which, in the old-fashioned days, at any rate, was the technical way of proving the signature").

1869, *Bruce v. Crews*, 39 Ga. 544, 547 (a clerk in a commercial house who had seen letters purporting to come from C., but not in reply to others, held not qualified to C.'s handwriting).

1907, *Nichols & Shepard Co. v. Ringler*, 135 Ia. 181, 112 N. W. 543 (testimony based on "correspondence," admitted).

1906, *State v. Goldstein*, 72 N. J. L. 336, 62 Atl. 1006 (business correspondence with a tenant for three years, held to qualify).

1913, *Hoisting Machinery Co. v. Goeller I. Works*, 84 N. J. L. 504, 87 Atl. 331 (one who had received letters from J. G. and had been paid for contracts based on them, admitted).

§ 704. **Custodians of Records.**

[*Note 1, par. 1; add:*]

1905, *Wooldridge v. State*, 49 Fla. 137, 38 So. 3 (a member of a school board who had often seen the superintendent's handwriting on warrants, held qualified).

1904, *Gress Lumber Co. v. Georgia P. S. Co.*, 120 Ga. 751, 48 S. E. 115 (clerk of a city council, who had many times seen the signature of O. in the minutes of the city council, in former years, held not qualified to O.'s signature; wholly erroneous; none of the cases on this part of the doctrine are considered).

1911, *Nicholson v. Eureka L. Co.*, 156 S. C. 59, 72 S. E. 86 (grandson having custody of grandfather's documents, admitted).

1905, *Whitaker v. Thayer*, 38 Tex. Civ. App. 537, 86 S. W. 364 (deceased deputy-clerk's writing in a land-office, proved by the officer).

§ 714. **Knowledge of Land-Value.**

[*Note 1; add:*]

1909, *Schmidt v. Beiseker*, 19 N. D. 35, 120 N. W. 1096.

1913, *Fire Ass'n of Phila. v. Farmers' Gin Co.*, 39 Okl. 162, 134 Pac. 443 (cotton gin).

1905, *Hope v. Phila. & W. R. Co.*, 211 Pa. 401, 60 Atl. 996.

New Jersey seems pedantically strict:

1909, *Morrell v. Preiskel*, — N. J. L. —, 74 Atl. 994.

[*Note 4; add:*]

1906, *Lally v. Central V. R. Co.*, 215 Pa. 436, 64 Atl. 633.

[*Note 9; add:*]

1904, *Muskeget Island Club v. Nantucket*, 185 Mass. 303, 70 N. E. 61 (assessor).

[*Note 10; add:*]

- 1906, *Lewis v. Englewood Elev. R. Co.*, 223 Ill. 223, 79 N. E. 44 (eminent domain).  
 1906, *Louisiana R. & N. Co. v. Morere*, 116 La. 997, 41 So. 236 (land).  
 1906, *St. Louis M. & S. E. R. Co. v. Continental B. Co.*, 198 Mo. 698, 96 S. W. 1011 (right of way through a brickmaking plant).  
 1904, *Riley v. Camden & T. R. Co.*, 70 N. J. L. 289, 57 Atl. 444 (shade-trees).  
 1909, *Van Ness v. New York & N. J. T. Co.*, 78 N. J. L. 511, 74 Atl. 456 (a witness who had bought and sold land in the town, held not qualified to testify to the damage to the land done by cutting a shade tree, because "none of the land dealt in by the witness had a single shade tree on it"; this is amusing quibbling; did any one ever hear of a real estate dealer specializing in shade-tree lots or cedar-of-lebanon backyards?)  
 1905, *Reed v. Pittsburg C. & W. R. Co.*, 210 Pa. 211, 59 Atl. 1067 (land).  
 1905, *Union R. Co. v. Hunton*, 114 Tenn. 609, 88 S. W. 182 (land).  
 1905, *Watkins L. M. Co. v. Campbell*, 98 Tex. 372, 84 S. W. 424 (land).  
 1905, *Johnson v. Tacoma*, 41 Wash. 51, 82 Pac. 1092 (realty benefits).

### § 715. Services-Value.

[*Note 1; add:*]

- 1905, *Fuller v. Stevens*, — Ala. —, 39 So. 623 (one testifying to the value of attorneys' services need not know the special value of the plaintiff's attorney's services).

[*Note 5; add:*]

- 1905, *Lawrence v. Methuen*, 187 Mass. 592, 73 N. E. 860 (physician's services).

### § 716. Personal Property Value.

[*Note 1; add:*]

- 1906, *Moss v. State*, — Ala. —, 40 So. 340 (shoes). 1904, *Southern R. Co. v. Morris*, 143 Ala. 628, 42 So. 17 (mare).  
 1905, *Withey v. Pere Marquette R. Co.*, 141 Mich. 412, 104 N. W. 773 (value of clothing, etc., damaged in a railroad collision).

[*Note 2; add:*]

- 1906, *Echols v. State*, 147 Ala. 700, 41 So. 298 (sundry goods stolen).  
 1906, *Tubbs v. Mechanics' Ins. Co.*, 131 Ia. 217, 108 N. W. 324 (owner of a building, etc.).  
 1908, *Jensen v. Palatine Ins. Co.*, 81 Nebr. 523, 116 N. W. 286 (stock of goods). 1909, *Anderson v. Chicago B. & O. R. Co.*, 84 Nebr. 311, 120 N. W. 1114 (crops and land).  
 1912, *Needham v. Halverson*, 22 N. D. 594, 135 N. W. 203 (horses).  
 1905, *Union Pacific R. Co. v. Lucas*, 136 Fed. 374, 69 C. C. A. 218 (land and buildings).  
 1907, *Smith v. Mine & S. S. Co.*, 32 Utah 21, 88 Pac. 683 (household goods).  
 1906, *Palmer v. Goldberg*, 128 Wis. 103, 107 N. W. 478 (a farmer, held qualified as to the value of his own horses).

*Contra:* 1905, *Motton v. Smith*, 27 R. I. 57, 62, 60 Atl. 681 (owner of jewelry, not shown to have knowledge, excluded; but on rehearing the Court conceded that "an owner is doubtless qualified to state the cost price of articles of personal property, and from that, with information as to age and wear, the jury may estimate value. . . . We did not attempt to lay down a general rule upon the subject").

Some uncertainty may have been created in the modern rulings, by a misapprehension of certain earlier ones, rendered while a party was still disqualified by interest, and dealing with the question, then a living one (*post*, § 612, n. 4), whether a husband or wife of a party, or a party generally, should be granted a special exception of necessity for testifying to the contents and value of a package lost by a carrier; *e. g.* 1860, *Illinois C. R. Co. v. Taylor*, 24 Ill. 323.

[*Note 3; add:*]

- 1904, *Pacific Mill Co. v. Enterprise Mill Co.*, 16 Haw. 282, 288 (mouldings, etc.).  
 1905, *Gossage v. Phila. B. & W. R. Co.*, 101 Md. 698, 61 Atl. 692 (ship).  
 1909, *Sullivan v. Girson*, 39 Mont. 274, 102 Pac. 320 (diamond ring).  
 1905, *Tucker v. Colonial F. Ins. Co.*, 58 W. Va. 30, 51 S. E. 86 (merchandise insured).

**§ 717. Witness must know Market Value.**

[*Note 1; add:*]

- 1877, *Berg. v. Spink*, 24 Minn. 138 (horses).

[*Note 3; add:*]

- 1904, *Sylvester v. Ammons*, 126 Ia. 140, 101 N. W. 782 (stock of goods).

**§ 718. Knowledge of Value in the Vicinity.**

[*Note 1; add:*]

- 1906, *Walsh v. Board*, 73 N. J. L. 643, 64 Atl. 1088 (a former owner of the land, not shown to know values in the locality, held properly excluded).  
 1903, *Lynch v. Troxell*, 207 Pa. 162, 56 Atl. 413 (land).

**§ 719. Knowledge of Value by Hearsay.**

[*Note 2; add:*]

- 1903, *Spohr v. Chicago*, 206 Ill. 441, 69 N. E. 515 (here an expert testifying to the price of land solely by having read the deed-recital of consideration was excluded).  
 1905, *Fountain v. Wabash R. Co.*, 114 Mo. App. 676, 90 S. W. 393 (dealers in cattle, knowing in part from perusal of trade-journals, admitted).  
 1912, *Midland V. R. Co. v. Adkins*, 36 Okl. 15, 127 Pac. 867 (testimony to market value, based on talks with dealers and on newspaper quotations, admitted).

**§ 720. Acquaintance with the Specific Object.**

[*Note 1; add:*]

- 1905, *Keeney v. Fargo*, 14 N. D. 423, 105 N. W. 93 (rental).  
 1905, *Hope v. Phila. & W. R. Co.*, 211 Pa. 401, 60 Atl. 996 (land).

[*Note 2; add:*]

- 1906, *Harris v. Quincy O. & K. C. R. Co.*, 115 Mo. App. 527, 91 S. W. 1010 (cattle).  
 1909, *Sullivan v. Girson*, 39 Mont. 274, 102 Pac. 320 (diamond ring converted; a witness who had seen it described its size, etc., and then a jeweler estimated its value).

**§ 728. Recollection; Impression, Belief; Law in Various Jurisdictions.**

[*Note 1; add:*]

- 1913, *Trailer v. State*, 8 Ala. App. 217, 63 So. 37 ("It seemed like a knife," allowed).  
 1905, *Jordan v. State*, 50 Fla. 94, 39 So. 155 (identity of a person "to the best of my judgment").  
 1905, *State v. Richards*, 126 Ia. 497, 102 N. W. 439 (identity of a person).  
 1910, *State v. Vanella*, 40 Mont. 326, 106 Pac. 364 (identity inferred from voice).  
 1906, *Gilliland v. Board*, 141 N. C. 482, 54 S. E. 413 ("I think he always voted," admitted).  
 1913, *Heflin v. Eastern R. Co.*, — Tex. Civ. App. —, 159 S. W. 499 ("impression" as to a man's conduct when hurt).

[*Note 1 — continued*]

1910, *Herrick v. Holland*, 83 Vt. 502, 77 Atl. 6 ("judgment" and "idea," admitted).  
1912, *State v. Elliott*, 68 Wash. 603, 123 Pac. 1089 (identity of a person; "best recollection," admitted).

**§ 735. History of Past Recollection.**

[*Text*, p. 827, l. 2 of the quotation from *Doe v. Perkins*:]

For "the book was in court," read: "the original was not in court."

[*Text*, p. 830; after the last quotation, *add* a note 1:]

<sup>1</sup> So also: 1906, *Sanders, J.*, in *State v. Legg*, 59 W. Va. 315, 53 S. E. 545.

[*Note 3*; *add*.:]

In *Ontario*, the Supreme Court has lately had to correct a trial judge.  
1911, *Fleming v. Toronto R. Co.*, 25 Ont. L. R. 317.

**§ 736. History in Particular Jurisdictions.**

[*Note 1*; *add*.:]

1905, *Clark v. Union Traction Co.*, 210 Pa. 636, 60 Atl. 302 (obscure).

[*Note 5*; *add*.:]

*Ind.*: 1905, *Southern R. Co. v. State*, 165 Ind. 613, 75 N. E. 272 (*Johnson v. Culver* approved; this is a virtual repudiation of the general doctrine, and is unsound).  
*Wis.*: 1905, *Manning v. School District*, 124 Wis. 84, 102 N. W. 356 (sanctioned).

**§ 738. New York Doctrine: Present Recollection must first appear to be lacking.**

[*Note 2*; *add*.:]

In *Bacon v. Conroy* (1909), 2d C. C. A., 172 Fed. 532, it is said that the "better practice" requires the entries to be offered where the witness has no present recollection, and for this is cited *National Ulster Co. Bank v. Madden*, *supra*, n. 1.

[*Note 3*; *add*.:]

1913, *Salo v. Duluth & I. R. Co.*, 121 Minn. 78, 140 N. W. 188 (telegram reciting facts known to the witness, and already testified to by him, excluded, where his only failure of memory was as to the date of the event, and he needed to refer to the telegram for this purpose only; no precedents are cited; the opinion is apparently unaware that it is following the peculiar and unsound New York doctrine, and does not consider the two prior conflicting rulings in Minnesota above cited; it refers to the "confusion and disagreement in the authorities," without realizing that there is no "confusion" on this point, and that the issue is the simple one whether one or another plain rule will be adopted; it loftily premises, "We are content to leave the general discussion of these questions to the text-writers and encyclopedists," but then proceeds to spend two pages on a "general discussion" which is profitless in view of its complete ignoring of the prior state of the controversy).

**§ 745. Recollection Must have been Fresh, etc.**

[*Note 1*; *add*.:]

1906, *Murray & Peppers v. Dickens*, 149 Ala. 240, 42 So. 1031 ("No precise time is fixed by law").

[*Note 1 — continued*]

1903, *Volusia Co. Bank v. Bigelow*, 45 Fla. 638, 33 So. 704 ("at or about the time . . . so that it may be safely assumed that the recollection was then sufficiently fresh to correctly express it").

**§ 747. Witness must Guarantee Accuracy.**

[*Note 1; add:*]

1907, *Diamond Glue Co. v. Wietzychowski*, 227 Ill. 338, 81 N. E. 392. 1908, *Dorrance v. Dearborn Power Co.*, 233 Ill. 354, 84 N. E. 269.

1911, *Koehler v. Abey*, 168 Mich. 113, 133 N. W. 923 (left to the trial Court).

1910, *Terro v. Harwood*, 15 N. Mex. 424, 110 Pac. 556.

1913, *Marron v. Great Northern R. Co.*, — Or. —, 129 Pac. 1055 (under Rev. C. § 8020).

[*Note 3; add, at the beginning:*]

1906, *St. Louis S. W. R. Co. v. White S. M. Co.*, 78 Ark. 1, 93 S. W. 58 (telegrapher's service-marks).

1911, *Koehler v. Abey*, 168 Mich. 113, 133 N. W. 923 (routine duties of an inspector of machinery).

[*Note 5, par. 1; add, under Accord:*]

1906, *Franklin v. Atlanta & C. A. L. R. Co.*, 74 S. C. 332, 54 S. E. 578 (hospital record; the opinion is not very clear).

1904, *Southern L. & T. Co. v. Benbow*, 135 N. C. 303, 47 S. E. 435 (a certain signed letter, excluded; the opinion confuses this principle and that of § 2099, *post*).

[*Note 6, par. 1, at the end; add:*]

1906, *Holden v. Prudential L. Ins. Co.*, 191 Mass. 153, 77 N. E. 309 (here a medical man's writing of the answers to an insurance application was allowed to be used).

[*Note 7, l. 9 from the end; add:*]

and in *First Nat'l Bank v. Yeoman*, 14 Okl. 626, 78 Pac. 388 (1904).

[*Note 8, par. 1; add:*]

1906, *Jones v. State*, 147 Ala. 701, 41 So. 299 (account books).

1903, *Peterson v. Mineral K. F. Co.*, 140 Cal. 624, 74 Pac. 162 (memorandum held not sufficiently verified).

1905, *Dryden v. Barnes*, 101 Md. 346, 61 Atl. 342 (a list testified to by plaintiff, but made up from prior lists by H. and by B., the plaintiff having no personal knowledge, excluded).

1905, *Hoogewerff v. Flack*, 101 Md. 371, 61 Atl. 184 (books offered through a clerk who did not keep them nor know of the facts, excluded).

1906, *State v. Trimble*, 104 Md. 317, 64 Atl. 1026 (certain hospital records, proved by a physician who did not make the entries, etc., excluded).

1905, *Allwright v. Skillings*, 188 Mass. 538, 74 N. E. 944, *semble* (stock-exchange transactions).

1913, *Salo v. Duluth & I. R. Co.*, 121 Minn. 78, 140 N. W. 188 (telegram).

1908, *Eberson v. Continental Ins. Co.*, 130 Mo. App. 296, 109 S. W. 62 (appraisal of stock of goods).

1905, *Rosenthal v. McGraw*, 138 Fed. 721, 724, C. C. A. (a witness who did not make the entries and did not know that they were correct, excluded).

1906, *Grunberg v. U. S.*, 145 Fed. 81, 92, C. C. A. (invoices, etc.).

1904, *Hart v. Godkin*, 122 Wis. 646, 100 N. W. 1057 (rule applied).

In *Conover v. Neher R. Co.*, 38 Wash. 172, 80 Pac. 281 (1905), a party's time-book was excluded on the ground that the parties (corporate officers) themselves had testified and "their knowledge was the primary evidence," citing no authority but a cyclopedia article;

[*Note 8 — continued*]

the ruling could not have been justified had the Court explicitly invoked the theory of § 1560, *post*; but, as it stands, it merely confuses the law; and the case of *Mathes v. Robinson*, later cited in the opinion on another point, is *contra* on this point.

**§ 748. Witness need not be the Writer.**

[*Note 1; add, under par. 1:*]

1906, *People v. Brown*, 3 Cal. App. 178, 84 Pac. 670.

1906, *Wood v. Holah*, 79 Conn. 215, 64 Atl. 220 (*Curtis v. Bradley* applied; here excluding the memorandum).

1905, *McCarthy v. Meaney*, 183 N. Y. 190, 76 N. E. 36 (certain memoranda not made nor verified by T., not allowed to be received as his testimony).

1913, *Jenkins v. State*, — Wyo. —, 134 Pac. 260 (stenographic notes made by another person, but seen and verified by the witness freshly after the event; use allowed).

**§ 749. Original required.**

[*Note 1, par. 1; add:*]

1906, *O'Brien v. U. S.*, 27 D. C. App. 263, 272 (bookkeeper's memorandum of total sums represented in a document given to the defendant, admitted).

1904, *Davis v. State*, 47 Fla. 26, 36 So. 170 (approving *Volusia Co. Bank v. Bigelow*).

1904, *Eatman v. State*, 48 Fla. 21, 37 So. 576 (memorandum taken from a ledger, excluded).

1904, *Chicago & E. I. R. Co. v. Zepp*, 209 Ill. 339, 70 N. E. 623 (a Chicago weather-record made by forming a book from letterpress copies of original sheets sent to Washington, admitted as an original; the opinion ignores the further ground of admissibility, that the original sheets, being in another jurisdiction, were unobtainable by subpoena, under the rule of § 1213, *post*).

1904, *Donner v. State*, 72 Nebr. 263, 100 N. W. 305 (stockyards-book, not the original, excluded).

1905, *Manchester Assur. Co. v. Oregon R. & N. Co.*, 46 Or. 162, 79 Pac. 60 (engine inspection-book).

**§ 751. Bookkeeper's Entry of Salesman's Oral Statement.**

[*Note 2, col. 1, under Accord; add:*]

1906, *Murray & Peppers v. Dickens*, 149 Ala. 240, 42 So. 1031 ("It would seem, on reason, that if one party testifies that he knew of the correctness of the item and gave it correctly to the other, and the other testifies that he entered it as it was given to him, that that would amount to the same thing as if the party who made the entry should swear that he knew of the correctness of the item"; applied to a time-book; the opinion cites an encyclopedia of law, but does not notice the recent ruling in this Court to the contrary, *Snow H. Co. v. Loveman, infra*).

1907, *Furlong & Meloy v. North British & M. Ins. Co.*, 136 Ia. 468, 113 N. W. 1084 (inventory of burnt stock, made by two persons testifying).

1909, *Buck v. Brady*, 110 Md. 568, 73 Atl. 277 (memorandum of a rabies investigation made in part by each of three doctors, used on their joint testimony).

1906, *Petty v. Benoit*, 193 Mass. 233, 79 N. E. 245 (books of account verified by the plaintiff and his clerks, admitted; citing *Kent v. Garvin, supra*).

1913, *The City of St. Joseph*, 8th C. C. A., 205 Fed. 284 (foremen making entries on slates or memoranda, and bookkeepers transcribing them; both sets of men testifying, the accounts were admitted).

1912, *Lawn v. Prager*, 67 Wash. 568, 121 Pac. 466 (building contractor's time-books, proved by the foreman who made the slips and the defendant who copied them, admitted).

§ 754. Memorandum goes as Testimony to the Jury.

[Note 1; add:]

- 1905, Alabama G. S. R. Co. v. Clarke, 145 Ala. 459, 39 So. 816.  
 1910, Birmingham R. L. & P. Co. v. Seaborn, 188 Ala. 658, 53 So. 241 ("The true rule . . . is laid down in the case of Acklen v. Hickman").  
 1904, State v. McGruder, 125 Ia. 741, 101 N. W. 646.  
 1908, Atherton v. Emerson, 199 Mass. 199, 85 N. E. 530 (doctrine applied). 1908, Cumberland G. M. Co. v. Atteaux, 199 Mass. 426, 85 N. E. 536, *semble*.  
 1909, Farrell v. Haze, 157 Mich. 374, 122 N. W. 197 (not decided). 1911, Koehler v. Abey, 168 Mich. 113, 133 N. W. 923. 1912, Johnson v. Union Carbide Co., 169 Mich. 651, 134 N. W. 1079.  
 1910, Terr. v. Harwood, 15 N. Mex. 424, 110 Pac. 556 (whether it may be handed to the jury, or simply read, not decided).  
 1904, First Nat'l Bank v. Yeoman, 14 Okl. 626, 78 Pac. 388.  
 1905, Manning v. School District, 124 Wis. 84, 102 N. W. 356 ("may be put in evidence").

[Note 5; add:]

- D. C.: 1908, Sechrist v. Atkinson, 31 D. C. App. 1 (not decided).  
 Mass.: 1906, Holden v. Prudential L. Ins. Co., 191 Mass. 153, 77 N. E. 309 (here the Court is still unappreciative of the true nature of the process; the memorandum is said to be "plainly inadmissible," but the witness may "use it to aid him in testifying").  
 U. S.: 1906, Grunberg v. U. S., 145 Fed. 81, 96 (again the subject is confused by ignoring the two kinds of memoranda.).

§ 759. Present Recollection; Writing not made by Witness.

[Note 1, par. 1; add, under *Accord*:]

- 1914, Riley v. Fletcher, — Ala. —, 64 So. 85 (bill of exceptions from former trial).  
 1905, Shrouder v. State, 121 Ga. 615, 49 S. E. 702 (record of mortgages).  
 1911, Federal U. Surety Co. v. Indiana L. & M. Co., 178 Ind. 328, 95 N. E. 1104 (lumber hauler allowed to refresh from a delivery-slip not made out by him).  
 1906, Fay v. Walsh, 190 Mass. 374, 77 N. E. 44.  
 1904, Taft v. Little, 178 N. Y. 127, 70 N. E. 211 (R. allowed to testify from a memorandum made by R.'s bookkeeper).

[Note, par. 3; add:]

- 1907, Hill v. Adams Express Co., 74 N. J. L. 338, 68 Atl. 94 (distinction of two kinds of refreshing, ignored).  
 1914, State v. Patton, — Mo. —, 164 S. W. 223 ("the Missouri rule is . . . against the rule urged by Wigmore's Greenleaf, 16th ed., § 439c; where it is said that the memory of the witness may be refreshed by any paper, whether the same is known by the witness to be correct or not; this view of Mr. W. has been followed by our St. Louis Court of Appeals, Eberson v. Investment Co., 130 Mo. App. 308; we do not find this statement of the learned author and of the Court of Appeals to be borne out either by the cases which he cites to support it, or by the great weight of the authorities which we have examined"; now we do not know how faithful or how competent was the private secretary who looked up the learned opinion-writer's citations; but from the misquotation of the above passage from Greenleaf it is easy to infer other carelessness somewhere; the fact is that *no authorities are cited* in the Greenleaf passage in support of the above phrased statement; the passage reads: "That the paper was not *written by the witness himself* is no objection," and then a Note 1 cites twenty-one authorities in support of that statement; these authorities do support it, except that one is not verifiable, being miscited by volume or page, and is therefore out of question, and one is capable of being misunderstood; then the text con-

[*Note*, par. 3 — *continued*]

tinues, "and it is *therefore incorrect* (confusing this with the preceding subject) *to require* that the paper be one written by the witness or under his direction or *known by him to be correct*," and then a *Note* 2 cites four authorities as examples of a requirement indeed so made, but incorrectly so made; it is likely that a hasty perusal imagined that these authorities were cited as supporting the doctrine approved in the text.

[*Note* 2; *add*.:]

1905, *State v. Teachey*, 138 N. C. 587, 50 S. E. 232 (dying declarant's affidavit, used by an auditor).

**§ 760. Writing not Original.**

[*Note* 1; *add*, under *Accord*.:]

1904, *Davis v. State*, 47 Fla. 26, 36 So. 170 (witness allowed to refer to a copy of stenographic notes, made after adjournment; approving *Volusia Co. Bank v. Bigelow*, cited *ante*, § 749, n. 1).

1912, *Erdman v. State*, 90 Nebr. 642, 134 N. W. 258 (newspaper).

1904, *Taft v. Little*, 178 N. Y. 127, 70 N. E. 211 (R. allowed to testify from memoranda made by his bookkeeper from books made up from data furnished by R.'s foreman).

**§ 761. Writing not made at the Time, etc.**

[*Note* 4; *add*.:]

1904, *State v. Aspara*, 113 La. 940, 37 So. 883 (stenographic report of former testimony).

1904, *Portsmouth St. R. Co. v. Peed's Adm'r*, 102 Va. 662, 47 S. E. 850.

**§ 762. Writing Shown to the Opponent.**

[*Note* 2; *add*.:]

1908, *Harman v. Illinois & E. Coal Co.*, 237 Ill. 36, 86 N. E. 625.

1907, *Morris v. U. S.*, — C. C. A. —, 149 Fed. 123.

[*Note* 5, l. 4; *add*.:]

*Accord*: 1906, *Lowrie v. Taylor*, 27 D. C. App. 522, 526, *semble* (here the production of the book was not demanded).

*Contra*: 1912, *State v. Kwiatkowski*, 83 N. J. L. 650, 85 Atl. 209 (here the precise point was not raised). 1903, *Loose v. State*, 120 Wis. 115, 97 N. W. 526 (but the Court may require production).

**§ 763. Writing is not Part of Testimony.**

[*Note* 1; *add*.:]

1910, *Pace v. Louisville & N. R. Co.*, 166 Ala. 519, 52 So. 52. 1914, *Riley v. Fletcher*, — Ala. —, 64 So. 85 (affirming *Acklen v. Hickman*).

1908, *Sechrist v. Atkinson*, 31 D. C. App. 1.

1911, *Mattison v. Mattison*, 203 N. Y. 79, 96 N. E. 359 (hotel register, not admitted).

1906, *State v. Legg*, 59 W. Va. 315, 53 S. E. 545 (reading aloud to a witness his former testimony; this seems strained, for the reading aloud was merely a mode of questioning him to stimulate recollection, and not an offering of the paper in evidence).

[*Note* 2; *add*.:]

1913, *Bruder v. State*, — Ark. —, 161 S. W. 1067 (trial Court's refusal to submit to the jury, held here not improper).

1905, *Logan v. Freerks*, 14 N. D. 127, 103 N. W. 426.

**§ 764. Cross-Examiner's Use of Writing to revive Recollection.**

[*Note 2; add:*]

1914, *Hutchinson v. Plant*, — Mass. —, 105 N. E. 1017 (not decided).

**§ 770. Leading Questions; Trial Court's Discretion.**

[*Note 2, par. 1, add:*]

1907, *Midland V. R. Co. v. Hamilton*, 84 Ark. 81, 104 S. W. 540.  
 1904, *Schley v. State*, 48 Fla. 53, 37 So. 518. 1905, *Reyes v. State*, 49 Fla. 17, 38 So. 257.  
 1904, *O'Dell v. State*, 120 Ga. 152, 47 S. E. 577. 1904, *Holmes v. Clisby*, 121 Ga. 241, 48 S. E. 934. 1905, *Phinazee v. Bunn*, 123 Ga. 230, 51 S. E. 300. 1908, *Moore v. State*, 130 Ga. 322, 60 S. E. 544.  
 1906, *State v. Simes*, 12 Ida. 310, 85 Pac. 914.  
 1909, *Peebles v. O'Gara Coal Co.*, 239 Ill. 370, 88 N. E. 166.  
 1908, *Knickerbocker Ice Co. v. Gray*, 171 Ind. 395, 84 N. E. 341.  
 1904, *State v. Robinson*, 126 Ia. 69, 101 N. W. 634. 1905, *State v. Drake*, 128 Ia. 539, 105 N. W. 54.  
 1905, *State v. Miller*, 71 Kan. 200, 80 Pac. 51.  
 1908, *Baltimore & O. R. Co. v. State*, 107 Md. 642, 69 Atl. 439.  
 1906, *Gray v. Kelley*, 190 Mass. 184, 76 N. E. 724. 1914, *Com. v. Dorr*, 216 Mass. 314, 103 N. E. 902.  
 1904, *Woodruff v. State*, 72 Nebr. 815, 101 N. W. 1114.  
 1906, *Luckenback v. Sciple*, 72 N. J. L. 476, 63 Atl. 244.  
 1905, *State v. Hazlett*, 14 N. D. 490, 105 N. W. 617. 1910, *State v. Fujita*, 20 N. D. 555, 129 N. W. 360.  
 1904, *Koon v. Southern Ry.*, 69 S. C. 101, 48 S. E. 86.  
 1905, *State v. Cambron*, 20 S. D. 282, 105 N. W. 241.  
 1904, *Lane v. Bauserman*, 103 Va. 146, 48 S. E. 857.  
 1909, *Berry v. Doolittle*, 82 Vt. 471, 74 Atl. 97.  
 1904, *Lyon v. Grand Rapids*, 121 Wis. 609, 99 N. W. 311.

**§ 772. Question calling for Answer "Yes" or "No."**

[*Note 1; add:*]

1907, *Walker v. Baldwin*, 106 Md. 619, 68 Atl. 25.

[*Note 3; add:*]

1906, *Hix v. Gulley*, 124 Ga. 547, 52 S. E. 890 (good example).  
 1909, *Peebles v. O'Gara Coal Co.*, 239 Ill. 370, 88 N. E. 166.  
 1905, *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247.

[*Text*, p. 865; at the end of par. (1), *add* a new note 2a:]

\* 1913, *Ganow v. Ashton*, — S. D. —, 143 N. W. 383 (approving the above rule).

**§ 773. Opponent's Witness under Cross-Examination.**

[*Note 1, par. 1; add:*]

1906, *Lauchheimer v. Jacobs*, 126 Ga. 281, 55 S. E. 55 (in discretion).

**§ 774. Witness Hostile, Biassed, or Unwilling.**

[*Note 1; add:*]

1907, *State v. Walker*, 133 Ia. 489, 110 N. W. 925.  
 1907, *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396 (the opponent's wife and daughter).  
 1912, *Hollywood v. State*, 19 Wyo. 493, 120 Pac. 471.

§ 778. **Witness not Understanding, etc.**

[*Note 1; add:*]

1913, *Maves v. Grand Trunk P. R. Co.*, Alta. S. C., 14 D. L. R. 70 (elaborate opinion by Beck, J.).

[*Note 3; add:*]

1906, *State v. Simes*, 12 Ida. 310, 85 Pac. 914 (simple-minded woman, in rape).

1903, *Campion v. Lattimer*, 70 Nebr. 245, 97 N. W. 290 (a person ignorant and dull).

So also the reticence of *shame* or *modesty*:

1910, *State v. Dudley*, 147 Ia. 645, 126 N. W. 812 (rape).

§ 779. **Proving a Contradiction.**

[*Note 1; add, under Accord:*]

1910, *Sheridan Coal Co. v. Hull Co.*, 87 Nebr. 117, 127 N. W. 218.

§ 780. **Misleading Questions by Cross-Examiner.**

[*Note 2; add:*]

1905, *Briggs v. People*, 219 Ill. 330, 76 N. E. 499 (rule illustrated).

1905, *State v. Boice*, 114 La. 856, 38 So. 584.

§ 781. **Intimidating Questions.**

[*Note 4; add:*]

1904, *Cleveland, P. & E. R. Co v. Pritschau*, 69 Oh. 438, 69 N. E. 662.

§ 782. **Repetition of Questions.**

[*Note 2; add:*]

1905, *Braham v. State*, 143 Ala. 28, 38 So. 919.

1904, *Thomas v. State*, 47 Fla. 99, 36 So. 161 (excluded).

1911, *Smith v. Boston Elevated R. Co.*, 208 Mass. 186, 94 N. E. 315.

[*Note 4; add:*]

1903, *Spohr v. Chicago*, 206 Ill. 441, 69 N. E. 515.

1912, *People v. Lustig*, 206 N. Y. 162, 99 N. E. 183 (above passage quoted and applied).

So, too, the cross-examination questions may, in discretion, be repeated on *re-direct examination*: 1904, *Caven v. Bodwell G. Co.*, 99 Me. 278, 59 Atl. 285; and cases cited *post*, § 1896.

[*Note 5; add:*]

1909, *Math v. Chicago City R. Co.*, 243 Ill. 114, 90 N. E. 235 (a misapplication of this rule with several others).

§ 783. **Multiple Examiners, etc.**

[*Note 1; add:*]

1906, *State v. Nugent*, 116 La. 99, 40 So. 581 (two defendants and three counsel; only one allowed to examine the same witness).

[*Note 2; add:*]

1908, *Jackson v. Tribble*, 156 Ala. 480, 47 So. 310.

[*Note 5; add:*]

1906, *Barnes v. Squier*, — Mass. —, 78 N. E. 731 (similar to *Munro v. Stowe*).  
 1914, *People v. Becker*, 210 N. Y. 274, 104 N. E. 396 (murder; the principal witness for the prosecution was examined in chief from 10 A.M. till 2.30 P.M., the lunch period intervening, and was then cross-examined until 8.50 P.M., the day being Saturday of a week's trial; a refusal to adjourn the further cross-examination until Monday was held error on the facts, though later in the next week the cross-examiner declined further cross-examination of the witness when tendered for the purpose; this seems unsound; *Werner, J., diss.*).

#### § 784. Questions by the Judge.

[*Note 1, par. 1, p. 884; change the number to note 5; and add:*]

1888, *Sharp v. State*, 51 Ark. 147, 154, 10 S. W. 228 ("The judge has the right in a criminal prosecution to interrogate the witnesses; but he has no right to usurp the place of the State's attorney").  
 1905, *Arkansas C. R. Co. v. Craig*, 76 Ark. 258, 88 S. W. 878 (quoting the above passage).  
 1905, *Grant v. State*, 122 Ga. 740, 50 S. E. 946.  
 1905, *O'Shea v. People*, 218 Ill. 352, 75 N. E. 981 (the proper course for a judge in cross-examining witnesses, defined).  
 1898, *Dunn v. People*, 172 Ill. 582, 50 N. E. 137 (but giving feeble sanction to such questions by the judge).  
 1911, *State v. Keehn*, 85 Kan. 765, 118 Pac. 851.  
 1907, *Terr. v. Meredith*, 14 N. M. 288, 91 Pac. 731.  
 1904, *Eckhout v. Cole*, 135 N. C. 583, 47 S. E. 655 (good opinion, by *Connor, J.*).  
 1905, *State v. Hazlett*, 14 N. D. 490, 105 N. W. 617.  
 1905, *Howard v. Terr.*, 15 Okl. 199, 79 Pac. 773 (good opinion, by *Burwell, J.*; *DeFord v. Painter* not cited).  
 1906, *Komp v. State*, 129 Wis. 20, 108 N. W. 46.

Mr. (Assistant District Attorney) *Arthur Train*, in his book "*The Prisoner at the Bar*" (1906), pp. 181, 182, has some valuable comments.

And now see the able and powerful vindication of the judicial function, by *Burch, J.*, in *State v. Keehn*, 85 Kan. 765, 118 Pac. 851 (1911).

[In the same *Note 1 (5)*, *add* in *par. 2*:]

1909, *Flint v. Stockdale's Estate*, 157 Mich. 593, 122 N. W. 279 (an example of improper treatment of the trial judge).

#### § 785. Continuous Narration; Responsive Answers.

[*Note 2; add:*]

1905, *Horton v. State*, 123 Ga. 145, 51 S. E. 287 ("The practice [of continuous narrative] is to be commended rather than condemned").  
 1907, *Hendricks v. St. Louis Transit Co.*, 124 Mo. App. 157, 101 S. W. 675.  
 1909, *Pumphrey v. State*, 84 Nebr. 636, 122 N. W. 19 (trial Court's discretion).

[*Note 4; add:*]

*Contra*, for a party answering interrogatories: 1909, *Carville v. Franklin*, 164 Ala. 543, 51 So. 396.

This topic of responsiveness is beset with crude misunderstandings, that tend to suppress truth and turn the inquiry into a logomachy:

Sometimes it is said that the *party questioning* may object on this ground, but not the opposing party.

1906, *Dunahugh's Will*, 130 Ia. 692, 107 N. W. 925. There should be no such distinction;

[*Note 4 — continued*]

if the answer gives an admissible fact, it is receivable, whether the question covered it or not. No party is owner of facts in his private right. No party can impose silence on the witness called by Justice.

That a party *waives objection* to a responsive answer, by the very asking of the question, is noticed *ante*, § 18, n. 27.

That an opponent is entitled to the *striking out* of an answer which is non-responsive and inadmissible, is noticed *ante*, § 18, n. 1a; but this is merely a rule excusing him from not having objected before the answer.

Courts ought to cease repeating the novel and unwholesome assertion that "where an answer is not responsive to the question put, it is the duty of the Court to strike it out, on motion." (*Math v. Chicago C. R. Co.*, 253 Ill. 114, 90 N. E. 235, 1909.)

### § 786. Improper Suggestion other than by Questions.

[*Note 5; add:*]

1906, *State v. Goodson*, 116 La. 388, 40 So. 771 (co-defendants not allowed as of right to consult a co-indictee in jail and about to be used as a witness for the State).

1906, *State v. Barker*, 43 Wash. 69, 86 Pac. 387 (exchange of signals between witness and attorney, held improper).

[*Note 6; add:*]

But a stricter rule now obtains in England:

1910, *Dickman's Case*, 5 Cr. App. 135 ("If we thought in any case that justice depended upon the independent identification of the person charged, and that the identification appeared to have been induced by some suggestion or other means, we should not hesitate to quash any conviction that followed").

### § 788. Prior Conference with Attorney.

[*Note 1, par. 1; add:*]

1911, *State v. Papa*, 32 R. I. 453, 80 Atl. 12 (the defendant's counsel has a right to interview witnesses already summoned by the State).

The following ruling is unsound:

1909, *Eads v. State*, 17 Wyo. 490, 101 Pac. 946 (questions seeking to clear away an inference of counsel's suggestion in conference with a witness, excluded).

### § 789. Dramatic Communication.

[*Note 2, par. 1; add:*]

1905, *Turner v. Com.*, — Ky. —, 89 S. W. 482 (putting on a vest worn by one of the parties, to illustrate an affray).

1912, *Hutchinson v. Richmond S. G. Co.*, 247 Mo. 71, 152 S. W. 52 ("Look out, below!" repeated by witness with loudness, to show the nature of a warning given).

The following statutes belong here:

Alta. St. 1910, 2d sess., Evidence Act, c. 3, § 18 (quoted *post*, § 811, n. 3).

Sask. St. 1907, Evidence Act, § 33 (quoted *post*, § 811, n. 3).

1904, *Clark v. Brooklyn H. R. Co.*, 177 N. Y. 357, 69 N. E. 647 (plaintiff-witness' illustration of his nervous affection caused by the injury, held doubtful, as being "under the sole control of the witness himself"; here not improper in discretion).

[*Note 3, par. 1; add:*]

1905, *Birmingham R. L. & P. Co. v. Rutledge*, 142 Ala. 195, 39 So. 338 (personal injury; the plaintiff allowed to "walk the best he could before the jury").

[Note 3 — continued]

1904, *Plunkett v. State*, 72 Ark. 409, 82 S. W. 845 (rape under age; the prosecutrix testifying with the babe in her lap, held not erroneous).

1904, *Blanchard v. Holyoke St. R. Co.*, 186 Mass. 582, 72 N. E. 94 (a motion to permit the plaintiff in a personal injury suit to testify while reclining on a stretcher, held not improperly denied on the facts, in the trial Court's discretion).

1906, *State v. Barrick*, — W. Va. —, 55 S. E. 652 (rape; that the prosecutrix testified while lying ill on a cot, held not improper).

### § 790. Models, Maps, Photographs; General Principle.

[Text, p. 893, l. 10 from below; add a new note 1a after "nothing."]

<sup>1a</sup> Quoted with approval in *Northern Pacific R. Co. v. Alderson*, C. C. A., 199 Fed. 735 (1912).

### § 791. Instances of Models, Maps, and Diagrams.

[Note 1, par. 1; add:]

1906, *Hisler v. State*, 52 Fla. 30, 42 So. 692 (map of location of homicide).

1913, *Reinke v. Sanitary District*, 260 Ill. 380, 103 N. E. 236 (graphic summaries of statistics).

1904, *State v. Ryno*, 68 Kan. 348, 74 Pac. 1114 (handwriting; cited *post*, § 797, n. 4).

1910, *Strasser v. Stabeck*, 112 Minn. 90, 127 N. W. 384 (plat of the place of a collision).

1905, *Carman v. Montana C. R. Co.*, 32 Mont. 137, 79 Pac. 690.

1908, *People v. Del Verno*, 192 N. Y. 470, 85 N. E. 690 (knife used as a model).

1906, *Bullard v. Hollingsworth*, 140 N. C. 634, 53 S. E. 441 (map and plat of boundaries).

1908, *Higgs v. Minneapolis, St. P. & S. S. M. R. Co.*, 16 N. D. 446, 114 N. W. 722 (hay and grass burnt).

1912, *Hughes v. State*, 126 Tenn. 40, 148 S. W. 543 (room of a homicide, rearranged to show the scene).

[Note 1, par. 2; add:]

1906, *People v. Maughs*, 149 Cal. 253, 86 Pac. 187 (murder; model of the part of the house, admitted).

1905, *Chicago & A. R. Co. v. Walker*, 217 Ill. 605, 75 N. E. 520 (skeleton of a foot, used to explain an injury).

[Text; at the end, add:]

(4) A map, model, or diagram, though *made out of court*, is nevertheless subject to cross-examination through the witness who verifies and uses it. Hence the objection based on the Hearsay rule, that it is prepared *ex parte*, is entirely unsound (*post*, § 1385).

[Note 2; add:]

So also: 1911, *Napier v. Little*, 137 Ga. 242, 73 S. E. 3: "The map of a county surveyor, while not evidence, under the circumstances of this case, is admissible to go to the jury as a mere diagram to illustrate other testimony." Under this convenient but insidious term "illustrate," it is easy to re-classify almost any kind of evidence. Courts often fail to perceive that a diagram, map, or photograph is *always somebody's say-so*, and that therefore some explanation is always due of why that somebody is not in court to verify his graphic statement.

§ 792. *Instances of Photographs.*[*Note 1; add:*]

- 1905, *Russell v. State*, — Ala. —, 38 So. 291 (person of the defendants).  
 1906, *Kansas C. S. R. Co. v. Morris*, 80 Ark. 528, 98 S. W. 363 (railroad injury).  
 1907, *People v. Grill*, 151 Cal. 592, 91 Pac. 515 (place of homicide).  
 1905, *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779 (locality of homicide, showing the position of body, knife, hat, etc., as re-arranged by a witness who testified to the correct placing).  
 1906, *People v. Maughs*, 149 Cal. 253, 86 Pac. 187 (murder; photograph of a person in the supposed position of the deceased, excluded).  
 1913, *Moffitt v. Connecticut Co.*, 86 Conn. 527, 86 Atl. 16 (street-car injury).  
 1904, *Shaffer v. U. S.*, 24 D. C. App. 417, 424 (accused).  
 1904, *MacFeat v. Phila. W. & B. R. Co.*, 5 Pen. Del. 52, 62 Atl. 898 (scene of a railroad accident).  
 1905, *State v. Powell*, 5 Pen. Del. 24, 61 Atl. 966 (wounds on the deceased).  
 1905, *Chicago & E. I. R. Co. v. Crose*, 214 Ill. 602, 73 N. E. 865 (railroad accident at a crossing; photographs taken twelve months afterward, excluded).  
 1906, *Chicago & S. L. R. Co. v. Kline*, 220 Ill. 334, 77 N. E. 229 (eminent domain; photographs of adjoining estates, excluded, as offered merely in evasion of the rule of proof of value).  
 1905, *Considine v. Dubuque*, 126 Ia. 283, 102 N. W. 102 (footpath).  
 1905, *Ottawa v. Green*, 72 Kan. 214, 83 Pac. 616 (sidewalk).  
 1908, *Louisville & N. R. Co. v. Brown*, 127 Ky. 732, 106 S. W. 795 (railway wreckage).  
 1911, *Bowling Green G. Co. v. Dean's Ex'x*, 142 Ky. 678, 134 S. W. 1115 (photograph of a lineman on a telegraph pole, the scene being reproduced by other persons, and duly verified, admitted).  
 1904, *Stone v. L. B. & B. St. R. Co.*, 99 Me. 243, 59 Atl. 56 (photograph of the scene of a railroad injury, excluded in discretion).  
 1904, *Babb v. Oxford P. Co.*, 99 Me. 298, 59 Atl. 290 (photograph of a coal conveyer, held not improperly excluded in the trial Court's discretion).  
 1904, *Martin v. Moore*, 99 Md. 41, 57 Atl. 671 (battery; photograph of the plaintiff on the day of the battery, excluded for lack of verification).  
 1912, *Maryland El. R. Co. v. Beasley*, 117 Md. 270, 83 Atl. 157 (place of an accident; photographs in winter, the accident occurring in June, held not improperly admitted in discretion).  
 1904, *Com. v. Fielding*, 184 Mass. 484, 69 N. E. 216 (arson).  
 1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127 (murder; photograph of the deceased's corsets, taken six months before trial, held properly admitted in the trial Court's discretion, though the corsets were in court; photograph of pieces of a knife-blade, admitted, to aid testimony, though the pieces were in court).  
 1908, *Com v. Johnson*, 199 Mass. 55, 85 N. E. 188 (photograph of defendant, from the rogues' gallery and indorsed with his police history, admitted on the facts).  
 1905, *Ness v. Escanaba*, 142 Mich. 404, 105 N. W. 879 (sidewalk; excluded on the facts).  
 1907, *Davis v. Adrian*, 147 Mich. 300, 110 N. W. 1084 (personal injury).  
 1909, *Harrison v. Green*, 157 Mich. 690, 122 N. W. 205 (photograph of machinery with persons placed as at the time of the injury, admitted).  
 1908, *Brett v. State*, 94 Miss. 669, 47 So. 781 (photograph of the scene of a murder reproduced by posing the parties; excluded, because misleading).  
 1909, *Riggs v. Metropolitan St. R. Co.*, 216 Mo. 304, 115 S. W. 969 (position of plaintiff when run over; photographs of an artificially re-constructed scene, excluded because the similarity of conditions was not sufficiently shown).  
 1905, *State v. Roberts*, 28 Nev. 350, 82 Pac. 100 (of a deceased, showing his wounds).  
 1910, *Turner v. Coheco Mfg. Co.*, 75 N. H. 521, 77 Atl. 999 (mill; discretion of trial Court).  
 1913, *State v. Strong*, 83 N. J. L. 177, 83 Atl. 506 (photograph of the place of a murder, taken later, without specifying the changes that had taken place, excluded).

[*Note 1 — continued*]

- 1904, *Smith v. Lehigh Valley R. Co.*, 177 N. Y. 379, 69 N. E. 729 (action for death; photograph of deceased excluded, her appearance being immaterial).  
 1904, *Davis v. Seaboard A. L. Ry.*, 136 N. C. 115, 48 S. E. 591 (injured person).  
 1910, *Pickett v. Atlantic C. L. R. Co.*, 153 N. C. 148, 69 S. E. 8 (land flooded).  
 1912, *Sherlock v. Minneapolis, St. P. & S. S. M. R. Co.*, 24 N. D. 40, 138 N. W. 976 (railway track).  
 1912, *Cincinnati, H. & D. R. Co. v. De Onzo*, 87 Oh. 109, 100 N. E. 320 (legs of a plaintiff before injury; photographs received).  
 1903, *State v. Miller*, 43 Or. 325, 74 Pac. 658 (of deceased, showing wounds, excluded, on the principle of § 1158, *post*).  
 1904, *Maynard v. Oregon R. & N. Co.*, 46 Or. 15, 78 Pac. 983 (railway wreck).  
 1909, *State v. Finch*, 54 Or. 482, 103 Pac. 505 (of deceased, admitted).  
 1909, *Buck v. McKeesport*, 223 Pa. 211, 72 Atl. 514 (photograph of a highway, held misleading on the facts).  
 1911, *Curtis v. N. Y. N. H. & H. R. Co.*, 32 R. I. 542, 80 Atl. 127 (place of railroad accident).  
 1906, *Newcomb v. State*, 49 Tex. Cr. 550, 95 S. W. 1048 (room of a homicide; excluded, because the position of furniture was not the same).  
 1905, *Toledo Traction Co. v. Cameron*, 137 Fed. 48, 66, 69 C. C. A. 28 (plaintiff's injured leg).  
 1906, *Porter v. Buckley*, 147 Fed. 140, C. C. A. (automobile accident; photographs of the locality, taken more than a year afterwards, excluded).  
 1907, *Foss v. Smith*, 79 Vt. 434, 65 Atl. 553 (exchange of furniture for tools, etc.; a photograph of the furniture held not improperly excluded, the appearance not being important in evidencing value).  
 1906, *Hupfer v. National Dist. Co.*, 127 Wis. 306, 106 N. W. 831 (vat-hoops).

§ 794. **Anonymous Pictures; Personal Knowledge, etc.**

[*Note 3; add:*]

- 1909, *Sellers v. State*, 91 Ark. 175, 120 S. W. 840 (murder; photograph of a reproduction of the actors, excluded, because not verified as to the positions, etc.).  
 1905, *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779 (cited *ante*, § 792, n. 1).  
 1912, *State v. Baker*, — Ia. —, 135 N. W. 1097 (pointing out that the photographer may identify places in the picture by referring to the alleged facts).  
 1909, *Consolidated G. E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651.  
 1909, *Morris v. Terr.*, 1 Okl. Cr. 617, 99 Pac. 760 (premises of a homicide).

[*Note 4; add:*]

- 1909, *Hassam v. Safford L. Co.*, 82 Vt. 444, 74 Atl. 197 ("the sufficiency of the verification . . . is ordinarily not reviewable").

[*Note 5, par. 1; add:*]

- 1911, *Napier v. Little*, 137 Ga. 242, 73 S. E. 3 (map).  
 1907, *State v. Remington*, 50 Or. 99, 91 Pac. 473 (map made by county surveyor, with a legend, verified by one who had visited the spot).  
 1904, *Koon v. Southern Ry.*, 69 S. C. 101, 48 S. E. 86 (drawing of a pile-driver).

[*Note 5, par. 2; add:*]

- 1914, *State v. Jones*, — Cal. —, 139 Pac. 441 (identification of a person).  
 1907, *McKarren v. Boston & N. St. R. Co.*, 194 Mass. 179, 80 N. E. 477 (plaintiff's spinal vertebrae; verification by the physician present and directing the photographer, held sufficient).

[*Note 5 — continued*]

1912, *Hughes v. State*, 126 Tenn. 40, 148 S. W. 543.

1904, *Hebbe v. Maple Creek*, 121 Wis. 668, 99 N. W. 442 (witness need not have been present at the photographing).

### § 795. Vacuum-Ray Photographs, etc.

[*Note 2; add:*]

1912, *Alexander v. Blackburn*, 178 Ind. 66, 98 N. E. 711 (magnifying glass for signatures).

For the use of other *scientific or professional* instruments of *calculation, registration, etc.* see *ante*, § 665.

[*Note 4; add:*]

1904, *Miller v. Minturn*, 73 Ark. 183, 83 S. W. 918 (malpractice; radiograph of the injured ankle, taken by an expert, admitted).

1914, *Prescott & N. W. R. Co. v. Franks*, — Ark. — 163 S. W. 180 (bodily wound; admitted).

1911, *Kimball v. Northern Electric Co.*, 159 Cal. 225, 113 Pac. 154 (knee).

1907, *Elzig v. Bales*, 135 Ia. 208, 112 N. W. 540 (a doctor's testimony based on an unauthenticated X-ray photograph, excluded).

1904, *Chicago & J. El. Co. v. Spence*, 213 Ill. 220, 72 N. E. 796 (X-ray skiograph of the plaintiff's body received, after preliminary evidence of correctness of method).

1907, *Chicago City R. Co. v. Smith*, 226 Ill. 178, 80 N. E. 716 (personal injury; certain X-ray photographs held properly introduced).

1912, *Colesar v. Star Coal Co.*, 255 Ill. 532, 99 N. D. 709 (X-ray photograph of stone in kidney, held on the facts inadmissible because "unintelligible to the jury").

1905, *State v. Matheson*, 130 Ia. 440, 103 N. W. 137 (X-ray radiograph of a bullet, taken by an expert and verified by him, admitted).

1910, *Dean v. Wabash R. Co.*, 229 Mo. 425, 129 S. W. 953 (X-ray photographs of a bone, admitted).

1907, *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807 (X-ray picture of an injured leg, admitted).

[*Text*, p. 903, par (4), at the end; *add:*]

The *dictograph* falls under the principle of the telephone.

[*Text*, p. 903, par. (5), at the end; *add* a new note 5:]

<sup>a</sup> The use of the *phonograph* is legitimate, on the same principle:

1905, *Loring v. Boston Elev. R. Co.*, Superior Court of Suffolk Co., Mass., Boston Transcript, Dec. 12 (damage by noise; Wait, J., allowed the use of phonograph records, to show the noise made by the defendant's trains).

1906, *Boyne C. G. & A. R. Co. v. Anderson*, 146 Mich. 328, 109 N. W. 429 (eminent domain; "a phonograph was permitted to be operated in presence of the jury to reproduce sounds claimed to have been made by the operation of trains in proximity to respondent's hotel").

[*Text*, par. (6), at the end; *add* a new note 6:]

<sup>b</sup> *Not decided*: 1906, *Boles v. People*, 37 Colo. 41, 86 Pac. 1030 (spiritualistic communication as to a murderer).

### § 797. Photographs of Handwriting.

[*Note 4; add:*]

1910, *Estate of Vines*, Prob. 147 (will in India proved by a photograph of the will, with affidavit of the attesting witness).

[*Note 4 — continued*]

1908, *M'Cullough v. Munn*, 2 Ir. R. 194 (photograph of a lost libelous letter alleged to have been written by defendant but denied by him; whether the photograph could be compared with admitted specimens, not decided; a doubt which was perversely unnecessary).

1913, *Hayes' Estate*, — Colo. —, 135 Pac. 449 (testimony by deposition to a will's handwriting, based on photographic copies duly verified, held admissible).

Ia. St. 1913, c. 296, p. 307, Apr. 19 (amending Code § 4623, by adding subdiv. 5; where depositions are taken and refer to books of account, the books may be photographically copied and the copy attached).

1906, *McClellan's Estate*, 20 S. D. 498, 107 N. W. 681 (inheritance; photographic reproductions of enlistment papers on record at barracks in Ireland, admitted; here the custodian's certified copies were also in evidence).

[*Note 6; add:*]

1908, *State v. Skillman*, 76 N. J. L. 474, 70 Atl. 83 (photographic enlargements, admitted).

1904, *Johnson v. Com.*, 102 Va. 927, 46 S. E. 789 (enlarged photographs of specimens, admitted).

So, too, enlarged drawings or *diagrams* are allowable: 1904, *State v. Ryno*, 68 Kan. 348, 74 Pac. 1114 (blackboard illustrations of handwriting by an expert, allowed).

1890, *McKay v. Lasher*, 121 N. Y. 477, 24 N. E. 711 (cited *ante*, § 791, n. 1).

1904, *Groff v. Groff*, 209 Pa. 603, 59 Atl. 65 (blackboard reproductions of the disputed signatures, held not improperly excluded in the trial Court's discretion).

**§ 803. Deposition; Officer not to be Party's Agent or Kinsman.**

[*Note 3; add:*]

1682, *Newton v. Foot*, Dick. 793 (deposition suppressed, because "the clerk of the plaintiff's solicitor sat as clerk to the commissioners").

1819, *Cooke v. Wilson*, 4 Madd. 380 (solicitor's clerk).

1906, *Bledsoe v. Jones*, 145 Ala. 685, 40 So. 111 (counsel).

1906, *Southern P. Co. v. Wilson*, 10 Ariz. 162, 85 Pac. 401 (deposition in a foreign country, not excluded merely because the solicitor of the witness, a party interested, read to him the interrogatories in the commissioner's presence).

Ark. St. 1905, c. 326 (deposition may be written "by any one who may be called on to do the writing by the officer").

1848, *Glanton v. Griggs*, 5 Ga. 424, 426, 433 (a student of defendant's counsel acting as commissioner).

Ga. St. 1908, No. 568, p. 84, Aug. 17 (depositions).

1904, *Knickerbocker Ice Co. v. Gray*, 165 Ind. 140, 72 N. E. 869 (deposition written by the office-clerk and stenographer of one of the attorneys, excluded, because not by a "disinterested person"; good opinion by Dowling, C. J.).

1913, *Segura's Succession*, 134 La. —, 63 So. 640 (counsel for a party, disqualified).

N. C. Rev. 1905, § 1652 (like Code 1883, § 1357).

For *affidavits*, the officer taking the acknowledgment is subject to the same rule:

1907, *Malcom Sav. Bank v. Cronin*, 80 Nebr. 228, 114 N. W. 158 (noting the effect of statutes).

[*Note 4; add before l. 1:*]

Man. St. 1910, 10 Edw. VII, c. 71.

1911, Rev. Bond, 21 Man. 366.

Can. St. 1913, 3-4 Geo. V, c. 13, § 25 (provision for stenographic transcripts of depositions without witness' signing or reading; amending § 683, Crim. Code 1906).

Tenn. St. 1909, c. 160, p. 560 (depositions may be taken by stenographer).

[*Note 4 — continued*]

U. S. St. 1900, Mar. 23, c. 541.

W. Va. St. 1909, c. 44, p. 382 (provision for stenographer's transcription and for certification of the transcript without signature of witness).

The following statute seems hardly necessary :

N. Y. St. 1912, c. 390, p. 746 (inserting § 222*b* in C. Cr. P.; examination before magistrate may be taken by stenographer and certified by magistrate).

#### § 805. Reading Over and Signing.

[*Note 1; add:*]

1908, *Slaughter Co. v. King Lumber Co.*, 79 S. C. 338, 60 S. E. 705 (deposition taken directly by typewriting, without shorthand transcription, need not be read over, under 23 Stats. at L. p. 1072).

#### § 811. Interpreted Testimony; Deaf-Mutes, Aliens, etc.

[*Note 1; add:*]

This important reason why Courts are reluctant to allow the use of an interpreter unless really necessary, *i. e.* that his intervention cripples a cross-examination, is equally noted in modern practice: Train, "*The Prisoner at the Bar*," 1906, p. 239 (quoted *post*, § 1367, n. 5).

[*Note 2; add:*]

1906, *Dobbins v. Little Rock R. & E. Co.*, 79 Ark. 85, 95 S. W. 794 (deaf-mute).

1906, *People v. Salas*, 2 Cal. App. 537, 84 Pac. 295 (trial Court's discretion controls).

1912, *People v. Rardin*, 255 Ill. 9, 99 N. E. 59 (competency determined by the trial Court; here a distant relative of the prosecutrix).

[*Note 3, col. 1; add:*]

1906, *Dobbins v. Little Rock R. & E. Co.*, 79 Ark. 85, 95 S. W. 794 (deaf-mute's testimony taken by a sign-interpreter, instead of through written questions and answers).

Minn. St. 1905, c. 47 (a deaf or dumb person charged with insanity is entitled to an interpreter "as a matter of absolute right").

The following statutes belong here :

Alta. St. 1910, 2d sess., Evidence Act, c. 3, § 18 ("A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible").

Sask. St. 1907, Evidence Act, § 33 (like Alta. St. 1910, c. 3, § 18).

[*Note 7, par. 1; add:*]

1907, *State v. Smith*, 203 Mo. 695, 102 S. W. 526 (like *State v. Burns*, Ia.).

1908, *People v. Weston*, 236 Ill. 104, 86 N. E. 188 (deaf-mute; the judge may cause the witness and the proposed interpreter to be questioned for ascertaining the feasibility of interpretation, but on demand the jury should be removed during this stage).

1911, *Com. v. Shooshanian*, 210 Mass. 123, 96 N. E. 70 (a witness who understands both languages may give a translation of a conversation heard by him, without calling an interpreter).

It deserves protest here that one of the greatest injustices done in the courts of our metropolitan cities is the failure to provide honest and competent interpreters.

#### § 812. Other Principles Discriminated.

[*Text*, p. 917; *add* a new par. (5):]

(5) An interpreter must take an *oath* to interpret truly (*post*, § 1824).

§ 815. **Confessions; Rule applies to Accused, not to Witness.**

[Note 2; add:]

1905, *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1 (a confession of an accomplice having been obtained by officers through fear, but not being admitted, the jury were allowed, in weighing the accomplice's testimony on the stand, to consider evidence that he had been put in fear "and still labored under this fear").

1912, *State v. Miller*, 68 Wash. 239, 122 Pac. 1066 (accomplice; the opinion collects recent precedents).

§ 816. **Admissions, etc., distinguished.**

[Note 1; add:]

For confessions used as *self-contradictions* to impeach on accused taking the stand, see *post*, § 821, n. 2.

§ 818. **Confessions in the 1500s and 1600s.**

[Note 7, l. 9 from the end; add:]

In *The Athenian Mercury*, a periodical printed between 1690 and 1697 (edited in selections as *The Athenian Oracle*, by J. Underhill, Camelot Series, 1892), a correspondent asks whether torture to a suspected criminal is unlawful, and the editor replies (p. 196) that "'tis neither political nor reasonable; but were it both of these, we very much doubt the lawfulness of it; Christianity and the laws of nature seem to forbid it"; the law of the land had as yet not shown a plain attitude to the editor.

[Note 7; at the end, add:]

Esmein, *History of Continental Criminal Procedure* (Simpson's transl., Continental Legal History Series), 1913, Part I, tit. II, ch. II, § 4, p. 107, and Part III, tit. II, ch. II, §§ 1-6, p. 351.

§ 821. **What is a Confession.**

[Note 2, par. 1; add:]

1913, *R. v. Hurd*, Alta. S. C., 10 D. L. R. 475 (larceny).

1905, *Carwile v. State*, 148 Ala. 576, 39 So. 220. 1906, *Neville v. State*, 148 Ala. 681, 41 So. 1011 (larceny). 1909, *Kelly v. State*, 160 Ala. 48, 49 So. 535.

1904, *People v. Jan John*, 144 Cal. 284, 77 Pac. 950 (*People v. Ammermann* followed).

1905, *People v. Kelly*, 146 Cal. 119, 79 Pac. 846. 1906, *People v. Weber*, 149 Cal. 325, 86 Pac. 671 (statements showing an alibi).

Colo.: but see *Tuttle v. People*, 1905, 33 Colo. 243, 79 Pac. 1035, *contra*, ignoring *Mora v. People*.

1910, *State v. Turner*, 82 Kan. 787, 109 Pac. 654.

1906, *State v. Thomas*, 135 Ia. 717, 109 N. W. 900.

1904, *State v. Aspara*, 113 La. 940, 37 So. 883.

1905, *State v. Royce*, 38 Wash. 111, 80 Pac. 268.

[Note 2, par. 3; add:]

1904, *Parks v. State*, 46 Tex. Cr. 100, 79 S. W. 301 (*Bailey v. State* followed; the *Quintana* and *Ferguson* cases apparently repudiated, where the statement is not used to impeach the defendant as a witness; *Brooks, J.*, diss.).

In *State v. Gianfala*, 113 La. 463, 37 So. 30 (1904), is a ridiculous example of an accused's exculpatory statement excluded because the Court thought that "he may well have been in fear and may well have hoped to mitigate his act," *i. e.* being probably a false exculpation, therefore it should be rejected; this is the rule of law gone mad).

[*Note 2, par. 4; add.:*]

*Accord:* 1909, *Harrold v. Terr.*, 8th C. C. A., 169 Fed. 47 (where a defendant, by taking the stand, waives his privilege and may be cross-examined to his admissions in general, a confession not admissible under the present rules may not be introduced by first asking him if he made it, and then, on his denial, by evidencing it with other testimony; *i. e.* the rules limiting the admissibility of a confession apply no matter how it be evidenced).

*Contra:* 1911, *People v. Brown*, 203 N. Y. 44, 96 N. E. 367 (the rule for confessions does not apply when the accused, taking the stand, is asked as to his former statements as a witness before the coroner).

[*Note 3; add.:*]

1910, *People v. Wilkins*, 158 Cal. 130, 111 Pac. 612.

1904, *Owens v. State*, 120 Ga. 296, 48 S. E. 21 (an absurd ruling; the Court incidentally makes the remarkable pronouncement that "a confession is rather a fact to be proved by evidence than evidence to prove a fact"; *Lamar and Candler, JJ., diss.*).

1904, *Michaels v. People*, 208 Ill. 603, 70 N. E. 747 (defendant on being arrested and charged with forgery, said, "Can't this thing be fixed up?"; held, not a confession).

1906, *State v. Campbell*, 73 Kan. 688, 85 Pac. 784 (statement of the receipt of money lawfully).

1909, *State v. Brinkley*, 55 Or. 134, 105 Pac. 708.

1909, *State v. Moore*, 36 Utah 521, 105 Pac. 293 (adultery by the defendant, being wife of C. H. M., with A. J. M.; the sheriff, on receiving her in custody, made the usual inquiries required by law as to her name, age, etc., and asked her, "Are you the wife of C. H. M.?" her answer held not a confession).

*Contra:* 1911, *McGehee v. State*, 171 Ala. 19, 55 So. 159 ("inculpatory admissions in the nature of a confession," that is, directly relating to the fact or circumstances of the crime and connecting the defendant therewith, "are subject to the rules for confessions").

[*Text, p. 930, at the end, add.:*]

(4) Of course the present rules of exclusion have no application to a confession *made in open court* before judge and jury on the trial of the issue.<sup>4</sup>

<sup>4</sup> In *Garner v. State*, 97 Ark. 63, 1910, 132 S. W. 1010, is an extraordinary instance of the improper exclusion of such a confession, on the ground that defendant's counsel was not present.

## § 825. Confession induced by Threat or Promise.

[*Note 5; add.:*]

1905, *R. v. Ryan*, 9 Ont. L. R. 137 (confession of a letter-carrier to a post-office inspector, admitted on the facts; *R. v. Thompson* followed).

## § 829. Person in Authority; Threats or Promises, etc.

[*Note 4; add.:*]

1911, *Godinho's Case*, 7 Cr. App. 12 (a hope of pardon originating in the accused's own mind, and not due to the statement of any person in authority, does not exclude).

1901, *R. v. Todd*, 13 Man. 364 (detectives obtaining a confession by trick, held not persons in authority).

1905, *R. v. Ryan*, 9 Ont. L. R. 137 (a post-office inspector questioning a letter-carrier; not decided).

§ 830. Same: United States Doctrine.

[Note 4; add:]

1909, *People v. Piner*, 11 Cal. App. 542, 105 Pac. 780 (the injured person may be a person in authority).

1910, *People v. Luis*, 158 Cal. 285, 110 Pac. 580 (a bystander, not a person in authority).

§ 831. Nature of the Inducement; Statutory Definitions.

[Note 2; add:]

*Ind.*: St. 1905, p. 584, § 239 (amending the above statute by adding, after the word "threats" the words, "or by intimidation or undue influences").

*Ky.*: St. 1912, c. 135, Mar. 19, p. 542 (confessions to police; quoted *post*, § 851).

*N. Y.*: 1908, *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135 (Code Cr. P., 1881, § 395; the words "private person" include a police officer or any other person not conducting a judicial proceeding); the New York Code's rule seems nowadays to be applied with more care, *i. e.* so as to render inapplicable all the quibbles dealt with in the ensuing sections.

*Tex.*: St. 1907, c. 118, p. 219 (amending C. C. P. Art. 790; instead of the clause "or be made voluntarily" etc., after the first "unless," substituting: "or be made in writing and signed by him, which written statement shall show that he was warned by the person to whom the same is made, first, that he does not have to make any statement at all, second, that any statement made may be used in evidence against him on his trial for the offence," etc.; and adding at the end, "provided that where the defendant is unable to write his name and sign [s?] the statement by making his mark, such statement shall not be admitted in evidence, unless it be witnessed by some person other than a peace officer, who shall sign the same as a witness").

*Wash.*: the Supreme Court of Washington has unfortunately thus far given very little effect to this reform, as the decisions cited *post*, §§ 851, 852, will indicate.

§ 832. Advice that "it would be better to tell the truth."

[Note 1; add:]

1904, *Brewer v. State*, 72 Ark. 145, 78 S. W. 773 (*Hardin v. State* approved).

[Note 3; add:]

1911, *Stanton's Case*, 6 Cr. App. 198.

1911, *Reagan v. People*, 49 Colo. 316, 112 Pac. 785 ("I want the straight facts," admitted).

1905, *State v. Wescott*, 130 Ia. 1, 104 N. W. 341.

1904, *Com. v. Hudson*, 185 Mass. 402, 70 N. E. 436, *semble*.

1906, *State v. Johnny*, 29 Nev. 203, 87 Pac. 3 (by a sheriff, "You might as well tell the truth").

1912, *State v. Humphrey*, 63 Or. 540, 128 Pac. 824.

1910, *State v. Allison*, 24 S. D. 622, 124 N. W. 747.

1905, *Hintz v. State*, 125 Wis. 405, 104 N. W. 110; *Roszczyńska v. State*, *ib.* 414, 104 N. W. 113.

§ 833. Threat of Corporal Violence.

[Note 3; add:]

1904, *Edmonson v. State*, 72 Ark. 585, 82 S. W. 203 (threat of hanging, excluded).

1907, *Thurman v. State*, 169 Ind. 240, 82 N. E. 64 (admitted on the facts).

1904, *State v. Gianfala*, 113 La. 463, 37 So. 30 (excluded; poor ruling).

[*Note 4, l. 4 from below; add.:*]

1904, *State v. Middleton*, 69 S. C. 72, 48 S. E. 35 (confession obtained by threats of whipping, etc., excluded).

1906, *Jackson v. State*, 50 Tex. Cr. 302, 97 S. W. 312 (confession obtained by hanging and burning, excluded).

[*Note 5; add.:*]

For the use of *police-officers' questions to one under arrest*, and the recent statutes and decisions concerning the "sweat-box" or "third degree" in this sense, see *post*, § 851.

**§ 835. Inducements involving Lighter Punishment, etc.**

[*Note 1; add.:*]

1906, *Smith v. State*, 125 Ga. 252, 54 S. E. 190 ("it would be lighter on him").

1906, *Maxwell v. State*, — Miss. —, 40 So. 615.

1906, *Johnson v. State*, 89 Miss. 773, 42 So. 606 (promise to intercede with the judge, etc.; excluded).

1906, *Sorenson v. U. S.*, 143 Fed. 820, C. C. A.

**§ 836. Promises of other Favorable Legal Action.**

[*Note 1, par. 1; add.:*]

1910, *Boughton's Case*, 6 Cr. App. 8 ("It has been conclusively established" that a promise that "there will be no prosecution" excludes the confession).

1911, *Stanton's Case*, 6 Cr. App. 198 ("If you will give me back my rings, I will forgive you"; this "would be a grave question").

1904, *State v. Hunter*, 181 Mo. 316, 80 S. W. 955 (promise not to prosecute).

**§ 839. Sundry Phrases and Inducements.**

[*Note 1, par. 1; add.:*]

1911, *State v. Lee*, 127 La. 1077, 54 So. 356 ("If I was in your place and you was the right man, I would try and effect a compromise"; excluded).

[*Note 3, under Promises; add.:*]

1912, *State v. Kwiatkowski*, 83 N. J. L. 650, 85 Atl. 209 (by an interpreter, that he would help him if he could; admitted).

**§ 840. Influences of a Moral or Religious Nature.**

[*Note 2; add.:*]

1913, *Mitsunaga v. People*, 54 Colo. 102, 129 Pac. 241.

**§ 841. Confession induced by Trick or Fraud.**

[*Note 1, par. 1; add.:*]

1904, *R. v. Todd*, 13 Man. 364 (detectives pretended to be a gang of criminals, and obtained a confession from the accused as qualifying him to join their gang; admitted).

1908, *R. v. White*, 18 Ont. L. R. 640 (confession induced by a police officer's false statement as to an accomplice confessing, admitted).

1910, *People v. Dunnigan*, 163 Mich. 349, 128 N. W. 180 (repudiating the contrary intimation in *People v. McCullough*, 81 Mich. 25, 45 N. W. 515).

1907, *People v. Furlong*, 187 N. Y. 198, 79 N. E. 978 (*People v. White, supra*, followed).

[*Note 1 — continued*]

1909, *People v. Scott*, 195 N. Y. 224, 88 N. E. 35 (confession induced by a trick purporting to give the defendant a chance to escape, admitted, under C. Cr. P., § 395).

Distinguish the following:

1908, *R. v. Choney*, 17 Man. 467 (a purporting agent of defendant's attorney falsely told the defendant while in jail that the attorney had telephoned him "to tell him everything about the case"; excluded).

[*Note 2, l. 2; add.:*]

or during insanity (*ante*, §§ 493-495).

# § 847. English Practice; Confessions under Arrest.

[*Note 10; add.:*]

The difference of attitude in English judges still continues: 1893, *R. v. Male & Cooper*, 17 Cox Cr. 689 ("The prisoner should be previously cautioned").

1895, *R. v. Miller*, 18 Cox Cr. 54 (answers to questions by an inspector without caution, admitted; "it is impossible to discover the facts of a crime without asking questions").

1898, *Rogers v. Hawken*, 19 Cox Cr. 122 (*R. v. Male & Cooper* not followed; there is "no such rule" that a statement made in answer to an officer's question, without caution but without inducement, is inadmissible; good opinion by Russell, L. C. J.).

1898, *R. v. Histen*, 19 Cox Cr. 16 ("When a prisoner is once taken into custody, a policeman should ask no questions at all without administering the usual caution).

1905, *R. v. Knight & Thayre*, 20 Cox Cr. 711 ("When a police-officer has taken anyone into custody, and also before doing so when he has already decided to make the charge, he ought not to question the prisoner. . . . I am not aware of any distinct rule of evidence that if such improper questions are asked the answers to them are inadmissible, but . . . in my opinion that is the right course to pursue").

1909, *James' Case*, 2 Cr. App. 319 (to a police-officer, while under arrest; he said, "You must tell me. . . . Any statement will be given in evidence against you at your trial"; no caution; admitted, citing *R. v. Thomas* and *R. v. Reason*).

1909, *Best's Case*, 1 K. B. 692 (answers given to a constable's questions after a caution, admitted; L. C. J. Alverstone: "In our opinion *R. v. Gavin*, 15 Cox Cr. C. 656, is not a good decision; . . . it is too wide and requires qualification").

1910, *Unsworth's Case*, 4 Cr. App. 1 (confession while in jail to a constable; no warning, no inducement; admitted).

*Canada*: 1904, *R. v. Kay*, 11 Br. C. 157 (answers to police officer, without a caution, and under arrest, excluded; "the arrest and charge are in themselves a challenge to the accused to speak, — an inducement within the rule"; a caution of the purpose and consequences must be given).

1913, *U. S. v. Wrenn*, N. Sc. S. C., 10 D. L. P. 452 ("the practice of detectives interrogating a prisoner when in jail, and when no one else is present at the interview, should be discouraged").

1890, *R. v. Day*, 20 Ont. 209 ("Although we reprehend the practice of questioning prisoners, we cannot come to the conclusion that evidence obtained by such questioning is inadmissible").

1899, *R. v. Elliott*, 31 Ont. 14 ("*R. v. Day* is the case settling the law in this Province").

1909, *R. v. Steffoff*, 20 Ont. L. R. 103 (made to the police under arrest after caution, admitted).

1912, *R. v. Cummings*, Que. K. B., 5 D. L. R. 86 (confession to an officer after caution, admitted).

1912, *The King v. Hoo Sam*, Sask. S. C., 1 D. L. R. 569 (if the officer puts questions, there must be a caution; prior cases examined).

### § 850. English Practice; Confessions by a Witness, etc.

[*Note 17, par. 1, col. 2, l. 12; add.:*]

1898, *R. v. Bird*, 19 Cox Cr. 180 (the accused testified before the magistrate and signed the written report; then, on being asked whether he had anything to say in answer to the charge, replied, "What I have already said is true"; the Court of Crown Cases Reserved held (1) that this answer made the written report admissible, (2) that, even without the answer, the written report was admissible, following *R. v. Erdheim*).

[*Note 17, par. 2; add.:*]

1904, *R. v. Golden*, 11 Br. C. 349 (forgery; after the statutory caution, the accused declined to say anything, but on request of the magistrate signed his name to the written statement; the signature was admitted to compare with the alleged forgery).

### § 851. United States; Confessions under Arrest.

[*Note 1, par. 1; add.:*]

1905, *Braham v. State*, 143 Ala. 28, 38 So. 919. 1907, *Heningsburg v. State*, 153 Ala. 13, 45 So. 246.

1907, *Terr. v. Emilio*, — Ariz. —, 89 Pac. 239.

1913, *Greenwood v. State*, — Ark. —, 156 S. W. 427 (even when questions are put).

1908, *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863.

1911, *Byram v. People*, 49 Colo. 533, 113 Pac. 528.

1904, *McNish v. State*, 47 Fla. 69, 36 So. 176 (the accused under arrest in chains, alone with the officer; admitted).

1904, *Williams v. State*, 48 Fla. 65, 37 So. 521.

1909, *Daniels v. State*, 57 Fla. 1, 48 So. 747 (see the authorities under § 861, *post*).

1910, *Sims v. State*, 59 Fla. 38, 52 So. 198.

1905, *Folds v. State*, 123 Ga. 167, 51 S. E. 305.

1912, *Terr. v. Chung Ning*, 21 Haw. 214, 220 (statements made in answer to police questions, after a caution, admitted).

1905, *Hoch v. People*, 219 Ill. 265, 76 N. E. 356.

1908, *State v. Laughlin*, 171 Ind. 66, 84 N. E. 756 (under St. 1905, c. 168, § 239).

1904, *State v. Icenbice*, 126 Ia. 16, 101 N. W. 273. 1910, *State v. Neubauer*, 145 Ia. 337, 124 N. W. 312. 1913, *State v. Kilduff*, — Ia. —, 141 N. W. 962.

1905, *State v. Inman*, 70 Kan. 894, 79 Pac. 162.

1904, *Hathaway v. Com.*, — Ky. —, 82 S. W. 400.

1904, *State v. Lewis*, 112 La. 872, 36 So. 788. 1904, *State v. Lyons*, 113 La. 959, 37 So. 890.

1906, *State v. Hogan*, 117 La. 863, 42 So. 353. 1907, *State v. Williams*, 120 La. 175, 45 So. 94. 1908, *State v. Pamela*, 122 La. 207, 47 So. 508.

1906, *Birkenfeld v. State*, 104 Md. 253, 65 Atl. 1. 1914, *McCleary v. State*, — Md. —, 89 Atl. 1100.

1908, *People v. Owen*, 154 Mich. 571, 118 N. W. 590.

1906, *State v. Barrington*, 198 Mo. 23, 95 S. W. 235. 1906, *State v. Church*, 199 Mo. 605, 98 S. W. 16. 1906, *State v. Spauth*, 199 Mo. 147, 98 S. W. 55. 1909, *State v. Brooks*, 220 Mo. 74, 119 S. W. 353. 1910, *State v. Green*, 229 Mo. 642, 129 S. W. 700 (by questioning of officers).

1908, *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135. 1909, *People v. Randazzio*, 194 N. Y. 147, 87 N. E. 112 (statutory rule applied). 1910, *People v. Hill*, 198 N. Y. 64, 91 N. E. 272. 1912, *People v. Garfalo*, 207 N. Y. 141, 100 N. E. 698 (arrested and in the presence of the victim).

1905, *State v. Smith*, 138 N. C. 700, 50 S. E. 859. 1905, *State v. Horner*, 139 N. C. 603, 52 S. E. 136. 1907, *State v. Jones*, 145 N. C. 466, 59 S. E. 353.

1910, *Com. v. Aston*, 227 Pa. 112, 75 Atl. 1019.

[*Note 1 — continued*]

1906, *State v. Henderson*, 74 S. C. 477, 55 S. E. 117.  
 1908, *State v. Landers*, 21 S. D. 606, 114 N. W. 717. 1908, *State v. Vey*, 21 S. D. 612, 114 N. W. 719.  
 1912, *Mullins v. Com.*, 113 Va. 787, 75 S. E. 193 (accused's examination at the inquest, excluded under Code § 3901).  
 1904, *State v. Blay*, 77 Vt. 56, 58 Atl. 794.  
 1906, *State v. Poole*, 42 Wash. 192, 84 Pac. 727 (this opinion devotes a page to this point, and cites authorities from other jurisdictions, apparently forgetting that the local statute, cited *ante*, § 831, has replaced the common law rule and made a new and unique one; this Court should be urged to recall its words in *State v. Hopkins*, quoted *ante*, § 831, that "the former rule does not obtain," and to look only at the statutory question of "fear produced by threats," instead of keeping alive all the old controversies and quibbles and thus losing the benefit of the statutory reform).  
 1905, *Hintz v. State*, 125 Wis. 405, 104 N. W. 110; *Roszczyniala v. State*, *ib.* 414, 104 N. W. 113. 1911, *Tarasinski v. State*, 146 Wis. 508, 131 N. W. 889.

[*Note 1, par. 2; add:*]

1904, *Parker v. State*, 46 Tex. Cr. 461, 80 S. W. 1008 (this decision finally reads all life out of the statute, by excluding the defendant's answers to the county attorney's questions, after due warning, under arrest, at the inquest; the ground is that testimony given under a severe cross-examination is not voluntary; this kind of judicial vapidty certainly makes the way smooth for the accused and hard for the prosecution, and may throw some light on the remarkably high record of homicides in this State).  
 1910, *Jenkins v. State*, 60 Tex. Cr. 236, 131 S. W. 542 (amendment of 1907, *ante*, § 831, construed; the confession must contain a recital of the caution and of its being given by the person to whom the confession is made; Ramsey, J., diss., prior cases considered).

[*Text*, p. 979, l. 5, at the end of the section; *add:*]

But does it make any difference that the confession was made *in answer to interrogatories* put by a police officer to the person under arrest? No, on the once settled principles of the authorities above cited. Yet the last ten years have seen signs of backsliding in some Courts.

This new phase of reaction is due to the misguided application of the terms "*sweat-box*" and "*third degree*" to such a process. Those terms originally and properly signified the use of some form of violence, in that sense, a confession so obtained was and is inadmissible (*ante*, § 833). But journalistic exaggeration has in common usage misapplied the terms to any process of simple interrogation of the arrested person, while in seclusion, by an official other than the judge.<sup>1</sup> Calling a thing by a bad name does not make it any worse. Let us therefore ask whether there is any reason why this simple and traditional process calls for prohibition. Assume that there is no

<sup>1</sup> The "sweat-box" and "third degree" practices, in their legitimate scope, are well explained by Mr. Thomas Byrnes, former chief of detectives in New York City, in the *Sunday Magazine*, Oct. 9, 1905, with which is to be compared the long-established and highly-developed French method, as illustrated in the citations of § 2251, n. 12, *post* (notably Gaboriau's novel "*Monsieur Lecocq*"). Further accounts by experienced persons are the following: Arthur Train, "*Courts, Criminals, and the Camorra*" (1912), p. 20; Allan Pinkerton, "*Bank Robbers and Detectives*" (1882), p. 231; International Association of Chiefs of Police, 1910, Proceedings of 17th Annual Session, p. 54.

[Text, p. 979 — continued]

violence; suppose the normal case of lengthy interrogation in seclusion, immediately after arrest; what are the considerations which should govern?

(1) In the first place, an innocent person is always helped by an early opportunity to tell his whole story; hundreds of suspected persons every day are set free because their story thus told bears the marks of truth. Moreover, and more important, every guilty person is almost always ready and desirous to confess, as soon as he is detected and arrested. This psychological truth, well known to all criminal trial judges, seems to be ignored by some Supreme Courts. The nervous pressure of guilt is enormous; the load of the deed done is heavy; the fear of detection fills the consciousness; and when detection comes, the pressure is relieved; and the deep sense of relief makes confession a satisfaction.<sup>1</sup> At that moment, he will tell all, and tell it truly. To forbid soliciting him, to seek to prevent this relief, is to fly in the face of human nature. It is natural, and should be lawful, to take his confession at that moment, — the best one. And this expedient, if sanctioned, saves the State an enormous delay and expense in convicting him after he has reacted from his first sensations, has yielded to his friends' solicitations, and comes under the sway of the natural human instinct to struggle to save himself by the aid of all technicalities.

(2) In the case of professional criminals, who usually work in groups, there is often no hope of getting at the group until one of them has "peached," and given the clues to the police. The police know this, and have known it for generations in every country. The only ones who apparently do not know it are some of the Supreme Court judges. A thorough questioning of the first suspected person who is caught makes possible the pursuit of the right trail for the others. To forbid this is to tie the hands of the police. The attitude of some judges towards these necessary police methods is lamentable; one would think that the police, not the criminals, were the enemies of society. To disable the detective police from the very function they are set to fulfil is no less than absurd. Let the judges who sit in judgment on crime look a little into the facts; let them read Arthur Train's "The Prisoner at the Bar." Let them not sit up aloft, and dictate a rule which ignores the well-known facts of criminal life and hampers the needful methods of justice.

But, it is argued, there are abuses by the police. Very true, — here and there, at least. It does not follow, however, that a stricter rule of exclusion for confessions is the proper remedy. It is still a misguided remedy. The true one is to provide a means of speedy confession which shall be less susceptible to abuses, while still taking advantage of the inherent psychological situation. In short, let an *authorized skilled magistrate* take the confession. Let every accused person be required to be taken before a magistrate within

<sup>1</sup> Read Balzac's description of this in "Lucien de Rubempré," c. XV, and "The Last Incarnation of Vautrin," c. II; also Daniel Webster's speech at the Knapp-Crowninshield Trial. Psychologists report that their studies have not yet taken up this phenomenon. But so well established a fact should be supplied with its scientific explanation.

[Text, p. 979 — continued]

a day after arrest for private examination; let the magistrate warn him of his right to keep silence; and then let his statement be taken if he is willing to make one.

Such is the expedient employed in every other civilized country on earth except our own. Such is the method long ago adopted in England.<sup>1</sup> We need not go so far as to introduce the French "juge d'instruction" into our system; but we may at least accept English experience of two generations. The examination before a magistrate meets a real need of the situation, both psychological and detective. To attempt to get along without it is virtually to force the police to practise it. For the pursuit of crime needs and justifies it; and as long as our legislators and judges are shortsighted enough to fail to provide it with proper safeguards, it must and will be practised without them.

From what is above said, it follows that the recent attempts, legislative and judicial, to exclude confessions obtained by police-questioning of persons arrested and in seclusion represent simply a misguided solution of the problem.<sup>2</sup>

<sup>1</sup> St. 1849, quoted *ante*, § 848, n. 7.

<sup>2</sup> *California*: 1910, *People v. Loper*, 159 Cal. 6, 112 Pac. 720 (the "sweating process"; confession excluded; but what does the opinion mean by exhuming the historical errors of the majority opinion in *Bram v. U. S.*, and offering them as law? That case should be forgotten).

1911, *People v. Borello*, 161 Cal. 367, 119 Pac. 500 (an ordinary confession obtained by interrogation, peculiar only in the amount of profanity used by the sheriff; excluded).

*Kentucky*: St. 1912, Mar. 19, c. 135, p. 542 (1. Sweating is defined to be "the questioning of a person in custody charged with crime in an attempt to obtain information from him concerning his connection with the crime or knowledge thereof," "by plying him with questions or by threats or other wrongful means, extorting from him information to be used against him," etc. 2. (Such questioning is forbidden to a police or similar officer while in charge). 3. (A confession thus obtained is inadmissible). 4. (Penalty for offence above defined). The legislative phraseology is crude and discreditable.

1913, *Com. v. McClanahan*, 153 Ky. 417, 155 S. W. 1131 (St. 1912, applied, to exclude a confession obtained by a police officer's continued questioning, without threats; the opinion shows no appreciation of the misguided nature of the legislation).

1914, *Helm v. Com.*, 156 Ky. 751, 162 S. W. 94 (a statement made without being questioned by the officer, admitted, is not within the prohibition of St. 1912).

1914, *Deaton v. Com.*, 157 Ky. 308, 163 S. W. 204 (St. 1912, held not applicable, where the accused went voluntarily to the prosecuting attorney and made their confessions).

*Louisiana*: St. 1908, No. 109, p. 166, July 1 (officers in custody of accused "who shall frighten by threats or who shall torture or shall resort to any means of an inhuman nature whatever to secure a confession" are punishable).

*Missouri*: 1905, *State v. Stebbins*, 188 Mo. 387, 87 S. W. 460 (here the Court improperly rebukes the prosecuting attorney for questioning the accused in his office; the confession in writing here stated that it was made "of my own free will and accord," and that the prosecuting attorney had informed him that it "will be used against me," yet the Court prates about his being "compelled to testify against himself").

1913, *State v. Thomas*, 250 Mo. 189, 157 S. W. 330 (the fact that a confession was obtained "by almost continuous interrogatories during 24 hours was almost sufficient to justify a court in rejecting the statement and admissions as involuntary").

*Texas*: St. 1907 (quoted *ante*, § 831)

## § 852. Confessions made before a Magistrate or as a Witness.

[Note 1; add:]

1906, *Peck v. State*, 147 Ala. 100, 41 So. 759 (an entrapping interrogation by the magistrate just before the preliminary hearing of the accused; excluded).

1913, *People v. O'Bryan*, 165 Cal. 55, 130 Pac. 1042 (under arrest, on oath, before the grand jury, without warning, held inadmissible, following *People v. Molineux*, N. Y.; but the opinion sanctions the exploded error that such an examination violated the privilege against self-crimination; of course, as noted *ante*, § 850, par. (3), there is no compulsion in such cases, hence no violation of that privilege).

1905, *Tuttle v. People*, 33 Colo. 243, 79 Pac. 1035 (testimony on oath as witness subpoenaed before the coroner, knowing that he was under suspicion, and without warning, excluded; the Court thus takes this opportunity to ally itself with the old-fashioned and absurd quibbles, which, in a State not hampered with a past record on this subject, an enlightened judiciary could have afforded to repudiate; the ruling is the more inexcusable in that the statements offered were conceded to be not confessions in the proper sense — *ante*, § 821 — but statements of "their whereabouts"; the Court in a defensive manner remarks that "Crime should be punished," etc., but fails to explain how it can be punished so long as Courts maintain an obstructive anachronistic attitude on such questions). 1911, *Reagan v. People*, 49 Colo. 316, 112 Pac. 785 (on oath, under arrest, before the coroner, after a warning, admitted).

1909, *Daniels v. State*, 57 Fla. 1, 48 So. 747 (statements made under arrest before the coroner, even though not strictly confessions, are not admissible unless the person is "fully advised of his rights" and then voluntarily makes the statement).

1905, *Davis v. State*, 122 Ga. 564, 50 S. E. 376 (statements to the grand jury as witness, after a caution, admitted; no authority cited). 1905, *Green v. State*, 124 Ga. 343, 52 S. E. 431 (defendant's testimony, under arrest, at the coroner's inquest, admitted). 1907, *Adams v. State*, 129 Ga. 248, 58 S. E. 822 (examination on oath before the coroner, under arrest, and without warning; excluded).

1887, *State v. Taylor*, 36 Kan. 329, 13 Pac. 550 (testimony at the inquest, without subpoena or questioning, admitted).

1905, *State v. Finch*, 71 Kan. 793, 81 Pac. 494 (testimony as witness subpoenaed at the inquest, not in custody nor under suspicion, admitted).

1903, *Tines v. Com.*, — Ky. —, 77 S. W. 363 (affidavit made to the district attorney, excluded; no precedents cited). 1904, *Seaborn v. Com.*, — Ky. —, 80 S. W. 223 ("voluntary testimony" before committing magistrate, admitted). 1904, *Bess v. Com.*, 118 Ky. 858, 82 S. W. 576 (defendant's voluntary testimony on his former trial, admitted).

1912, *Com. v. Mackenzie*, 211 Mass. 578, 98 N. E. 598 (on oath before the grand jury, voluntarily and after warning, admissible).

1908, *People v. Owen*, 154 Mich. 571, 118 N. W. 590 (on oath under arrest, before a chief detective and a notary; admitted).

1906, *Cooper v. State*, 89 Miss. 429, 42 So. 601 (testimony under oath before the grand jury, while in custody as accused, excluded; *Steele v. State* distinguished).

1890, *State v. Mullins*, 101 Mo. 514, 14 S. W. 625 (murder; voluntary testimony at the inquest, admitted, the accused being "well known" to be the killer). 1904, *State v. Woodward*, 182 Mo. 391, 81 S. W. 857 (statement to a judge in chambers, not on oath and voluntary, admitted; not one of the foregoing cases, except *State v. Mullins*, is cited). 1911, *State v. Marion*, 235 Mo. 359, 138 S. W. 491 (deposition of a party in a civil suit, admitted). 1906, *State v. Banusik*, — N. J. L. —, 64 Atl. 994 (confession not under oath, to a police magistrate, in jail, after warning, admitted).

1912, *State v. Humphrey*, 63 Or. 540, 128 Pac. 824 (on examination before a grand jury, after warning, admitted).

1911, *State v. Barwick*, 89 S. C. 153, 71 S. E. 838 (defendant allowed to be cross-examined to statements made by him under oath in the mayor's court; *State v. Senn* distinguished).

[*Note 1 — continued*]

1906, *Miller v. State*, — Tex. Cr. —, 91 S. W. 582 (testimony as witness before the examining magistrate, admitted). 1913, *Rogers v. State*, — Tex. Cr. —, 159 S. W. 40 (testimony before grand jury before arrest, reduced to writing and sworn to, admitted, as not being within the statute).

1904, *Burrell v. Montana*, 194 U. S. 572, 24 Sup. 787 (answers made by a bankrupt on citation before a referee, not being in custody nor charged with a criminal offence, held admissible). St. 1910, May 7, c. 216, No. 168, 61st Cong. p. 352 (Rev. St. § 860, repealed). 1912, *Powers v. U. S.*, 223 U. S. 303, 32 Sup. 281 (on oath as accused before the magistrate, without counsel, voluntarily testifying, but not warned by the magistrate).

1904, *State v. Blay*, 77 Vt. 56, 58 Atl. 794 (larceny; plea of guilty before a justice of the peace, without counsel or warning, admitted).

1904, *State v. Washing*, 38 Wash. 465, 78 Pac. 1019 (statement of defendant, an Indian, made before a magistrate on arraignment, without oath but without warning, admitted; compare the statute in this State, quoted *ante*, § 831; it does not seem to have produced its intended effect, in preventing further discussion of questions like the present one; this is seen also in the cases cited *ante*, § 851).

1907, *State v. May*, 62 W. Va. 129, 57 S. E. 366 (under Code 1906, c. 152, § 20, a statement under oath made at a preliminary examination by a person charged but not under arrest is not admissible). 1911, *State v. Cook*, 69 W. Va. 717, 72 S. E. 1025 (Code 1906, c. 152, § 20, forbidding the use of an accused's statement made under examination, does not forbid cross-examination to such self-contradictory former statement of an accused taking the stand).

1907, *Anderson v. State*, 133 Wis. 601, 114 N. W. 112 (on oath and under arrest before the coroner, without specific warning as to his privilege, admitted).

1911, *Maki v. State*, 18 Wyo. 481, 112 Pac. 334 (under arrest on oath before the coroner, without warning, excluded).

#### § 855. Was the Inducement brought to an End?

[*Note 1; add:*]

1904, *R. v. Lai Ping*, 11 Br. C. 102 (confession in jail; the caution by the magistrate, held to remove a prior inducement).

1905, *R. v. Young*, 38 N. Sc. 427 (elaborate opinions, analyzing the precedents).

1905, *Andrews v. People*, 33 Colo. 193, 79 Pac. 1031 (*Beery v. U. S.* not cited).

1905, *Griner v. State*, 121 Ga. 614, 49 S. E. 700. 1905, *Milner v. State*, 124 Ga. 86, 52 S. E. 302.

1907, *State v. Foster*, 136 Ia. 527, 114 N. W. 36.

1910, *State v. Turner*, 82 Kan. 787, 109 Pac. 654 (revolver delivered up by defendant after threats by the sheriff).

1904, *Green v. Com.*, — Ky. —, 83 S. W. 638 (confession to a private person, the next day after an inducement by an officer and an inadmissible confession to him, received).

1906, *State v. Rugero*, 117 La. 1040, 42 So. 495.

1909, *Com. v. Snyder*, 224 Pa. 526, 73 Atl. 910.

1904, *State v. Middleton*, 69 S. C. 72, 48 S. E. 35 (discretion of the trial Court).

1912, *State v. Miller*, 68 Wash. 239, 122 Pac. 1066.

#### § 857; Admission of the Part Confirmed.

[*Note 1; add:*]

Of course, the accused's subsequent confirmation of the confession *on the stand* cures any shortcoming: 1906, *State v. Johnny*, 29 Nev. 203, 87 Pac. 3.

§ 858. **Prevailing Doctrine; No Part Received.**[Note 2; *add*.:]

Ky.: 1904, *Com. v. Phillips*, — Ky. —, 82 S. W. 236 (the fact of finding, "together with the statement of the accused as to their location," admitted).

1906, *Com. v. Johnson*, 213 Pa. 432, 62 Atl. 1064 (*Laros v. Com.* approved).

1904, *State v. Middleton*, 69 S. C. 72, 48 S. E. 35.

[Note 5; *add*.:]

1906, *State v. Moran*, 131 Ia. 645, 109 N. W. 187 ("such facts, and so much of the confession as distinctly relates thereto").

§ 860. **Burden of Proof.**[Note 1; *add*.:]

1905, *State v. Stallings*, 142 Ala. 112, 38 So. 261 (an improper decision). 1910, *Green v. State*, 168 Ala. 90, 53 So. 286.

1909, *Daniels v. State*, 57 Fla. 1, 48 So. 747 (for statements made under arrest, it must first clearly appear that the party was advised of his rights and spoke voluntarily).

1904, *Watts v. State*, 99 Md. 30, 57 Atl. 542.

1913, *State v. Thomas*, 250 Mo. 189, 157 S. W. 330 (for a confession taken in writing and signed while under arrest).

But in any case the trial Court may properly be presumed to have found the necessary preliminary facts until the opposite is shown *in the record*:

1905, *Whatley v. State*, 144 Ala. 68, 39 So. 1014.

[Note 2; *add*, under *Contra*.:]

1904, *Jenkins v. State*, 119 Ga. 431, 46 S. E. 628.

[Note 4; *add*.:]

1907, *Thurman v. State*, 169 Ind. 240, 82 N. E. 64. 1908, *State v. Laughlin*, 171 Ind. 66, 84 N. E. 756 (under St. 1905, c. 168, § 239).

1904, *State v. Icenbice*, 126 Ia. 16, 101 N. W. 273, *semble*.

1908, *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135 (approving the above text).

§ 861. **Judge and Jury.**[Note 2; *add*.:]

Colo.: 1913, *Harris v. People*, — Colo. —, 135 Pac. 785.

1905, *State v. Willing*, 129 Ia. 72, 105 N. W. 355, *semble*.

1906, *Howard v. Com.*, — Ky. —, 90 S. W. 578.

1906, *Pearsall v. Com.*, — Ky. —, 92 S. W. 589.

1909, *State v. Williams*, 31 Nev. 360, 102 Pac. 974, *semble*.

1906, *State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016 (good opinion by Pitney, J.; quoted *ante*, § 1451, n. 1; *Bullock v. State*, *infra*, n. 3, repudiated; settling the doubt in *State v. Young*, *infra*, n. 3). 1912, *State v. Kwiatkowski*, 83 N. J. L. 650, 85 Atl. 209 (following *State v. Monich*).

1908, *State v. Landers*, 21 S. D. 606, 114 N. W. 717.

1905, *Hintz v. State*, 125 Wis. 405, 104 N. W. 110; *Roszczyńska v. State*, *ib.* 414, 104 N. W. 113.

1906, *Clay v. State*, — Wyo. —, 86 Pac. 17, *semble*.

[Note 3; *add*.:]

1904, *Shaffer v. U. S.*, 24 D. C. App. 337, 385.

1905, *Griner v. State*, 121 Ga. 614, 49 S. E. 700.

[*Note 3 — continued*]

1905, *State v. Wescott*, 130 Ia. 1, 104 N. W. 341 (*State v. Storms* followed). 1907, *State v. Von Kutzleben*, 136 Ia. 89, 113 N. W. 484. 1907, *State v. Foster*, 136 Ia. 527, 114 N. W. 36. 1909, *State v. Bennett*, 143 Ia. 214, 121 N. W. 1021. 1910, *Toomer v. State*, 112 Md. 285, 76 Atl. 118. 1885, *Com. v. Preece*, 140 Mass. 276, 5 N. E. 494 ("the humane practice" is for the judge, if he admits the confession, after a conflict of evidence, to tell the jury that "they should exclude the confession, if upon the whole evidence in the case they are satisfied that it was not the voluntary act of the defendant"). 1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127 (*Com. v. Preece* approved). 1906, *People v. Maxfield*, 146 Mich. 103, 108 N. W. 1087. 1905, *State v. Stebbins*, 188 Mo. 387, 87 S. W. 460 (this opinion faces both ways). 1909, *Heddendorf v. State*, 85 Nebr. 747, 124 N. W. 150. 1909, *People v. Randazzio*, 194 N. Y. 147, 87 N. E. 112 (a singular ruling). 1912, *Gonzalus v. State*, 7 Okl. Cr. 444, 123 Pac. 705. 1910, *Com. v. Aston*, 227 Pa. 112, 75 Atl. 1019. 1910, *State v. Allison*, 24 S. D. 622, 124 N. W. 747 (if the evidence is conflicting). 1910, *State v. Montgomery*, 26 S. D. 539, 128 N. W. 718. 1909, *State v. Wells*, 35 Utah 400, 100 Pac. 681. 1904, *State v. Washing*, 38 Wash. 465, 78 Pac. 1019. 1912, *State v. Wilson*, 68 Wash. 464, 123 Pac. 795.

[*Note 4; add:*]

1904, *Zuckerman v. People*, 213 Ill. 114, 72 N. E. 741 (embezzlement; the judge may hear both sides). 1913, *State v. Thomas*, 250 Mo. 189, 157 S. W. 336. 1908, *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135 (but there must be a proper offer of such evidence). 1910, *Berry v. State*, 4 Okl. Cr. 202, 111 Pac. 676 (approving the text above).

[*Note 5; add:*]

1909, *State v. Wells*, 35 Utah 400, 100 Pac. 681 (the defendant is entitled to cross-examine, but not to offer other evidence, before the ruling; the opinion, though citing some 25 cases from other jurisdictions, does not cite its own decision in *State v. Haworth*).

[*Note 6; add:*]

1905, *Griner v. State*, 121 Ga. 614, 49 S. E. 700 (not error not to withdraw). 1905, *State v. Stebbins*, 188 Mo. 387, 87 S. W. 460. 1907, *Harrold v. Terr.*, 18 Okl. 395, 89 Pac. 202 (*Kirk v. Terr.* followed). 1910, *State v. Barker*, 56 Wash. 510, 106 Pac. 133 (but not necessarily).

[*Note 7; add:*]

1909, *State v. Williams*, 31 Nev. 360, 102 Pac. 974. 1910, *State v. Barker*, 56 Wash. 510, 106 Pac. 133.

## § 862. Trial Judge's Discretion.

[*Note 1; add:*]

1907, *Thurman v. State*, 169 Ind. 240, 82 N. E. 64. 1909, *State v. Berberick*, 38 Mont. 423, 100 Pac. 209. 1906, *State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016 (the only question on review is whether there was evidence to support the trial judge's finding of admissibility). 1909, *State v. Zeller*, 77 N. J. L. 619, 73 Atl. 498.

[Note 1 — continued]

1904, *State v. Rogoway*, 45 Or. 601, 78 Pac. 987, 81 Pac. 234. 1912, *State v. Humphrey*, 63 Or. 540, 128 Pac. 824. 1913, *State v. Spanos*, — Or. —, 134 Pac. 6.  
1905, *Hintz v. State*, 125 Wis. 405, 104 N. W. 110 (as to the existence of the inducement); *Roszczyńska v. State*, ib. 414, 104 N. W. 113.

#### § 866. Value of Confessions.

[Note 7; add:]

1904, *People v. Buckley*, 143 Cal. 375, 77 Pac. 169.  
1905, *Griner v. State*, 121 Ga. 614, 49 S. E. 700.  
1905, *State v. Willing*, 129 Ia. 72, 105 N. W. 355.

#### § 867. Future of the Doctrine.

[Note 1, l. 8 from the end; add:]

1846, *Traylor's Case*, 4 West. L. J. 25, *Chicago Daily Law Bull.* Dec. 14, 1904. Mr. J. F. Geeting has a note carefully collating these cases in his edition of *American Criminal Cases*, vol. 12, p. 213.

Professor Hans Gross has a valuable chapter in his "Criminal Psychology," § 8, p. 31 (transl. Kallen, in the *Modern Criminal Science Series*). Mr. W. M. Best's chapter, in his "Principles of the Law of Evidence," §§ 560-573 (3d Amer. ed.), collects interesting data.

#### § 876. Process of Impeachment; Distinctions, etc.

[Text, p. 1005, l. 5 from below; add a new note 1:]

<sup>1</sup>In a series of articles by Professor Hugo Münsterberg (Professor of Psychology in Harvard University), in the *Times Magazine* (N. Y.) for January and March, 1907, the assertion is made (p. 427) that within the past few years "a new special science has grown up," by means of which a witness could be accurately tested directly "with regard to his memory and his power of perception, his attention and his [mental] associations, his volition and his suggestibility, with methods which are in accord with the exact work of experimental psychology"; and the reproach is made that Courts are "still unaware" of this; that they "proceed as if experimental psychology, with its efforts to analyze the mental faculties, still stood where it stood two thousand years ago"; that Courts are "completely satisfied with the most unscientific and haphazard methods of common prejudice and ignorance when a mental product, especially the memory report of a witness, is to be examined"; and that "the Courts will have to learn sooner or later" that these tests should be employed.

As to all this, a sufficient brief answer is that the Courts are ready to learn and to use, whenever the psychologists produce it, any method which the latter themselves are agreed is sound, accurate, and practical. If there is any reproach, it does not belong to the Courts or the law. A legal practice which has admitted the evidential use of the telephone, the phonograph, the dictograph, and the vacuum-ray, within the past decade, cannot be charged with lagging behind science. But where are these practical psychological tests, which will detect specifically the memory-failure and the lie on the witness-stand? Let us have proof of general scientific recognition that they are valid and feasible. The vacuum-ray photographic method, for example, was accepted by scientists the world over, within a few months after its promulgation. If there is ever devised a psychological test for the impeachment of witnesses, the law will run to meet it. Both law and practice permit the calling of any expert scientist whose method is acknowledged in his science to be a sound and trustworthy one. Whenever the Psychologist is really ready for the Courts, the Courts are ready for him.

Professor Münsterberg's claims were further expounded by him in a volume entitled "On the Witness Stand" in 1908.

[*Text*, p. 1005 — *continued*]

The controversy was taken up by Mr. C. C. Moore in *Law Notes*, and articles by him and Professor Münsterberg appeared in the numbers for October and November, 1907, and January, 1908. Another article by the learned psychologist appeared in *McClure's Magazine* for October, 1907 (XXIX, 614).

The voluminous Continental literature on the subject was carefully examined by the present writer, and a bibliography of it was published by him in the *Illinois Law Review* for February, 1909, with a summary of the criticisms tenable against the proposed methods. The general conclusion was that they are at present of no practical service in the judicial investigation of facts. Passages from that article and from Professor Münsterberg's book are reprinted in the present writer's "Principles of Judicial Proof, as given in Logic, Psychology, and General Experience, and illustrated in Judicial Trials" (Boston, 1913).

But the scientific study of testimonial psychology is undoubtedly much needed by lawyers and judges, and the "Principles etc.," above cited, attempts to serve this need. The legal profession should be grateful to Professor Münsterberg for having stimulated popular interest in the subject.

The *Journal of Criminal Law and Criminology* (31 W. Lake St. Chicago) contains notes and articles from time to time on this subject; and a bibliography of the articles in foreign languages, on the psychology of testimony, is prepared annually by Professor Guy M. Whipple (formerly of Cornell University, now of the University of Illinois) and appears in the *Psychological Bulletin*.

#### § 894. Impeachment of an Impeaching Witness.

[*Note 2*; at the end, *add*.:]

1905, *Dunn v. Com.*, 119 Ky. 457, 84 S. W. 321.

#### § 898. Second Reason; the Party guarantees Credibility.

[*Text*, par. (2), l. 3; *add* a note (1)]:

<sup>1</sup> 1906, *Lasher v. Colton*, 225 Ill. 234, 80 N. E. 122 (calling the opponent as witness).

It is disappointing to find a recent opinion repeating this cant formula, "The party who calls a witness certifies his credibility" (1907, *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396).

#### § 900. Impeaching One's Own Witness; Bad Character.

[*Note 1*; *add*.:]

1905, *State v. Gallo*, 115 La. 746, 39 So. 1001 (but here the offer was to show the witness to be an accomplice and hence fell rather under the principle of § 901, *post*).

#### § 901. Bias, Interest, or Corruption.

[*Note 1*, under *Corruption*; *add*.:]

1905, *State v. Moon*, 71 Kan. 349, 80 Pac. 597 (a witness had before trial told the prosecution of the defendant's conversations planning the larceny; on the stand, the witness denied all these things; on cross-examination, the prosecution was allowed to ask about them; after adjournment, he was arrested for perjury; he then sent for the prosecuting attorney, and retracted, and next day on the stand retold his story with all details as to the defendant's subornation; held proper, in a good opinion by Burch, J.; this opinion is a brilliant example of what a Court can and should do in repudiating the artificial trammels of the present rule).

[*Note 1*, under *Bias*; *add*.:]

1910, *People v. Jacobs*, 243 Ill. 580, 90 N. E. 1092 (cross-examination of a physician as to a letter by grand jurors criticizing him, held improper).

§ 905. Prior Self-Contradictions; Law in Various Jurisdictions.

[Note 2; add:]

1909, *Smith's Case*, 2 Cr. App. 86, 106 (rape; whether a boy whose testimony varied from a written statement made by him to the police could be cross-examined to the statement and the variance; not decided).

*Alta.*: St. 1910, 2d sess., Evidence Act, c. 3, § 23 (substantially like Eng. St. 1854, c. 125, § 22, with the correction as made in P. E. I. St. 1889, c. 9, § 15).

*Ont.*: St. 1909, c. 43, § 20 (like R. S. 1897, c. 73, § 20, but correcting the phrasing as in P. E. I. St. 1889, c. 9).

*Sask.*: St. 1907, c. 12, Evidence Act, § 27 (like Eng. St. 1854, c. 125, § 22).

*Yukon*: St. 1904, c. 5, § 40 (like Eng. St. 1854, c. 125, § 22).

[Note 3; add:]

1904, *People v. Creeks*, 141 Cal. 532, 75 Pac. 101 (like *People v. Crespi*, *supra*). 1905, *People v. Cook*, 148 Cal. 334, 83 Pac. 43 (cross-examination by the prosecution to several contrary statements, allowed on the facts). 1908, *Zipperlen v. Southern Pac. Co.*, 7 Cal. App. 206, 93 Pac. 1049 (allowable in case of adverse testimony surprising the attorney). 1908, *Dolbeer's Estate*, 153 Cal. 652, 96 Pac. 266 (declarations excluded, where there was no surprise).

1910, *State v. Marren*, 17 Ida. 766, 107 Pac. 993 (witness allowed to refresh his memory from report of his former testimony). 1906, *Chicago C. R. Co. v. Gregory*, 221 Ill. 591, 77 N. E. 1112 (contradiction of a medical witness by his memorandum given beforehand to the party, not allowed, for impeaching him). 1909, *People v. Lukoszno*, 242 Ill. 101, 89 N. E. 749 (cross-examination allowed: "he had a right either to refresh the memory of the witness if he was forgetful, or to probe his conscience and move him to relent and speak the truth if he was wilfully erring"). 1911, *People v. Cotton*, 250 Ill. 338, 95 N. E. 283 (allowing refreshment of recollection, for a forgetful witness, by reference to his former testimony; here the forgetfulness was "intentional").

1905, *Walker v. State*, 165 Ind. 94, 74 N. E. 604 (statute applied, in a bastardy case, to impeach the third person called by the defendant and said to be the father of the child).

1894, *State v. Keefe*, 54 Kan. 197, 201, 38 Pac. 302 (*Johnson v. Leggett* followed).

1905, *State v. Moon*, 71 Kan. 349, 80 Pac. 597 (*Johnson v. Leggett* followed; see the citation *ante*, § 901). 1904, *Com. v. Bavarian B. Co.*, — Ky. —, 80 S. W. 772 (use of former testimony as evidence under the guise of refreshing memory is not allowable). 1906, *Garrison v. Com.*, 122 Ky. 882, 93 S. W. 594 (prosecution allowed to prove by other witnesses the witness' contrary assertions). 1907, *Dukes v. Davis*, 125 Ky. 313, 101 S. W. 390 (rule of C. C. P. § 596 applied).

1903, *State v. Williams*, 111 La. 179, 35 So. 505 (cross-examination allowed, in case of surprise, to stimulate recollection). 1906, *State v. Stephens*, 116 La. 36, 40 So. 523 (witness for the State; cross-examination allowable if the purpose is to stimulate recollection, but not "if the sole purpose . . . is to discredit him, . . . unless the party offering it has been entrapped into calling a hostile witness," and even then only when the witness affirmatively testifies against him). 1913, *State v. Robertson*, 133 La. 806, 63 So. 363 (re-examination to a self-contradiction, held not improper on the facts; following *State v. Williams*).

1906, *Lindquist v. Dickson*, 98 Minn. 369, 107 N. W. 958 (proof of former self-contradiction, by extrinsic testimony, admitted in the trial Court's discretion, in a case of surprise). 1906, *State v. Sederstrom*, 99 Minn. 234, 109 N. W. 113 (prior inconsistent statements of the witness to the State's attorney, allowed to be shown).

1904, *Dunk v. State*, 84 Miss. 454, 36 So. 609 (self-contradiction of a witness for the prosecution, where the State's attorney had been "neither misled nor entrapped by the witness," excluded; but the ruling is erroneously put also on the ground of the immateriality of the assertion, misunderstanding *Williams v. State*, *post*, § 1038). 1906, *Dodd v. State*, 88 Miss. 50, 40 So. 545 (*Dunk v. State* followed; rule of discretion applied).

[*Note 3 — continued*]

1905, *Clancy v. St. Louis T. Co.*, 192 Mo. 615, 91 S. W. 509 (rule of *State v. Burks*, *supra*, applied). 1906, *Beier v. St. Louis T. Co.*, 197 Mo. 215, 94 S. W. 876 (a witness who had been subpoenaed by both parties, but introduced by the defendant only, and whose memory failed on various points covered by a written statement made by him two years before; the written statement not allowed to be put in evidence, no entrapment being shown). 1914, *State v. Patton*, — Mo. —, 164 S. W. 223 (method of refreshment of memory of State's witness as to his own former testimony, where the prosecutor is now surprised, carefully prescribed, so as to prevent a substitution of the former testimony instead of a mere refreshment). 1908, *First National Bank v. State*, 80 Nebr. 597, 114 N. W. 772 (allowable to "elicit the truth from a confused or unwilling witness"). 1910, *Masourides v. State*, 86 Nebr. 105, 125 N. W. 132 (allowing the whole former statement to be read to the jury, held improper). 1913, *State v. D'Adame*, 84 N. J. L. 386, 86 Atl. 414 ("where the specific testimony comes as a surprise, such an attack is admissible").

1913, *State v. Kysilka*, 84 N. J. L. 6, 87 Atl. 79 (similar).

1906, *State v. Johnson*, 73 N. J. L. 199, 63 Atl. 12 (prior self-contradiction, allowed to be shown on cross-examination, on the ground of surprise; the foregoing precedents ignored, and none others cited).

1906, *Terr. v. Livingston*, 13 N. M. 318, 84 Pac. 1021 (rule in *Hickory v. U. S.*; why did not the Court cite and follow the rule of its own statute, which is broader?).

1909, *Sturgis v. State*, 2 Okl. Cr. App. 362, 102 Pac. 57 (prosecution is allowed to cross-examine the witness and to prove by others the self-contradictions, where the witness had surprised the attorney by altering his expected testimony; but here surprise was negatived; leading opinion by Furman, P. J.).

1906, *State v. Jennings*, 48 Or. 483, 87 Pac. 524 (proof by other testimony, allowed).

1908, *Com. v. Deitrick*, 221 Pa. 7, 70 Atl. 275 (admitted, without restriction).

1913, *Barker v. Rhode Island Co.*, 35 R. I. 406, 87 Atl. 174 (interrogation allowed in case of surprise; in the trial Court's discretion).

1904, *State v. Callahan*, 18 S. D. 145, 99 N. W. 1099 (cross-examination to prior testimony, forbidden; rule obscure; the opinion takes no note of the difficulties of the subject).

1905, *Dallas C. E. St. R. Co. v. McAllister*, 41 Tex. Civ. App. 131, 90 S. W. 933. 1907, *Skeen v. State*, 51 Tex. Cr. 39, 100 S. W. 770 (rape; after the prosecuting witness' denial of the intercourse charged, the prosecution was not allowed to prove her prior affirmation of it). 1896, *Putnam v. U. S.*, 162 U. S. 687, 16 Sup. 923 (cited *ante*, § 761, n. 5; this case confuses several principles, and should have no weight).

1904, *Portsmouth St. R. Co. v. Peed's Adm'r*, 102 Va. 662, 47 S. E. 850 (allowable to refresh but not to contradict; statute not cited). 1905, *McCue v. Com.*, 103 Va. 870, 49 S. E. 623 (statute held applicable to criminal cases).

1909, *State v. Montgomery*, 56 Wash. 443, 105 Pac. 1035 (prosecuting attorney's treatment of a rape-witness who testified contrary to her original story to him, held improper on the facts).

Compare also the cases *post*, §§ 1020-1043 (*self-contradiction* in general).

#### § 906. Rules for Party's Admission, etc.

[*Note 3; add:*]

and *post*, § 916.

#### § 907. Contradiction by Other Witnesses.

[*Note 5; add, under Canada:*]

1904, *R. v. Hutchinson*, 11 Br. C. 24, 32.

1913, *Schwartz v. Winnipeg E. R. Co.*, Man. C. A., 9 D. L. R. 708, 717, per Haggart, J. A.; Yukon St. 1904, c. 5, § 40.

[Note 7; add:]

- 1909, *Dumas v. Clayton*, 32 D. C. App. 566.  
 1904, *Moultrie Repair Co. v. Hill*, 120 Ga. 730, 48 S. E. 143.  
 1913, *Cochburn v. Hawkeye C. M. Ass'n*, — Ia. —, 143 N. W. 1006.  
 1907, *Taber v. New York P. & B. R. Co.*, 28 R. I. 287, 67 Atl. 8.  
 1906, *Mississippi Glass Co. v. Franzen*, 143 Fed. 501, C. C. A.  
 1905, *Jennet v. Patten*, 78 Vt. 69, 62 Atl. 33.  
 1904, *Stout v. Sands*, 56 W. Va. 663, 49 W. Va. 428.  
 1909, *Halwas v. American Granite Co.*, 141 Wis. 127, 123 N. W. 789.

§ 908. Contradiction as involving Impeachment.

[Note 2; add:]

- 1912, *Midland Valley R. Co. v. LeMoine*, 104 Ark. 327, 148 S. W. 654.

[Note 3; add:]

It is surprising to find nowadays such a remark as the following: "The defendant having been called by the plaintiff as an adverse witness under the statute, the plaintiff was not bound by his testimony, and so the jury could accept the facts testified to by him [the defendant] and disbelieve the explanations": 1909, *Anderson v. Middlebrook*, 202 Mass. 506, 89 N. E. 157. Even if the witness had not been the adverse party, the plaintiff would not be "bound" by his testimony and the jury need not believe any more of it than they saw fit.

§ 912. Impeachment by Second Caller; Deposition.

[Note 2; add:]

- 1876, *Fountain's Adm'r v. Brown*, 56 Ala. 558.  
 Cal. St. 1907, c. 392, p. 731, Mar. 20, § 2 (like C. C. P. § 2034; adding a new § 2022).  
 1911, *People's National Bank v. Hazard*, 231 Pa. 552, 80 Atl. 1094.

§ 913. Impeachment by First Caller.

[Note 1, par. 1; add, under *Accord*.]

1906, *Johnston v. Marriage*, 74 Kan. 208, 86 Pac. 461 (negligent setting of fire; an employee of defendant, called by the plaintiff, was afterwards called by the defendant on the same subject; the plaintiff's impeachment of him by self-contradictions was forbidden, there being "no special circumstances which would make the rule's application work an injustice").

- 1913, *State v. Alexander*, 89 Kan. 422, 131 Pac. 139.  
 1908, *Baltimore & O. R. Co. v. State*, 107 Md. 642, 69 Atl. 439.

§ 914. Making a Witness One's Own by Cross-Examination.

[Note 1; add:]

*Contra*: 1912, *Renn v. State*, 64 Tex. Cr. 639, 143 S. W. 167, *semble* (Davidson, P. J., diss.).

*Accord*: 1909, *Lambert v. Armentrout*, 65 W. Va. 375, 64 S. E. 260 (opinion by Brannon, J., regretting that such is the rule). 1912, *McGuire v. Norfolk & W. R. Co.*, 70 W. Va. 538, 74 S. E. 859.

[Note 3; add:]

- 1874, *Hatch v. Brown*, 63 Me. 410, 416.

## § 915. Leading Questions.

[*Note 1, at the end; add.*]

*Contra*: 1913, *Anderson v. Berram*, — Nev. —, 136 Pac. 973.

## § 916. Calling the Other Party as Witness.

[*Note 2; add.*]

Manit. St. 1906, 5 & 6 Edw. VII, c. 17, § 2 (amends Rev. St. 1902, c. 40, by adding Rule 460A, quoted *post*, § 1890, n. 3).

1908, *Purse v. Purcell*, 43 Colo. 50, 95 Pac. 291 (the permission by statute to call the opponent does not limit the scope of allowable cross-examination when the opponent is taking the stand for himself).

1905, *Carney v. Hennessey*, 77 Conn. 577, 60 Atl. 128 (plaintiff called by defendant, allowed to be impeached by prior self-contradiction).

1909, *Dumas v. Clayton*, 32 D. C. App. 566 ("may be treated as witnesses on cross-examination").

Ida. St. 1909, p. 334, Mar. 13 (party or beneficiary, or agent etc. of corporate party, "may be examined by the adverse party as if under cross-examination, subject to the rules applicable to the examination of other witnesses, and the testimony given by such witnesses may be rebutted by the party calling him for such examination by other evidence; such witness when so called may be examined by his own counsel, but only as to matters testified to on such examination"). 1913, *Burrow v. Idaho & W. N. R. Co.*, 24 Ida. 652, 135 Pac. 838 (locomotive engineer of the defendant, held not within the statute).

Ill. St. 1905, May 18 (Municipal Court), § 33 (a party "may be examined upon the trial thereof as if under cross-examination" at the instance of the adversary, and is compellable, "in the same manner and subject to the same rules for examination as any other witness, to testify," but the calling party is not concluded but may rebut).

La. St. 1908, No. 126, p. 185, July 2 (opponent may be examined "as under cross-examination," and the examiner "shall not be held as vouching to the Court for the credibility of the opponents so placed on the stand or as estopped from impeaching in any lawful way the testimony given").

1904, *Emerson v. Wark*, 185 Mass. 427, 70 N. E. 482 (the proponent of a will was called by the contestant as a witness; held, that under Rev. L. c. 175, § 24, an instruction that "in putting him on, they put him before you as a person entitled to be believed" was erroneous).

1908, *Reed v. Mattapan D. & T. Co.*, 198 Mass. 306, 84 N. E. 469 (an officer of an opponent corporation is not a party, under this statute).

1909, *Anderson v. Middlebrook*, 202 Mass. 506, 89 N. E. 157 (see the comment *ante*, § 908, note 3).

1911, *Cobb, B. & Y. Co. v. Hills*, 208 Mass. 270, 94 N. E. 265 (statute applied).

Mich. St. 1909, No. 307, p. 753, June 2 (when the opposite party, his agent etc., is called, the calling party may "cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true").

1899, *Bennett v. Lumber Co.*, 77 Minn. 198, 79 N. W. 682 (under the words of the statute, the "directors, officers, superintendents, or managing agents" of a corporation include the superintendent of a saw-mill).

1905, *Davidson S. S. Co. v. U. S.*, 142 Fed. 315, C. C. A. (under Minn. Gen. St. 1894, § 5659, *supra*, the master of a vessel owned by a corporation is included).

1906, *Sharp v. Erie Co.*, 184 N. Y. 100, 76 N. E. 923 (plaintiff held not bound by the statements on cross-examination of an agent of defendant called by the plaintiff).

[*Note 2 — continued*]

N. C. Code 1883, § 580 (a party opponent may be compelled to testify "subject to the same rules of examination as any other witness"); Rev. 1905, §§ 865, 868 (like Code 1883, §§ 580, 583).

N. D. St. 1907, c. 21, p. 3 (Rev. C. 905, § 7252, amended in unspecified details). St. 1909, c. 72, p. 128 (similar to Del. L. 1859; adding, "Such witness, when so called, may be examined by his own counsel, but only as to matters testified to on such examination"; officers of corporations included).

Oh. St. 1910, p. 139, Apr. 28 (amending Gen. Code § 11497; officers of a corporation may be so examined).

Pa. St. 1911, Mar. 30, p. 35 (amending St. 1887, May 23, § 7, Witnesses, permitting cross-examination of officers of a corporation, etc.).

1904, *Jacobs v. Van Sickle*, 127 Fed. 62, 61 C. C. A. 598 (*Dravo v. Fabel* followed, in a chancery case).

1908, *Thomas v. Fos*, 51 Wash. 250, 98 Pac. 663 (impeachment by self-contradiction, permitted).

Wis. St. 1907, c. 271 (amending Stats. § 4068). 1910, *Keena v. American Box Toe Co.*, 144 Wis. 231, 128 N. W. 858 (question raised whether the discrimination of the statute, applying to corporation employees only, is constitutional). 1911, *Makar v. Montello G. Co.*, 146 Wis. 46, 130 N. W. 949 (similar). St. 1911, c. 291, p. 299 (amending Stats. § 4068, as to officers and agents of a corporation and officers of a municipality). 1911, *O'Day v. Meyers*, 147 Wis. 549, 133 N. W. 605 (a nominal co-defendant may be examined as an adverse party by his co-defendant, under Stats. 1898, § 4068).

[*Note 3; add:*]

1907, *Sullivan v. Fugazzi*, 193 Mass. 518, 79 N. E. 775 (consolidated actions by S. against F. and against R. Co.; rule for such a case examined).

[*Text*, p. 1052, l. 5; *add* a new par. (5):]

(5) Where a party, called for himself, is *cross-examined by the opponent* to his own case, the opponent may impeach by self-contradictions, which are here the party's admissions.<sup>5</sup>

<sup>5</sup> 1909, *Lambert v. Armentrout*, 65 W. Va. 375, 64 S. E. 260.

## § 917. Necessary Witness.

[*Note 1; add:*]

The following situation is analogous:

The Cardiff, [1909] P. 183 (collision, alleged by defendant vessel to be the fault of the pilot; neither side calling him, the pilot was offered the choice to give evidence, then both sides to cross-examine him).

## § 918. Prosecution's Witness.

[*Note 1; add:*]

1803, *R. v. Oldroyd*, R. & R. 88 (cited *ante*, § 905, n. 1).

[*Note 2; add:*]

1905, *State v. Gallo*, 115 La. 746, 39 So. 1001 (rule held equally applicable to the State).

1908, *Com. v. Deitrick*, 221 Pa. 7, 70 Atl. 275 (not decided; but the doctrine favored).

[*Note 3; add:*]

1912, *People v. Baskin*, 254 Ill. 509, 98 N. E. 957 (rule in *Carle v. People* approved).

1912, *People v. Rardin*, 255 Ill. 9, 99 N. E. 59 (similar).

But even this expedient is subjected to too much restriction, as the cases there cited show. It is time that we abandoned the absurd rigor of the rule against impeachment.

#### § 921. Relevancy and Auxiliary Policy; their Different Bearings.

[*Text*, p. 1058, at the end of the section; *add:*]

1900, Hon. *J. F. Daly*, in "The Brief," III, 15: "In my experience and that of many judges there has been no successful impeachment of a witness by proof of bad reputation. There is something distasteful to the average jurymen in the 'swearing away a man's character'; and the general feeling in that regard is evidenced by the reluctance, on the one hand, of witnesses to come forward and testify that they would not believe a witness under oath, and the readiness, on the other hand, with which all a man's acquaintances hasten to his support. . . . The advice to clients should be: Do not attempt to impeach the character of an adversary or a witness unless you are absolutely certain there is no character to impeach."

#### § 923. Kind of Character; Rule in Various Jurisdictions.

[*Note 5; add:*]

1904, *Ross v. State*, 139 Ala. 144, 36 So. 718 (general character, but not character for turbulence, allowed).

Ark. St. 1905, c. 52 (amends the above statute by substituting "morality" for "immorality").

1906, *Maloy v. State*, 52 Fla. 101, 41 So. 791 (manslaughter; accused's character for veracity, admitted).

Ind. St. 1905, p. 584, § 239 (foregoing statute re-enacted).

1904, *State v. Haupt*, 126 Ia. 152, 101 N. W. 739 (prosecutrix in seduction). 1913, *Hunt v. Waterloo C. F. & N. R. Co.*, — Ia. —, 141 N. W. 334 (veracity-character admissible; Code §§ 4613, 4614, admitting general character, is not exclusive).

1913, *Louisville & N. B. Co. v. Scalf*, 155 Ky. 273, 159 S. W. 804 (same). 1904, *Helm v. Com.*, — Ky. —, 81 S. W. 270 (general moral character, admitted). 1905, *Newman v. Com.*, — Ky. —, 88 S. W. 1089 (character for peace and quiet of a defendant taking the stand, excluded; "his character for truthfulness, or his general moral character," might have been shown).

1906, *State v. Baudoin*, 115 La. 837, 40 So. 239 (assault with intent to kill; prosecuting witness' character for chastity, excluded). 1906, *State v. Romero*, 117 La. 1003, 42 So. 482 (a woman's character for unchastity, not admissible).

1893, *People v. Mills*, 94 Mich. 630, 54 N. W. 488 ("lack of chastity cannot be used to impeach the credibility of a female witness"). 1904, *People v. Wilson*, 136 Mich. 298, 99 N. W. 6 (bastardy; the woman's character for unchastity, excluded).

1913, *Alabama & V. R. Co. v. Thornhill*, — Miss. —, 63 So. 674 (*Smith v. State* followed).

1900, *State v. Evans*, 158 Mo. 609, 59 S. W. 994 (defendant's general moral character, admissible). 1905, *State v. Woodward*, 191 id. 617, 90 S. W. (similar). 1906, *State v. Beckner*, 194 id. 281, 91 S. W. 893 (murder; defendant's character for violence; excluded only general bad moral character can be used; prior decisions reviewed).

1906, *State v. Richardson*, 194 Mo. 326, 92 S. W. 649 (*State v. Beckner* followed; but the defendant's character for turbulence may be used, on the principle of § 58, *ante*, if he has first offered his character for peaceableness). 1906, *York v. Everton*, 121 Mo. App. 640, 97 S. W. 604 (reputation for unchastity, admitted; here, against a woman, though the rule is laid down for "both male and female witnesses"; but why should the Court rest this on *State v. Sibley*, *supra*?). 1908, *State v. Oliphant*, 128 Mo. App. 252, 107 S. W. 32 (illegal liquor

## [Note 5 — continued]

sales; defendant's repute as a violator of the liquor law, admitted against him as a witness following *State v. Beckner*; Johnson, J., expressing dissatisfaction with the rule; but might not the learned judge push his skepticism a little further, and ask whether the character rule itself is so sacred? And should not an habitual offender's character always be admissible?). 1908, *Imboden's Estate*, 128 Mo. App. 555, 107 S. W. 400 (only character for truth and veracity admitted; purporting to follow *State v. Pollard*, and ignoring *State v. Becker*). 1908, *State v. Baker*, 209 Mo. 444, 108 S. W. 6 ("truth and veracity as an average negro," held proper in subject but not in form, — whatever that may mean). 1908, *State v. Priest*, 215 Mo. 1, 114 S. W. 949 (general moral character, admissible). 1913, *State v. Wellman*, 253 Mo. 302, 161 S. W. 795 (crime against nature; that the defendant, who had testified, had the repute of committing crimes of the sort; excluded, distinguishing *State v. Beckner* and *State v. Pollard*).

1904, *Com. v. Williams*, 209 Pa. 529, 58 Atl. 922 (preceding cases approved).

1906, *Powers v. State*, 117 Tenn. 363, 97 S. W. 815 (homicide; defendant's character for violence, not admitted to impeach him as a witness; purporting to follow *State v. Beckner*, Mo., *supra*, but obscure as to the precise rule laid down).

1905, *State v. Stimpson*, 78 Vt. 124, 62 Atl. 14 (rape under age; the woman's character as a prostitute excluded).

1906, *State v. Detwiler*, 60 W. Va. 583, 55 S. E. 654 (rape; prosecutrix' character for chastity, not admitted to impeach credibility).

For the use of the woman's character for chastity, in rape, and bastardy, compare §§ 62, 68, *ante*, and § 987, *post*.

## § 925. Accused's Character as Witness and Party.

## [Note 1; add:]

1913, *Paxton v. State*, — Ark. —, 157 S. W. 396 ("general reputation" admitted).

1907, *Clinton v. State*, 53 Fla. 98, 43 So. 312.

1904, *People v. Albers*, 137 Mich. 678, 100 N. W. 908 (perjury; an offer of defendant's character for veracity, held improperly excluded, though the defendant had not taken the stand, because it was relevant to the charge of perjury; although the offering counsel did not specify that it was for the latter purpose).

1908, *People v. Hinkman*, 192 N. Y. 421, 85 N. E. 676 (rule applied to exclude testimony of bad reputation in rebuttal, after the defendant had admitted a prior conviction and protested that he had "been a good boy ever since").

1908, *State v. Cloninger*, 149 N. C. 567, 63 S. E. 154 (rule applied to specific acts brought out on cross-examination).

## § 928. Prior Character; Competing Rules.

## [Note 1; add:]

1904, *People v. Nunley*, 142 Cal. 441, 76 Pac. 45 (reputation in a place twelve miles away, two years before, where he had lived, admitted in rebuttal).

1904, *Alford v. State*, 47 Fla. 1, 36 So. 436 (character some years before, admitted on the facts).

1910, *Kennedy v. Modern Woodmen*, 243 Ill. 560, 90 N. E. 1084 (character ten years before the trial in another town, admitted).

1909, *Brown's Will*, 143 Ia. 649, 120 N. W. 667 (reputation in another town five years before admitted).

1906, *State v. Simmons*, 74 Kan. 799, 88 Pac. 57 ("No hard and fast rule" can be laid down).

1905, *Craft v. Barron*, — Ky. —, 88 S. W. 1099 (character in Kentucky, ten years before, and in California at the time of trial, admitted in the Court's discretion).

1912, *State v. Albanes*, 109 Me. 199, 83 Atl. 548 (accused's character in a town 10 years ago,

[*Note 1 — continued*]

held not improperly excluded in discretion, character in the town of residence for the 10 years preceding the homicide having been admitted).

1907, *People v. Mix*, 149 Mich. 260, 112 N. W. 907 (reputation in two near-by towns for a period more than two years prior, admitted, approving the text above, and distinguishing *Webber v. Hanke*).

1905, *State v. Bryant*, 97 Minn. 8, 105 N. W. 974 (reputation not allowed to be proved, in the trial Court's discretion, by one who had known the witness since youth, but had not heard his reputation mentioned for four years).

1905, *State v. Shouse*, 188 Mo. 473, 87 S. W. 480 (excluding the accused's character in Tennessee seven or eight years before). 1909, *Lindsay v. Bates*, 223 Mo. 294, 122 S. W. 682 (character in a place where witness had always lived up to three years before trial, admitted).

1907, *People v. Van Gaasbeck*, 189 N. Y. 408, 82 N. E. 718 (*Sleeper v. Van Middelsworth*, *supra*, followed).

### § 932. *Insanity.*

[*Note 1, l. 22; add:*]

*Contra*: 1912, *People v. Enright*, 256 Ill. 221, 99 N. E. 936 (an astonishing decision).

### § 933. *Intoxication.*

[*Note 1; add:*]

1905, *Morris v. State*, — Ala. —, 39 So. 608 (at the time of the affray).

1913, *People v. Salladay*, — Cal. App. —, 135 Pac. 508 (intoxication for a period of 16 days, including the day in controversy, admissible).

1905, *Sharpton v. Augusta & A. R. Co.*, — Ga. —, 51 S. E. 553 (intoxication at the time of the injury, admitted).

1905, *Miller v. People*, 216 Ill. 309, 74 N. E. 743 (intoxication at the time of testifying may be shown).

1908, *Pittsburgh C. C. & St. L. R. Co. v. O'Conner*, 171 Ind. 686, 85 N. E. 969.

[*Note 2; add:*]

1904, *Woods v. Dailey*, 211 Ill. 495, 71 N. E. 1068 (cumulative evidence of intemperate habits, here excluded).

1903, *State v. Castle*, 133 N. C. 769, 46 S. E. 1 (that the accused, who testified, "drank liquor," excluded, the proof not relating to the time of the homicide or of testifying).

### § 934. *Disease, Age, etc.*

[*Note 1; add:*]

*Contra*: 1909, *Cannon v. Terr.*, 1 Okl. Cr. 600, 99 Pac. 622 (that the witness was a "dope fiend"; ruling not clear).

*Accord*: 1914, *Wilson v. U. S.*, — U. S. —, 34 Sup. 347 (use of morphine in general and during the trial, admitted).

[*Note 1; add, in a new paragraph:*]

*Hypnotism* may here have a bearing: 1905, *State v. Exum*, 138 N. C. 599, 50 S. E. 283, *semble* (that defendant had occasionally hypnotized his wife, now testifying for him, allowed on cross-examination). So, too, the habitual use of *cocaine*; *Contra*: 1904, *Williams v. U. S.*, 6 Ind. Terr. 1, 88 S. W. 334 (unless the witness is under its influence when examined, or is expressly shown to be affected in his faculties).

[*Note 2; add.:*]

1905, *Mathison v. State*, 87 Miss. 739, 40 So. 801 (near-sightedness of an eye-witness to a homicide).

§ 935. Religious Belief.

[*Note 4; add.:*]

Pa. St. 1909, No. 90, p. 140, § 3 (quoted *post*, § 1828).

[*Note 5, par. 1; add.:*]

1882, *Bush v. Com.*, 80 Ky. 244 (the Constitutional provision "was intended to prevent any inquiry into that belief" as affecting credibility).

1904, *Louisville & N. R. Co. v. Mayes*, — Ky. —, 80 S. W. 1096 (foregoing case followed).

For the *privilege* against disclosing religious belief, see *post*, § 2214.

§ 936. Race.

[*Note 1; add.:*]

1910, *State v. Lem Woon*, 57 Or. 482, 107 Pac. 974 (revengeful trait of Chinese in a factional feud, not admitted; approving the text above at § 516).

§ 944. Cross-Examination; Broadness of Scope.

[*Note 1; add.:*]

1905, *Birmingham R. & E. Co. v. Mason*, 144 Ala. 387, 39 So. 590.

1903, *Porter v. People*, 31 Colo. 508, 74 Pac. 879.

1905, *Smith v. State*, 165 Ind. 180, 74 N. E. 983.

Ky. C. C. P. 1895, § 593 (quoted *ante*, § 981, n. 4).

1904, *Fuqua v. Com.*, 118 Ky. 578, 81 S. W. 923.

1906, *Greer v. Union St. R. Co.*, 193 Mass. 246, 79 N. E. 267.

1906, *State v. Standard Oil Co.*, — Mo. —, 91 S. W. 1062.

1905, *State v. Foster*, 14 N. D. 561, 105 N. W. 938.

1905, *Guthrie v. Carey*, 15 Okl. 276, 81 Pac. 431.

1905, *State v. Sauls*, 70 S. C. 393, 50 S. E. 17.

1905, *Worrell v. Kinnear*, 103 Va. 719, 49 S. E. 988.

1913, *Miller v. Pearce*, — Vt. —, 85 Atl. 588.

§ 946. Demeanor of a Witness.

[*Note 1; add.:*]

1904, *Hauser v. People*, 210 Ill. 253, 71 N. E. 416.

Compare the rule for an *accused's* demeanor during trial (*ante*, § 274).

§ 949. Relationship, etc., as Evidence of Bias.

[*Note 2; add.:*]

1906, *R. v. Finnessey*, 11 Ont. L. R. 338 (similar to *Thomas v. David*, *supra*; cited more fully *post*, § 986, n. 11).

1905, *Funderburk v. State*, 145 Ala. 661, 39 So. 672 (rape; marital separation of the woman's brother-in-law, testifying for the defendant, allowed to be shown for the State).

1905, *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1 (hostility between the families of deceased and accused).

[*Note 2 — continued*]

1906, *Perdue v. State*, 126 Ga. 112, 54 S. E. 820 (paramour of the defendant).

1904, *State v. Harness*, 10 Ida. 18, 76 Pac. 788 (rape; illicit relations of the woman's sister with a third person, admitted to show the sister's motives for her testimony).

[*Note 3; add:*]

1904, *Adkinson v. State*, 48 Fla. 1, 37 So. 522 (questions as to the witness' daughter's illicit relations with the defendant's brother, excluded).

1911, *People v. Goodrich*, 251 Ill. 558, 96 N. E. 542 (embezzlement of Mrs. M.'s money; cross-examination of Mrs. M. by defendant's counsel as to her past improper relations with defendant, excluded, though the Court would have held it admissible had Mrs. M. been called for the defendant; erroneous, and queer in its notion of human nature).

1904, *Hogen v. Klabo*, 13 N. D. 319, 100 N. W. 847 (pecuniary relations of plaintiff and his principal witness, admitted).

1911, *Henry v. State*, 6 Okl. Cr. 430, 119 Pac. 278 (murder; that the witness for the State, wife of defendant, was living apart from him, as paramour of the deceased, admitted).

[*Note 4, par. 1; add:*]

1905, *People v. Cowan*, 1 Cal. App. 411, 82 Pac. 339 (membership in the same miners' union).

1909, *McMahon v. Chicago City R. Co.*, 239 Ill. 334, 88 N. E. 223 (how many times the appellant defendant's medical expert had testified for "the street car lines of Chicago," held too broad since the question should have been limited to the "number of times the witness had testified for the appellant"; unsound).

1904, *Gregory v. Detroit U. R. Co.*, 138 Mich. 368, 101 N. W. 546 (here the Court commits the error of ruling that "there must be something in the testimony itself or in the manner of the witness to justify the conclusion" of bias; yet the Court has no right to control the jury's inferences of bias by some rule of law; the simple fact that the witness is the father or husband or surety or employee of a party may be given just as much or as little weight as the jury please in affecting their trust of the testimony; this opinion exhibits a radical misapprehension of the common-law theory of testimony on a jury-trial; instructions of any sort to the jury on such subjects are out of place).

1910, *Genest v. Odell Mfg. Co.*, 75 N. H. 509, 77 Atl. 77 (that a physician-witness was employed by the insurer of the defendant, admitted).

1913, *Johnson v. Seaboard A. L. R. Co.*, 163 N. C. 431, 79 S. E. 690 (that the witness, an employee of defendant, had come to trial on a free pass given by the defendant, allowed).

1903, *Wabash S. D. Co. v. Black*, 126 Fed. 721, 726, 61 C. C. A. 639 (physician).

[*Note 6; add:*]

1906, *Glass v. State*, 147 Ala. 50, 41 So. 727 (quarrel over a former indictment, admitted).

[*Note 7; add, under Accord:*]

1904, *Smith v. State*, 48 Fla. 307, 37 So. 573 (murder; indictment against defendant for stealing the deceased's cattle, admitted).

1909, *Dotterer v. State*, 172 Ind. 357, 88 N. E. 689 (assault and battery; an alleged accomplice was allowed to be impeached as to bias by a judgment of conviction for his part in the battery, and to discredit his denial that he was not present at the battery).

[*Note 8; add:*]

1886, *State v. Henderson*, 29 W. Va. 147, 159, 1 S. E. 225 (that certain witnesses for the prosecution were indebted to the prosecuting witness, not allowed even on cross-examination; unsound).

§ 950. **Expressions and Conduct as Evidence of Bias.**

[*Note 5; add:*]

1909, *Grayson v. State*, 162 Ala. 83, 50 So. 349 (carrying concealed weapon; that the prosecuting witness had once before caused the defendant to be searched for a weapon, admitted). 1905, *Creeping Bear v. State*, 113 Tenn. 322, 87 S. W. 653 (soliciting against a pardon for defendant).

[*Note 6; add:*]

1904, *Hanners v. State*, 147 Ala. 27, 41 So. 973 (threats). 1906, *Vaughn v. State*, 52 Fla. 122, 41 So. 881 (threats to kill). 1908, *Telfair v. State*, 56 Fla. 104, 47 So. 863 (expressions of hostility). 1909, *Stewart v. State*, 58 Fla. 97, 50 So. 642 (threats against defendant by a witness for the prosecution). 1909, *Stockham v. Malcolm*, 111 Md. 615, 74 Atl. 569 (that the plaintiff-witness would "spend \$50,000 to whip the defendant in court," admitted). 1904, *People v. Rice*, 136 Mich. 619, 99 N. W. 860 (helping to secure a conviction). 1913, *State v. Horton*, 247 Mo. 657, 153 S. W. 1051 (threats by a witness who was mother of the prosecutrix in rape).

§ 951. **Details of a Quarrel on Cross-Examination.**

[*Note 2; add:*]

1877, *Fincher v. State*, 58 Ala. 215, 219 (extent of hostility may be inquired into). 1905, *McDuffie v. State*, 121 Ga. 580, 49 S. E. 708 (details excluded; citing the intervening rulings). 1904, *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042 (wife-murder by poison; the deceased's sister, being asked as to reasons for bias, answered that she disliked accused because he poisoned her sister; held erroneous; the ruling is indefensible, because the cross-examiner himself called for a specific answer). 1910, *People v. Strauch*, 247 Ill. 220, 93 N. E. 126 (criminal libel; the plaintiff having admitted hostile feelings, it was held not improper to forbid questions on cross-examination as to the plaintiff's having called the defendant a "perjurer," and having published a vituperative letter about the defendant; the opinion on the latter point states the rule too strongly in implying that prior utterances by the complainant in a libel charge are always inadmissible, even to show his bias). 1905, *Seymour v. Bruske*, 140 Mich. 244, 103 N. W. 613. 1905, *State v. Malmberg*, 14 N. D. 523, 105 N. W. 614 (details of political rivalry, etc., allowed in discretion; good opinion by Engerud, J.). 1911, *Richardson v. Gage*, 28 S. D. 390, 133 N. W. 692 (whether the plaintiff-witness had assaulted the opponent; not decided). 1906, *State v. Baird*, 79 Vt. 257, 65 Atl. 101 (details excluded, in the trial Court's discretion).

§ 952. **Explaining Away, etc.; Details on Re-Examination.**

[*Note 1; add:*]

1908, *Strong v. State*, 85 Ark. 536, 109 S. W. 536 (bias explained away by threats; cited more fully *ante*, § 280). 1906, *Lenfest v. Robbins*, 101 Me. 176, 63 Atl. 729 (trespass for assault; the defendant allowed on re-examination to explain that the hostility "was not on his side").

Compare the rule for *party's hostility* (*ante*, § 396).

[*Note 3; add:*]

1908, *State v. Kight*, 106 Minn. 371, 119 N. W. 56. Distinguish the application of the rule for details of employment creating *interest* (*post*, § 696), as in *State v. Bean*, 77 Vt. 384, 60 Atl. 807 (1905).

**§ 953. Preliminary Inquiry to Witness.***[Note 1; add:]*

- 1904, *Alford v. State*, 47 Fla. 1, 36 So. 436 (not necessary).  
 1907, *Goss v. Goss*, 102 Minn. 346, 113 N. W. 690 (not decided).  
 1912, *People v. Lustig*, 206 N. Y. 162, 99 N. E. 183 (not necessary).  
 1905, *State v. Bardelli*, 78 Vt. 102, 62 Atl. 44 (same).

**§ 957. Willingness to Swear Falsely.***[Note 1; add:]*

- 1907, *State v. Caron*, 118 La. 349, 42 So. 960 (whether he had said that he would swear to anything that would help his brother, held allowable).

**§ 958. Offer to Testify Corruptly.***[Note 1; add, under Admitted:]*

- 1895, *Alward v. Oakes*, 63 Minn. 190, 65 N. W. 270 (letters "evinced a corrupt disposition to make his testimony in this case depend upon the pecuniary or other valuable consideration," etc., admitted).  
 1905, *Hathaway v. Goslant*, 77 Vt. 199, 59 Atl. 835 (question as to an offer for money to leave the State, when a witness in another suit, allowed in discretion).

**§ 959. Confession that Testimony was False.***[Note 1, par. 11; add, under Excluded:]*

- 1905, *State v. Wells*, 33 Mont. 291, 83 Pac. 476 (cross-examining a witness who has identified his former testimony, "Is that testimony true or false?" not allowed; unsound). The pedantic error of such rulings can be seen by comparing the marvellously successful use of such a cross-examination by Sir Charles Russell with Pigott in the Parnell Case (quoted *post*, § 1260).

**§ 960. Attempt to Suborn Another Witness.***[Note 1; add:]*

- 1909, *Com. v. Min Sing*, 202 Mass. 121, 88 N. E. 918 (attempted subornation, admissible "to show his bias and affect his credibility").  
 1913, *Burnaman v. State*, — Tex. Cr. —, 159 S. W. 244 (here the special controversy was whether the rule applied to admit a corrupt attempt by the accused's brother who was a witness; properly held admissible, Davidson, P. J., diss. on the ground that the dominant purpose of the evidence was that purpose forbidden by § 280, *ante*).

**§ 961. Receipt of Money, etc.***[Note 2; add:]*

- 1904, *Parrish v. State*, 139 Ala. 16, 36 So. 1012 (whether he paid his own travel expenses; held properly disallowed). 1904, *Southern R. Co. v. Morris*, 143 Ala. 628, 42 So. 17 (but payment of charges already due is not admissible).  
 1906, *Kansas C. S. R. Co. v. Belknap*, 80 Ark. 587, 98 S. W. 363 (that the witnesses of defendant received free transportation, allowed).  
 1910, *People v. Tomalty*, 14 Cal. App. 224, 111 Pac. 513 (the fact of frequent employment as expert by one party may be inquired into, but not the details of amounts).  
 1904, *Chicago City R. Co. v. Handy*, 208 Ill. 81, 69 N. E. 917 (that an expert medical witness is to receive more than the statutory fee, and that he is frequently employed as such by

[Note 2—continued]

one of the litigants, allowable). 1904, *Chicago & E. I. R. Co. v. Schmitz*, 211 Ill. 446, 71 N. E. 1050 (that the witness was interested as a medical man in similar suits against other corporations, excluded). 1909, *West Skokie Drainage District v. Dawson*, 243 Ill. 175, 90 N. E. 377 (to an engineer, whether he had been promised "considerable money" if the proceedings "went through," allowed).

1905, *Union Pacific R. Co. v. Field*, 137 Fed. 14, 16, 69 C. C. A. 536 (that a witness for the defendant corporation "came to the trial upon passes . . . was not a proper subject of comment"; unsound).

1905, *State v. Rosenthal*, 123 Wis. 442, 102 N. W. 49 (payment of expenses, etc., may be inquired into).

### § 963. Habitual Falsities; Sundry Corrupt Conduct.

[Note 1; add:]

1905, *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918 (that the witness employed a person to negotiate with a judge for a corrupt decision in a prior stage of the cause, allowed).

[Note 2; add:]

1912, *Frauenthal v. State*, — Ark. —, 146 S. W. 491 (rape under age, the prosecutrix being 12–13 years of age; the defendant offered to show that the prosecutrix had asserted similar acts done to her by other men, and that these other charges were false — though this part of the offer is not clear; excluded on the ground that nothing short of mental derangement could be shown; we respectfully protest against such a dangerous ruling, and recommend a perusal of Gross' "Criminal Psychology" and Healy's "Juvenile Delinquent"; it ought to be well understood by criminal judges that some women and girls have at times precisely this trait, and that it is always proper to protect a possibly innocent man by an inquiry into the prosecutrix' trait).

1910, *Heath v. State*, 173 Ind. 296, 90 N. E. 310 (rape under age; that the complainant witness and her father had filed affidavits charging other young men with similar acts, excluded).

1912, *People v. Wilson*, 170 Mich. 669, 137 N. W. 92 (like *People v. Evans*, *supra*).

1909, *State v. Pemberton*, 39 Mont. 530, 104 Pac. 556 (the prosecuting witness was not allowed to be asked as to a similar robbery-story, falsely told by him on one occasion fourteen years before, nor was the story allowed to be proved by another witness; no authority cited).

It is time that the Courts took warning here, and became more liberal. They know, and we all know, that the court-room has its quota of false claimants and pretended victims of wrongs; some are children, some eccentrics, some hysterics, some insane, some conscious blackmailers. It is hard enough, at last, to detect and expose them. To hamper this exposure with the shibboleth "*res inter alios acta*" is impractical. And the injustice of the situation is often intensified by this maddening prohibition of the very evidence to which a common-sense tribunal would most quickly resort.

Any judge who has not heard of some of the instances in which such a complete investigation soon clears up the whole atmosphere should read Dr. Bernhard Glueck's article on "The Forensic Phase of Litigious Paranoia," in the *Journal of the American Institute of Criminal Law and Criminology*, V, 371 (September, 1914); also Professor Hans Gross' "Criminal Investigation" (1907, transl. Adam), p. 171.

The double barrier erected by our strict precedents in this field may be instanced by the case nowadays common in our courts, a charge against an oldish man of indecencies with a young girl or child in his shop or house. Usually the facts are either that the man is a sexual pervert, or that the female is a sexual hysteric or a precocious little reprobate. If the former case, the prosecution tries to show that the man has a habit of treating little girls in that way. No; that cannot be done; the character-rule forbids. If the latter case, the

[*Note 2 — continued*]

defence tries to show that the girl has been falsely charging other men with similar offences. No, that cannot be done; the witness-rule forbids. And so, whichever the truth may be, the Court ties up the case in these intellectual ropes, and lets the parties struggle away with the fragments of evidence that are permitted to be used. And yet we assume that this process is a skilled and worthy effort to establish the truth!

### § 966. Interest in Civil Cases; General Principle.

[*Note 1, col. 1; add:*]

1906, *Hanchett v. Haas*, 219 Ill. 546, 76 N. E. 845.

1904, *Conner v. Missouri P. R. Co.*, 181 Mo. 397, 81 S. W. 145.

[*Note 1, at the end; add:*]

1908, *Helbig v. Citizens' Ins. Co.*, 234 Ill. 251, 84 N. E. 897.

1904, *Strebin v. Lavengood*, 163 Ind. 478, 71 N. E. 494 (form of instruction, considered).

1905, *Denver C. T. Co. v. Norton*, 141 Fed. 599, 608, C. C. A. (party-opponent; an instruction may be demanded).

### § 967. Accomplices and Co-Indictees.

[*Note 2; add:*]

1910, *Tollifson v. People*, 49 Colo. 219, 112 Pac. 794 (burglary; the witness was under a charge of assault, held not improperly excluded in discretion).

1906, *Hayes v. State*, 126 Ga. 95, 54 S. E. 809.

1905, *Terr. v. Boyd*, 16 Haw. 660 (indictment for the same offence, admitted).

1904, *State v. Rosa*, 71 N. J. L. 316, 58 Atl. 1010 (that the witness was arrested on the same charge, admitted on cross-examination).

1909, *De Graff v. State*, 2 Okl. Cr. 519, 103 Pac. 538 (liquor-offence).

1912, *O'Neal v. State*, — Tex. Cr. —, 146 S. W. 938.

[*Note 3, par. 1; add:*]

1905, *Stevens v. People*, 215 Ill. 593, 74 N. E. 786 ("Do you expect to be no further prosecuted in this matter?" allowed, whether or not his expectation was justified by any binding promise).

[*Note 4; add, under Accord:*]

1904, *Wilkerson v. State*, 140 Ala. 165, 37 So. 265 (indictment for the same illegal sale of liquor; admitted).

1910, *McCray v. State*, 134 Ga. 416, 68 S. E. 62 (murder of W.; indictment against defendant and McK., a witness for defendant, for an assault on B., as a part of the same affair, admitted to show bias of McK.).

1910, *Gray v. State*, 4 Okl. Cr. 292, 111 Pac. 825.

### § 968. Accused in a Criminal Case.

[*Note 1; add:*]

1904, *People v. Wells*, 145 Cal. 138, 78 Pac. 470. 1907, *People v. Ryan*, 152 Cal. 364, 92 Pac. 853.

1904, *Waller v. People*, 209 Ill. 284, 70 N. E. 681.

1904, *Schultz v. People*, 210 Ill. 196, 71 N. E. 405 (form of instruction determined; prior rulings collected). 1911, *People v. Arnold*, 248 Ill. 169, 93 N. E. 786.

1907, *Burk v. State*, 79 Nebr. 241, 112 N. W. 573.

[*Note 1 — continued*]

- 1907, *State v. Bartlett*, 50 Or. 440, 93 Pac. 243.  
 1895, *Reagan v. U. S.*, 157 U. S. 301, 305, 15 Sup. 610.  
 1904, *Alexis v. U. S.*, 129 Fed. 60, 63 C. C. A. 502.  
 1905, *Schutz v. State*, 125 Wis. 452, 104 N. W. 90.

§ 969. Bonds, Rewards, Insurance, etc., as affecting Interest.

[*Note 1; add:*]

- 1903, *Terr. v. Sing Kee*, 14 Haw. 586, 590 (informer).

[*Note 2; add:*]

- 1905, *Borck v. State*, — Ala. —, 39 So. 580 (buyer of liquor illegally sold).  
 1890, *Hronek v. People*, 134 Ill. 139, 24 N. E. 681 (private detective's evidence is not necessarily open to be discredited).  
 1913, *People v. Gardt*, 258 Ill. 468, 101 N. E. 687 (*Hronek v. People* followed).  
 1905, *State v. Bean*, 77 Vt. 384, 60 Atl. 807.  
 1907, *Taft v. Taft*, 80 Vt. 256, 67 Atl. 703 (private detectives in divorce).

[*Note 3; add:*]

- 1903, *Southern R. Co. v. Bunnell*, 138 Ala. 247, 36 So. 380 (railroad passenger's ejection; whether the ticket agent testifying for the defendant, was under indemnity-agreement for the case, allowed).  
 1908, *Bates v. State*, 4 Ga. App. 486, 61 S. E. 888.

[*Note 4; add:*]

- 1908, *Lenahan v. Pittston C. M. Co.*, 221 Pa. 626, 70 Atl. 884 (rule affirmed; but here a witness for the defendant was allowed to be asked if he, besides being an attorney for defendant, was attorney for a company insuring the defendant).

[*Note 5; add:*]

- 1902, *Fuller Co. v. Darragh*, 101 Ill. App. 664 (that an insurance company is defending a case, held improper to be asserted to the jury).  
 1906, *Hammer v. Janowitz*, 131 Ia. 20, 108 N. W. 109 (defendant's insurance against employer's liability, not admitted).  
 1908, *Gracz v. Anderson*, 104 Minn. 476, 116 N. W. 1116 (cross-examination of defendant as to insurance, to affect his credibility, held properly excluded in the trial Court's discretion).  
 1911, *Simpson v. Foundation Co.*, 201 N. Y. 479, 95 N. E. 10.  
 1904, *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202 (that defendant was insured, excluded).  
 1904, *Edwards v. Burke*, 36 id. 107, 78 Pac. 610 (principle affirmed).  
 1905, *Lowsit v. Seattle L. Co.*, 38 id. 290, 80 Pac. 431 (*Iverson v. McDonald* followed).  
 1905, *Stratton v. Nichols L. Co.*, 39 id. 323, 81 Pac. 831 (similar).  
 1905, *Dossett v. St. Paul & T. L. Co.*, 40 id. 276, 82 Pac. 273 (similar).

[*Note 6; add:*]

- 1911, *Pierce v. United Gas & E. Co.*, 161 Cal. 176, 118 Pac. 700 (jurors should ordinarily not be asked questions emphasizing the fact of defendant's insurance).  
 1905, *Teston v. State*, 50 Fla. 137, 138, 39 So. 787 (embezzlement from a labor union; witnesses being members of the union were allowed to be questioned as to the bonding company's non-liability for indemnity unless upon conviction).  
 1906, *Howard v. Beldenville L. Co.*, 129 Wis. 98, 108 N. W., 48 (proper mode of procedure in questioning jurors as to an interest in a casualty company, considered).

Yet a witness not a party may be affected by his interest in an insurance company :

[*Note 6 — continued*]

1906, *Capital C. Co. v. Holtzman*, 27 D. C. App. 125, 138.

1902, *Hedlun v. Holy Terror M. Co.*, 16 S. D. 261, 92 N. W. 31 (*cited ante*, § 949, n. 4).

Compare the cases cited *ante*, §§ 282, 393, 949.

[*Note 7; add:*]

1905, *State v. Jackson*, 128 Ia. 543, 105 N. W. 51 (prosecuting witness in false pretences; repudiating the prior intimation in *State v. Rivers*, 58 id. 102, that the motives of interest or bias thus created could be considered as evidence, not merely as to the credibility of the witness, but also as to the guilt of the accused).

### § 980. Record of Judgment of Conviction.

[*Note 5; add:*]

Of course the rule about asking the witness before proving a self-contradiction (*post*, § 1025) has no application here.

[*Text*, p. 1108; *add a new par.:*]

(7) Whether to the record of conviction must be added some evidence of *identity* of the person convicted and the witness, involves the presumption of identity of person from *identity of name* (*post*, § 2529).

### § 983. Cross-Examination; Relevant Questions excluded, etc.

[*Text*, p. 1112, l. 1 of the quotation; *insert:*]

in *R. v. Kennedy* (Kilkenny; Mongan's Celebrated Trials in Ireland, pp. 28).

[*Note 3; add:*]

and the citations *post*, § 1810.

### § 986. History and State of the Law in England and Canada.

[*Note 2; add:*]

1908, *Farrington's Case*, 1 Cr. App. 113 (that the defendant was an associate of blackmailers, held improper).

1913, *R. v. Cargill*, 2 K. B. 271 (extrinsic evidence of unchaste acts by the girl, on a charge of rape under age, excluded).

[*Note 11; add:*]

*England*: An article on the Scope of Cross-Examination is found in 71 J. P. 385, 397, 409 (1907).

*Canada*: *B. C.*: St. 1903-4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 4 (repeals St. 1902, c. 22, § 6).

1909, *Brownell v. Brownell*, 42 Can. Sup. 368 (divorce; plaintiff's counsel was examining the defendant as to a bigamous marriage which the defendant admitted; on being asked the name of the woman, the defendant refused to say, and the trial Court declined to compel the answer; by a majority the ruling was sustained; the opinions are excellent illustrations of the opposite points of view).

*Newf.*: St. 1904, c. 3, Rules of Court 32, par. 23 (like Eng. Ord. 36).

*Ont.*: 1906, *R. v. Finnessey*, 11 Ont. L. R. 338 (rape on a woman who had been alone in company with B.; questions to the woman and to B. as to having intercourse at the time of being in company were disallowed on the trial; held, on appeal, that the former question

[*Note 11 — continued*].

was proper to be put, but the witness was "not generally compellable to answer," though "to some extent" the trial Court's discretion controls, citing *R. v. Laliberté, supra*; and that the latter question was additionally proper as evidencing bias, on the principle of § 949, *ante*, and an answer ought to have been compelled).

*Yukon*: Consol. Ord. 1902, c. 17, Ord. XXII, R. 259 (like Eng. Ord. 36, *supra*).

[*Note 16; add, under Canada:*]

1906, *R. v. Finessey*, 11 Ont. L. R. 338 (cited *supra*, n. 11).

[*Note 18; add:*]

*Alta.*: St. 1910, Evidence Act, c. 3, § 22 (like Eng. St. 1854, c. 125, § 25, substituting "any crime").

*Ont.*: St. 1909, c. 43, § 19 (like R. S. 1897, c. 73, § 19).

*Sask.*: St. 1907, c. 12, Evidence Act, § 30 (like Eng. St. 1854, c. 125, § 25, substituting "any offence").

*Yukon*: St. 1904, c. 5, § 43 (like Eng. St. 1854, c. 125, § 25, substituting "any crime").

[*Note 19; add:*]

For the cases interpreting this statute, see *post*, § 2276, n. 5, and *ante*, § 194.

## § 987. State of the Law in the Various Jurisdictions of the United States.

[*Note 1; add:*]

*Alabama*: Par. (2): 1904, *Ross v. State*, 139 Ala. 144, 36 So. 718 (concealed weapon; cross-examination to other misconduct, allowed). 1909, *Smith v. State*, 161 Ala. 94, 49 So. 1029 (cross-examination to illegal sale of liquor, excluded). 1909, *Lowman v. State*, 161 Ala. 47, 50 So. 43 (cross-examination as to being "charged with running after other men's wives," not allowed).

Par. (4): Line 6, for "ib.," read "129 *id.*" and add the following: 1904, *Ross v. State*, 139 Ala. 144, 36 So. 718 (indictment for assault to murder, excluded). 1904, *Gordon v. State*, 140 Ala. 29, 36 So. 1009 (conviction for throwing stones into a railroad train, excluded, under Code 1896, § 1795; the statute was not intended to include crimes not disqualifying at common law). 1904, *Wilkerson v. State*, 140 Ala. 165, 37 So. 265 (indictment for public drunkenness, excluded). 1906, *Williams v. State*, 144 Ala. 14, 40 So. 405 (only infamous crimes are admissible; hence, "Were you ever convicted of a crime?" is too general). 1906, *Fuller v. State*, 147 Ala. 35, 41 So. 774 (conviction for a statutory felony is admissible to impeach; distinguishing prior rulings as to misdemeanors, and admitting that they contain "expressions calculated to mislead"). 1907, *Mitchell v. State*, 148 Ala. 618, 42 So. 1014 (conviction for gaming, not admitted).

*Alaska*: Par. (4): 1906, *Ball v. U. S.*, 147 Fed. 32, 38, C. C. A. (under C. C. P. 1900, § 669, the conviction may be of a misdemeanor, and may be of a court in another jurisdiction).

*Arkansas*: Par. (1): St. 1905, c. 52 (re-enacts Stats. 1894, § 2959). 1904, *Plunkett v. State*, 72 Ark. 409, 82 S. W. 845 (rape under age; acts of intercourse of prosecutrix with other men, excluded). 1910, *Adams v. State*, 93 Ark. 260, 124 S. W. 766 (seduction; woman's intercourse with another man, admitted, but only on the principle of § 1007, *post*). 1910, *Belford v. State*, 96 Ark. 274, 131 S. W. 953 (bastardy; woman's intercourse with others, admitted, but only on the principle of § 133, *ante*). 1911, *McAlister v. State*, 99 Ark. 604, 139 S. W. 684.

Par. (2): 1905, *Little Rock V. & I. Co. v. Robinson*, 75 Ark. 548, 87 S. W. 1029 (questions as to immoral conduct, held not improperly excluded in the trial Court's discretion). 1906, *Benton v. State*, 78 Ark. 284, 94 S. W. 688 (certain questions as to past domestic life; some held proper, others not). 1911, *McAlister v. State*, 99 Ark. 604, 139 S. W. 684 (murder; cross-examination to the witness' former act of assassination, allowed).

## [Note 1 — continued]

Par. (4): 1905, *Smith v. State*, 74 Ark. 397, 85 S. W. 1123 (conviction of petit larceny, admitted, against a defendant-witness).

*California*: Par. (2): 1907, *People v. Fong Chung*, 5 Cal. App. 587, 91 Pac. 105. 1910, *Gird's Estate*, 157 Cal. 534, 108 Pac. 99 (cross-examination to a woman claimant's unchastity, not allowed).

Par. (4): 1904, *People v. White*, 142 Cal. 292, 75 Pac. 828 (the conviction must be for a felony not a misdemeanor). 1905, *People v. Kelly*, 146 Cal. 119, 79 Pac. 846 (conviction of five different felonies shown). 1906, *People v. Gray*, 149 Cal. 507, 83 Pac. 707 (arrest for drunkenness, excluded). 1906, *People v. Soeder*, 150 Cal. 12, 87 Pac. 1016 (felony; here against a defendant).

*Colorado*: Par. (2): 1910, *Tollifson v. State*, 49 Colo. 219, 112 Pac. 794 (cross-examination to arrest or information, generally improper, but in trial Court's discretion).

*Connecticut*: Par. (2): 1905, *Shailer v. Bullock*, 78 Conn. 65, 61 Atl. 65 (bastardy; questions to the defendant, a clergyman, as to prior charges of immorality, dismissal from employment, etc., in other communities, held to be allowable in the trial Court's discretion; yet "most of the foregoing questions . . . should have been properly excluded, because, if proved or admitted, they had no legitimate tendency to affect his character for truthfulness"). 1909, *State v. Rivers*, 82 Conn. 454, 74 Atl. 757 (particular acts of immorality and unchastity, either before or after the date of the alleged assault, admissible on cross-examination of the complainant, on a charge of rape under age).

*Delaware*: Par. (4): 1905, *State v. Powell*, 5 Pen. Del. 24, 61 Atl. 966 (conviction for carrying a concealed weapon, excluded).

*Florida*: Par. (2): 1906, *Baker v. State*, 51 Fla. 1, 40 So. 673 (murder; a witness for the State, not allowed to be cross-examined as to being the mother of bastards; conviction of crime and character for veracity are alone available). 1908, *Clinton v. Goodrich*, 56 Fla. 57, 47 So. 389 (cross-examination to illegal fishing, held improper).

*Georgia*: Par. (1): 1904, *Black v. State*, 119 Ga. 746, 47 S. E. 370 (rape; extrinsic testimony to the woman-witness' acts of lewdness with third persons, excluded).

Par. (2): 1906, *Allred v. State*, 126 Ga. 537, 55 S. E. 178 (to a defendant, on cross-examination, whether he "had ever bought any spurious money," not allowed, under Code 1895 § 1027).

*Idaho*: Par. (1): 1904, *State v. Harness*, 10 Ida. 18, 76 Pac. 788 (statute not applicable to misconduct affecting the witness' animus against the defendant).

*Illinois*: Par. (2): 1904, *Chicago City R. Co. v. Uhter*, 212 Ill. 174, 72 N. E. 195 (personal injuries; cross-examination as to domestic misconduct, excluded, as not concerning "the truth or falsity of his testimony"). 1910, *People v. Bissett*, 246 Ill. 516, 92 N. E. 949 (murder; defendant cross-examined as to having been a gambler and used aliases; said to be "prejudicial," but not passed upon). 1912, *People v. Brown*, 254 Ill. 260, 98 N. E. 535 (perjury; cross-examination of a woman-witness to chastity, held properly excluded, as abusive and unnecessary). 1913, *People v. Newman*, 261 Ill. 11, 103 N. E. 589 (former arrest, excluded). 1914, *People v. Warfield*, 261 Ill. 293, 103 N. E. 979 (confidence game by de luxe book-contracts; cross-examination of defendant to an alias, and of defendant's witnesses, book-dealers, to dishonest trade methods, not allowed; unsound; no authority cited). 1914, *People v. Duncan*, 261 Ill. 339, 103 N. E. 1043 (rape under age; cross-examination of defendant's wife to lewd conduct, excluded; unsound).

Par. (4): 1904, *McKevitt v. People*, 208 Ill. 460, 70 N. E. 693 (Rev. St. 1874, c. 38, § 279, as amended in 1899 to exempt from the civil consequences of infamy a person sentenced to the State Reformatory, does not affect the admissibility of a conviction under ib. § 426, where the sentence on such conviction is to the Reformatory). 1908, *Clifford v. Pioneer Fireproofing Co.*, 232 Ill. 150, 83 N. E. 448 (conviction for an infamous crime, admissible; here, rape).

*Indiana*: Par. (1): 1904, *Dunn v. State*, 162 Ind. 174, 70 N. E. 521 (murder; testimony to an act of adultery with another person, eight years before, contradicting the defendant's denial of it on his cross-examination, held improper).

## [Note 1 — continued]

1905, *Walker v. State*, 165 Ind. 94, 74 N. E. 614 (excluded).

P. 1129, col. 2, l. 6, add: "and bastardy (§ 399)."

Par. (2): 1910, *Heath v. State*, 173 Ind. 296, 90 N. E. 310 (rape under age; complainant witness' character, not evidenced by acts of intercourse with others).

Par. (4): 1909, *Dotterer v. State*, 172 Ind. 357, 88 N. E. 689 (conviction for assault and battery, admitted; opinion not clear; applying Rev. St. 1897, § 519, being Burns' Annot. St. 1908, § 530).

*Indian Territory*: Par. (2): 1906, *McCoy v. U. S.*, 6 Ind. Terr. 415, 98 S. W. 144 (to the defendant, "How many larceny cases have there been here against you?" allowed; *Oxier v. U. S.* followed, but the various rules are not carefully discriminated).

*Iowa*: Par. (4): 1913, *Thorman's Estate*, — Ia. —, 144 N. W. 7 (cross-examination to disbarment, allowed).

*Kansas*: Par. (2): 1907, *State v. Pugh*, 75 Kan. 792, 90 Pac. 242 (trial Court's discretion). 1913, *State v. Sexton*, 91 Kan. 171, 136 Pac. 901 (illegal sale of liquor; cross-examination of the State's witness to sales by him, with a view to contradicting him if he denied, held improper; unsound; cross-examination is not objectionable because of the "outside issues brought in"; it brings in no issues; but if on cross-examination he had denied, then of course other witnesses cannot be called to contradict him; if, on the other hand, he had on cross-examination admitted the sales, the fact is thus quickly in the case, and the only question can be whether a man who himself sells liquor illegally is any the less credible thereby when he testifies against another alleged liquor-seller; the records of experience for centuries are that such persons are somewhat open to suspicion; is there not a fable of *Æsop* on the point?).

Par. (4): 1904, *State v. Coover*, 69 Kan. 382, 76 Pac. 845 (questions to defendant as to prior arrest and sentence to the reform school, allowed).

*Kentucky*: Par. (1): 1908, *Leach v. Com.*, 129 Ky. 497, 112 S. W. 595 (murder; immoral intimacy between deceased and chief witness for the State, admitted, as evidencing bias; distinguishing the inadmissible use to evidence moral character).

Pars. (2), (3), (4): 1904, *Mullins v. Com.*, — Ky. —, 79 S. W. 258 (prior arrest, excluded; no authority cited).

1904, *Seaborn v. Com.*, — Ky. —, 80 S. W. 223 (obscure).

1906, *Henderson v. Com.*, 122 Ky. 296, 91 S. W. 1141 (conviction for forgery, admitted).

1906, *Britton v. Com.*, 123 Ky. 411, 96 S. W. 556 (murder; cross-examination of the accused as to killing a man in Virginia and being indicted for it, excluded, on the ground that it is "not competent to show any particular wrongful act that the witness has been guilty of, or that he has been indicted for an offence," unless by showing a conviction therefor; this ruling seems to follow precisely *Welch v. Com.*, 111 Ky. 530, *supra*, and to straighten out at last the long tangle in the foregoing rulings; notice that it virtually assimilates the rule to that of the California Code type).

1907, *Wells v. Com.*, — Ky. —, 99 S. W. 218 (conviction misdemeanor, excluded).

1907, *Ball v. Com.*, — Ky. —, 99 S. W. 326 (similar).

St. 1908, c. 67, p. 181, Mar. 19, § 1 (juvenile delinquents; "the disposition of any child under this act" shall not be evidence against such child "in any civil, criminal, or other cause . . . for any purpose whatsoever").

1908, *Ochsner v. Com.*, 128 Ky. 761, 109 S. W. 326 (the particular nature of the offence may be inquired about, when the conviction is proved by cross-examination).

*Louisiana*: Par. (2): 1906, *State v. High*, 116 La. 79, 40 So. 538 (murder; cross-examination of a witness for the State as to a seduction, held properly excluded in discretion).

1906, *State v. Barrett*, 117 La. 1086, 42 So. 513 (questions to the defendant-witness, "how often have you been prosecuted before the courts, and for what offences," held improper, in asking for mere prosecutions not convictions; prior cases explained; *Breaux, C. J.*, diss.).

Par. (4): 1906, *State v. Griggsby*, 117 La. 1046, 42 So. 497 (conviction in a city court, admitted, here against a defendant-witness). 1913, *State v. Manual*, 133 La. 571, 63 So.

[Note 1 — continued]

174 (murder; cross-examination of accused to a conviction for fence-cutting, allowed; the rule is not restricted to felonies).

*Maryland*: Par. (1): 1906, *Richardson v. State*, 103 Md. 112, 63 Atl. 317 (woman witness in bigamy).

Par. (2): 1913, *Avery v. State*, 121 Md. 229, 88 Atl. 148 (abortion; question to the accused's wife whether she had ever taken the girl to a house of ill-fame, excluded; apparently accepting the rule of total exclusion of questions to chastity-character).

*Massachusetts*: Par. (2): 1906, *Taylor v. Schofield*, 191 Mass. 1, 77 N. E. 652 (trial Court's discretion controls).

Par. (4): St. 1913, c. 81 (amending Rev. L. c. 175, § 21; substituting "felony" for "crime," and limiting the time for misdemeanor to 5 years prior, unless within that time there was another conviction). 1913, *Rittenberg v. Smith*, 214 Mass. 343, 101 N. E. 989 (a presidential certificate of commutation, releasing after part service of sentence a person convicted of fraudulent concealment of assets from a trustee in bankruptcy, does not prevent the conviction from being used to discredit). St. 1914, c. 406 (substituting, for Rev. L. c. 175, § 21, as amended by St. 1913, c. 81, the following: "The conviction of a witness of a crime may be shown to affect his credibility," but not after 5 years if a misdemeanor, nor after 15 years if a felony, "unless there has been a subsequent conviction [*sic*, for what?] of the witness within the above mentioned periods"; this nicely balanced difference, of 5 years for misdemeanor and 15 years for felony, in its inherent relation to grades of credibility, must have been revealed to the legislators by some seer of superhuman insight; certainly neither scientific nor legal annals record that truth).

*Michigan*: Par. (2): 1904, *People v. Dowell*, 136 Mich. 306, 99 N. W. 23 (*People v. Gotshall*, *supra*, followed). 1912, *Yanelli v. Littlejohn*, 172 Mich. 91, 137 N. W. 723 (false representations in selling land; cross-examination of defendant to other false methods, allowed).

Par. (4): 1906, *Lansing v. Michigan C. R. Co.*, 143 Mich. 48, 106 N. W. 692 (disbarment of an attorney for criminal conduct; *Dickinson v. Dustin*, *supra*, explained).

1906, *People v. DeCamp*, 146 Mich. 533, 109 N. W. 1047 ("a crime"). 1913, *Lunde v. Detroit United R. Co.*, — Mich. —, 143 N. W. 45 (personal injuries; cross-examination of the woman to her past unchaste life, held allowable in the trial Court's discretion; reviewing prior cases).

*Minnesota*: Par. (2): 1905, *Malone v. Stephenson*, 94 Minn. 222, 102 N. W. 372 (civil arson; questions as to domestic morals, etc., held improperly allowed in the trial Court's discretion). 1905, *State v. Bryant*, 97 Minn. 8, 105 N. W. 974 (liquor sale; cross-examination of the prosecuting witness as to a recent forgery, flight, and arrest, held properly excluded; foregoing cases not cited). 1906, *State v. Peterson*, 98 Minn. 210, 108 N. W. 6 (liquor-selling; trial Court's discretion confirmed). 1907, *State v. Quirk*, 101 Minn. 334, 112 N. W. 409 (murder; cross-examination of the defendant to his gambling career, held not improper in discretion). 1909, *State v. Fournier*, 108 Minn. 402, 122 N. W. 329 (cross-examination held improper on the facts).

*Mississippi*: Par. (2): 1904, *Ivy v. State*, 84 Miss. 264, 36 So. 265 (murder; cross-examination of the defendant's mistress as to her children by other fathers, held improper).

1907, *Starling v. State*, 89 Miss. 328, 42 So. 798 (to a defendant, whether he had been charged with any other offence, excluded).

Par. (4): 1905, *Cook (Dan) v. State*, 85 Miss. 738, 38 So. 111 (the preposterous ruling is made that convictions of crime to discredit cannot be used "unless the witness had at first denied it"; no authority is or could be cited for this ruling).

1905, *Cook (Lon) v. State*, 85 Miss. 738, 38 So. 111 (similar to the preceding).

*Missouri*: Par. (1): 1905, *Wright v. Kansas City*, 187 Mo. 678, 86 S. W. 452.

Par. (2): 1907, *State v. Long*, 201 Mo. 664, 100 S. W. 587 (cross-examination to the fact of a detestable crime, allowed in the trial Court's discretion). 1912, *State v. Bobbitt*, 242 Mo. 273, 146 S. W. 799 (cross-examination to improper conduct, held not improperly ex-

[*Note 1 — continued*]

cluded in the trial Court's discretion). 1913, *Wendling v. Bowden*, 252 Mo. 647, 161 S. W. 774 (not clear).

Par. (4): 1905, *State v. Heusack*, 189 Mo. 295, 88 S. W. 21 (statute applied to allow questions as to a misdemeanor). 1905, *State v. Spivey*, 191 Mo. 87, 90 S. W. 81 (but the question should ask directly for the conviction, and not as to being in the penitentiary, etc.).

1905, *State v. Woodward*, 191 Mo. 617, 90 S. W. 90 (compare the rule of § 1270, *post*). 1907, *State v. Brooks*, 202 Mo. 106, 100 S. W. 416 (conviction for manslaughter, admitted against defendant as witness). 1907, *State v. Arnold*, 206 Mo. 589, 105 S. W. 641 (conviction for misdemeanor, admissible).

*Montana*: Par. (2): 1904, *State v. Howard*, 30 Mont. 518, 77 Pac. 50 (cross-examination as to being under arrest, allowed on the facts).

1904, *State v. Rogers*, 31 Mont. 1, 77 Pac. 293 (questions as to a plan to commit another crime, excluded). 1909, *State v. Crowe*, 39 Mont. 174, 102 Pac. 579 (cross-examination to the witness' prior misdeeds, excluded). 1912, *State v. Biggs*, 45 Mont. 400, 123 Pac. 410 (cross-examination held properly limited).

*Nebraska*: Par. (1): 1910, *Wilson v. State*, 87 Nebr. 638, 128 N. W. 38 (defendant's desertion from the army). 1914, *Koepke v. Delfs*, — Nebr. —, 146 N. W. 962 (bastardy; extrinsic testimony to plaintiff's intercourse with others, excluded).

Par. (2): 1905, *Razee v. State*, 73 Nebr. 732, 103 N. W. 438 (criminal libel; cross-examination of the accused as to domestic relations, etc., held improper; no authority cited).

*Nevada*: Par. (4): 1905, *State v. Roberts*, 28 Nev. 350, 82 Pac. 100 (conviction must be of felony). 1905, *State v. Lawrence*, 28 Nev. 440, 82 Pac. 614 (cross-examination of a defendant as to convictions of felonies, allowed).

*New Hampshire*: Par. (4): 1909, *Genest v. Odell Mfg. Co.*, 75 N. H. 365, 74 Atl. 593 (conviction for drunkenness, excluded).

*New Jersey*: Par. (1): 1903, *State v. Hendrick*, 70 N. J. L. 41, 56 Atl. 247.

Par. (2): 1905, *State v. Mount*, 72 N. J. L. 365, 61 Atl. 259 (assault and battery; cross-examination of the defendant to prior convictions for assault, allowed).

Par. (3): St. 1906, c. 206, § 6, c. 208, § 5 (privilege abolished for bribery and other offences).

Par. (4): 1906, *State v. Mount*, 73 N. J. L. 582, 64 Atl. 124 (the accused, on a charge of assault, having admitted a prior conviction for assault, further inquiries as to the aggravated nature of the prior assault, and rebuttal testimony contradicting his version of it, held improper). 1909, *Hill v. Maxwell*, 77 N. J. L. 766, 73 Atl. 501 (*State v. Henson* followed; here on a civil trial for battery the defendant was asked as to having pleaded *nolo contendere* to an indictment for the battery).

*New York*: Par. (1): 1904, *People v. De Garmo*, 179 N. Y. 130, 71 N. E. 736. 1910, *Potter v. Browne*, 197 N. Y. 288, 90 N. E. 812 (witness plaintiff not allowed to state his expressed reasons for discharging C., on the pretext of explaining the bias of C. as a witness).

Par. (2): 1904, *People v. De Garmo*, 179 N. Y. 130, 71 N. E. 736 (defendant allowed to be cross-examined, on a charge of manslaughter by beating, to other acts of violence). 1906, *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287 (*People v. Crapo* approved, and the rule applied to an accused). 1909, *People v. Morrison*, 195 N. Y. 116, 86 N. E. 1120, 88 N. E. 21 ("the defendant in an action either civil or criminal cannot be asked on cross-examination whether he has been indicted"; and this rule applies equally to a witness not a party; following *People v. Cascone*).

Par. (4): St. 1909, c. 240, § 61, p. 408 (re-enacting P. C. § 714, now Consol. L., c. 88, § 2444).

*North Carolina*: Par. (3): Rev. 1905, § 4407 (in election contests, no witness shall be excused from discovering his qualification to vote, "except as to his conviction for an offence which would disqualify him").

*North Dakota*: Par. (2): 1909, *State v. Nyhus*, 19 N. D. 326, 124 N. W. 71 (cited more fully *post*, § 2276, n. 5). 1914, *State v. Oien*, — N. D. —, 145 N. W. 424 (cross-examination to an arrest, not allowed).

[Note 1 — continued]

**Oklahoma:** Par. (1): 1912, *Hooper v. State*, 7 Okl. Cr. 43, 121 Pac. 1087 (illegal sale of liquor; information charging another sale, held inadmissible).

Par. (2): 1904, *Flohr v. Terr.*, 14 Okl. 477, 78 Pac. 565 (larceny; cross-examination of witnesses to adultery, excluded). 1905, *Hill v. Terr.*, 15 Okl. 212, 79 Pac. 757 (discretion of the trial Court controls). 1908, *Slater v. U. S.*, 1 Okl. Cr. 275, 98 Pac. 110 (whether he had ever been arrested, and for what, not allowed; forceful opinion, by Furman, P. J.). 1908, *Price v. State*, 1 Okl. Cr. 358, 98 Pac. 447 (cross-examination as to marrying a woman with whom he had committed adultery, not allowed). 1909, *Cannon v. Terr.*, 1 Okl. Cr. 600, 99 Pac. 622 (cross-examination of defendant's wife as to prostitution, etc., allowed). 1909, *Caples v. State*, — Okl. —, 104 Pac. 493 (defendant's prosecution for statutory rape of his wife before marriage, admitted as relevant to disprove his alleged motive for killing; but the Court in referring to *Price v. State* and *Slater v. U. S.*, *supra*, leave the precise rule for witnesses unstated). 1912, *McKinnon v. Lively*, 31 Okl. 433, 122 Pac. 124 (cross-examination to lawsuits and indictments, held improper). 1912, *Watson v. State*, 7 Okl. Cr. 590, 124 Pac. 1101 (murder; cross-examination of the accused to former killings, held improper on the facts). 1914, *Castleberry v. State*, — Okl. Cr. —, 139 Pac. 132 (rape under age; woman-witness for defendant, allowed to be cross-examined to immodest conduct with him); 1914, *Cobb v. Oklahoma Pub. Co.*, — Okl. —, 140 Pac. 1079 (cross-examination of plaintiff, in a suit for libel charging the plaintiff with fraud; inquiry into other similar transactions, allowed in discretion).

Par. (4): 1909, *Keys v. U. S.*, 2 Okl. Cr. App. 647, 103 Pac. 874 (whether he had been in jail, not allowed). 1912, *State v. Elliott*, — Okl. Cr. —, 124 Pac. 86 (conviction for "boot-legging," admissible). 1913, *Busby v. State*, — Okl. Cr. —, 136 Pac. 598 (conviction 17 years before, admitted).

**Pennsylvania:** Par. (2): 1904, *Com. v. Williams*, 209 Pa. 529, 58 Atl. 922 ("Weren't you running a sporting-house?" to a woman, excluded; ignoring *Elliott v. Bayles*, *supra*, and erroneously treating it on the principle of § 924, *ante*).

Par. (4): 1909, *Com. v. Racco*, 225 Pa. 113, 73 Atl. 1067 (murder; defendant allowed in discretion to be asked whether he had been convicted of larceny, battery, etc.).

**South Carolina:** Par. (2): 1904, *Kennington v. Catoe*, 68 S. C. 470, 47 S. E. 719 (questions to an unmarried woman as to her children, etc., held properly excluded in the trial Court's discretion). 1906, *State v. Stukes*, 73 S. C. 386, 53 S. E. 643 (murder; cross-examination to the defendant's relations with a woman connected with the case, allowed). 1908, *State v. Mills*, 79 S. C. 187, 60 S. E. 664 (murder; cross-examination of a defendant to prior "difficulties," allowable only so far as they affect credibility).

**South Dakota:** Par. (2): 1904, *State v. Smith*, 18 S. D. 341, 100 N. W. 740 (rape under age; cross-examination of the prosecutrix to prostitution, etc., excluded). 1913, *State v. Sy-singer*, 25 S. D. 110, 125 N. W. 879 (questions as to living under assumed name, allowed). 1911, *Richardson v. Gage*, 28 S. D. 390, 133 N. W. 692 (question as to an arrest for stealing, held improper).

**Tennessee:** Par. (2): 1912, *Hughes v. State*, 126 Tenn. 40, 148 S. W. 543 (murder; cross-examination of defendant to former murders, held proper).

**Texas:** Par. (2): 1911, *Campbell v. State*, 62 Tex. Cr. 561, 138 S. W. 607 (rape; cross-examination to libertinous conduct, held improper). 1911, *Wright v. State*, 63 Tex. Cr. 429, 140 S. W. 1105 (cross-examination to a former indictment allowable, but not to a former arrest on complaint merely).

Par. (4): 1903, *Lee v. State*, 45 Tex. Cr. 51, 73 S. W. 407 (indictments admissible; *Henderson, J.*, diss.). 1907, *Fannin v. State*, 51 Tex. Cr. 41, 100 S. W. 916 (rule of *Lee v. State* recognized, that prior indictments could be used to impeach). 1907, *Cecil v. State*, — Tex. Cr. —, 100 S. W. 390 (former indictment for felony against defendant as witness, admissible). 1912, *Moore v. State*, — Tex. Cr. —, 144 S. W. 598 (discussing the question how far instructions should limit the use of such evidence). 1913, *Vick v. State*, — Tex. Cr. —, 159 S. W. 50 (conviction of felony 13 years before, held inadmissible on the facts; the opinions differ

[*Note 1 — continued*]

as to the precise rule of law; in the opinion of Prendergast, J., the prior cases are collected).

*United States*: Par. (2): 1906, *Glover v. U. S.*, 147 Fed. 426, C. C. A. ("a mere accusation or arrest," not allowed to be asked about).

1906, *Miller v. Terr.*, 149 Fed. 331, 336, — C. C. A. — (whether stolen property had been found in his possession, whether he had associated with persons reputed to be thieves, etc., not allowed). 1914, *Nashville I. R. Co. v. Barnum*, 2d C. C. A., 212 Fed. 634 (accepting the rule of Third Gt. W. Turnpike Co. *v. Loomis*, N. Y.).

Par. (3): U. S. St. 1901, c. 809, Mar. 2, 31 Stat. L. 950 (civilians before a court-martial; privilege recognized).

*Utah*: Par. (2): 1909, *State v. Williams*, 36 Utah 273, 103 Pac. 250 (rape under age; cross-examination of accused to similar conduct with other little girls, excluded).

1911, *State v. Thorne*, 39 Utah 208, 117 Pac. 58 (a witness may not be asked as to "mere specific acts or conduct of a wrongful, culpable, or even incriminating character not amounting to the commission of a crime," this being the "prevailing rule" in the United States; no authority cited; this is the first time that the anomalous rule of the California Code has been described as the "prevailing rule"; it is the rule of a very small minority of States; *Conway v. Clinton*, *supra*, not cited).

1913, *State v. Reese*, — Utah —, 135 Pac. 271 (bastardy; questions to a witness as to having himself embraced the prosecutrix' sister on the evening of the alleged act of intercourse, during a ride taken by all four, excluded, purporting to follow the quotation *ante* from Third Gt. Western Turnpike Co. *v. Loomis*, N. Y., and to prohibit all questions as to chastity; the opinion fails to observe any distinction between the question and the privilege not to answer, though quoting Comp. L. 1907, § 3431; the opinion's concession that "a few sporadic cases hold such questions proper" is a cheerful way of treating the general rule in England and America; and its citation of *State v. Shockley*, 29 Utah 25, 80 Pac. 865, as supporting this ruling, gives too much weight to a lamentable decision which ought rather to have been repudiated).

*Vermont*: Par. (2): 1905, *State v. Stimpson*, 78 Vt. 124, 62 Atl. 14 (rape under age; cross-examination of prosecutrix as to prior prostitution, not admitted to affect credit).

*Virginia*: Par. (2): 1906, *Southern R. Co. v. Blanford's Adm'x*, 105 Va. 373, 54 S. E. 1 (whether a collision was caused by a wrong setting of a switch; the switchman having testified that it was properly set, a cross-examination as to having made a similar mistake shortly before, was allowed "to test his accuracy, veracity, or credibility," on the principle of § 979, *ante*; but testimony from another witness would have been excluded).

Par. (4): 1853, *Anglea v. Com.*, 10 Gratt. 696 (under the Code, conviction of felony is admissible, even after a pardon). 1910, *Davidson v. Watts*, 111 Va. 394, 69 S. E. 328 (conviction for larceny may be shown, though the sentence has been served).

*Washington*: Par. (1): 1913, *State v. Shaw*, 75 Wash. 581, 135 Pac. 20 (murder; the accused having admitted on cross-examination that he had been discharged from the army for bad conduct, a military certificate to the same effect was excluded, on the ground of the inadmissibility of a certificate; ignoring the present and better ground).

Par. (2): 1904, *State v. Eder*, 36 Wash. 482, 78 Pac. 1023 (cross-examination of the defendant's wife to show that he had been confined in the penitentiary, held improper).

1905, *State v. Mann*, 39 Wash. 144, 81 Pac. 561 (question as to having been tarred and feathered, held properly excluded).

1906, *State v. Belknap*, 44 Wash. 605, 87 Pac. 934 (seduction; cross-examination of witnesses testifying to other intercourse with the prosecutrix was held to exceed the trial Court's discretion; unsound on the facts). 1910, *State v. Katon*, 47 Wash. 1, 91 Pac. 250 (trial Court's discretion controls). 1910, *State v. Cottrell*, 56 Wash. 543, 106 Pac. 179 (forgery; cross-examination to other frauds, held improper on the facts).

Par. (4): 1903, *State v. Champoux*, 33 Wash. 339, 74 Pac. 557 (conviction for murder, appealed from and pending, admitted). St. 1909, c. 249, p. 900, § 38 (quoted *ante*, § 488).

[*Note 1 — continued*]

1912, *State v. Overland*, 68 Wash. 566, 123 Pac. 1011 (under Crim. Code 1909, § 38, Rem. & Ball. Code, § 2290, any crime may be shown; even though a misdemeanor).

*Wisconsin*: Par. (2): 1903, *Meehan v. State*, 119 Wis. 621, 97 N. W. 173 (assault, question to the prosecuting witness, "whether he ran a sporting-house," excluded). 1905, *State v. Nergaard*, 124 Wis. 414, 102 N. W. 899 (violation of game law; questions to defendant as to prior arrest for a similar offence, held not prejudicial error, as he admitted his conviction therefor; questions as to being under police surveillance, held allowable in discretion). 1908, *Dungan v. State*, 135 Wis. 151, 115 N. W. 350 (assault with intent to rape; questions as to the accused's occupation with prostitutes, held allowable in the trial Court's discretion; good opinion by Dodge, J.). 1909, *Farrell v. Phillips*, 140 Wis. 611, 123 N. W. 117 (a single act of contempt of court many years before, held improperly admitted).

Par. (4): 1906, *Koch v. State*, 126 Wis. 470, 106 N. W. 531 (arrest and conviction for being drunk and disorderly; question allowed; the statute held to include misdemeanors, but not violations of a city ordinance).

1909, *Farrell v. Phillips*, 140 Wis. 611, 123 N. W. 117 (contempt of court is not a conviction of crime; and the details of the offence cannot be read).

*Wyoming*: Par. (2): 1909, *Eads v. State*, 17 Wyo. 490, 101 Pac. 946 (cross-examination to an arrest for shooting in a house of prostitution, held not improperly excluded in the trial Court's discretion).

#### § 988. Rumors of Particular Misconduct, etc., distinguished.

[*Note 1; add:*]

1905, *Harrison v. State*, — Ala. —, 40 So. 57 (defendant's character). 1906, *Williams v. State*, 144 Ala. 14, 40 So. 405 (witness' character). 1908, *Way v. State*, 155 Ala. 52, 46 So. 273 (like *Moulton v. State*). 1909, *Andrews v. State*, 159 Ala. 14, 48 So. 858 (murder; "how many fights do you recall that he has had?" allowed). 1909, *Lowman v. State*, 161 Ala. 47, 50 So. 43 (cross-examination to charges of illegal liquor-selling, allowed). 1912, *Ragland v. State*, — Ala. —, 59 So. 637 (the rumors cross-examined about must have been heard before the time of the alleged offence). 1913, *Watts v. State*, 8 Ala. App. 264, 63 So. 15 (wife-murder; re-direct examination of a witness to rumors of the accused having killed a prior wife, not admitted here; the witness having been first called for the State and having then on cross-examination testified only to a qualified good character of the accused).

1904, *Long v. State*, 72 Ark. 427, 81 S. W. 387, *semble*.

1894, *People v. Gordon*, 103 Cal. 573, 37 Pac. 535 (rule stated).

1904, *People v. Perry*, 144 Cal. 748, 78 Pac. 284 (rule applied).

1906, *People v. Weber*, 149 Cal. 325, 86 Pac. 671 (cross-examination as to being told of misconduct, allowed). 1912, *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435. 1914, *State v. Jones*, 48 Mont. 505, 139 Pac. 441 (enforcing the distinction stated above in the text).

1909, *Hunter v. State*, 133 Ga. 78, 65 S. E. 154 (allowed). 1911, *Dotson v. State*, 136 Ga. 243, 71 S. E. 164 (murder; cross-examination of witness to defendant's good character, as to having seen defendant in a fight, allowed). 1914, *Frank v. State*, 141 Ga. 243, 80 S. E. 1016.

1914, *McCreary v. Com.*, 158 Ky. 612, 165 S. W. 981 (rule applied).

1905, *State v. Richards*, 126 Ia. 497, 102 N. W. 439 (where actual character has been testified to, the cross-examination may ask as to actual misconduct). 1911, *State v. Kimes*, 152 Ia. 240, 132 N. W. 180 (like *State v. Arnold*; but why should the opinion cite an Alabama case and ignore the other Iowa precedents?).

1906, *State v. LeBlanc*, 116 La. 822, 41 So. 105. 1911, *State v. Green*, 127 La. 830, 54 So. 45 (liquor-selling).

1913, *People v. Huff*, 173 Mich. 620, 139 N. W. 1033 (cross-examination of a good character witness to the defendant's conduct after the date of the act charged, excluded).

[*Note 1 — continued*]

1891, *State v. Crow*, 107 Mo. 345, 17 S. W. 745 (rule applied).  
 1904, *State v. Brown*, 181 Mo. 192, 79 S. W. 1111. 1908, *State v. Harris*, 209 Mo. 423, 108 S. W. 28 (allowable in the trial Court's discretion).  
 1908, *People v. Laudiero*, 192 N. Y. 304, 85 N. E. 132.  
 1905, *Coxe v. Singleton*, 139 N. C. 361, 51 S. E. 1019 (*Barton v. Morphes*, approved).  
 1912, *State v. Wilson*, 158 N. C. 599, 73 S. E. 812 (murder; cross-examination to repute of defendant as prostitute, allowed, but not repute of particular acts).  
 1907, *State v. Dickerson*, 77 Oh. 34, 82 N. E. 969 (cross-examination to rumored misconduct of the accused, here held improper, because the witnesses cross-examined had not testified to the accused's reputation, but to their personal opinion of his character, as allowed in this State).  
 1908, *State v. Doris*, 51 Or. 136, 94 Pac. 44 (allowed, but a defendant-witness may explain the rumors; the further details to be in the trial Court's discretion).  
 1911, *Com. v. Colandro*, 231 Pa. 343, 80 Atl. 571 (excluded; ignoring the present principle).  
 1903, *Holloway v. State*, 45 Tex. Cr. 303, 77 S. W. 14 (here erroneously allowing proof of the acts, not merely the rumors).

§ 991. **Skilled Witness; Evidencing Incapacity, etc.**

[*Note 3; add:*]

1903, *State v. Snyder*, 67 Kan. 801, 74 Pac. 231 (illegal sale of beer; testing of a witness for the prosecution by his drinking from an offered bottle and then saying whether it was the same as that sold to him, excluded, on the ground of collateral issues).  
 1906, *People v. Pekarz*, 185 N. Y. 470, 78 N. E. 294 (cross-examination of an alienist; *Hoag v. Wright*, *supra*, approved).

§ 995. **Memory; Testing the Capacity, etc.**

[*Note 2; add:*]

In *McDermott's Estate*, 148 Cal. 43, 82 Pac. 842 (1905) is found the record of a witness whose testimony exhibited Majocchi's striking trait.

[*Note 3; add:*]

1906, *Southern R. Co. v. Blanford's Adm'r*, 105 Va. 373, 54 S. E. 1 (negligence of a switchman cited *ante*, § 987, n. 1).

§ 1003. **Test of Collateralness.**

[*Note 3; add:*]

1911, *Brock v. State*, 101 Ark. 147, 141 S. W. 756.  
 1912, *Thompson-Starrett Co. v. Warren*, 38 D. C. App. 310.  
 1913, *Sanger v. Bacon*, — Ind. —, 101 N. E. 1001 (falsification of a will).  
 1906, *State v. Arthur*, 135 Ia. 48, 109 N. W. 1083 (burglary; B. being one of the persons breaking in, defendant's statement that he did not know B. was allowed to be contradicted).  
 1906, *Finn v. New England T. & T. Co.*, 101 Me. 279, 64 Atl. 490 (a foreman's attempt to suppress a newspaper account of the accident, held collateral).  
 1905, *McKenzie v. Banks*, 94 Minn. 496, 103 N. W. 497.  
 1904, *Ferguson v. State*, 72 Nebr. 350, 100 N. W. 800.  
 1913, *Launikitas v. Wilkesbarre & W. V. T. Co.*, 241 Pa. 458, 88 Atl. 703 (but why should the opinion quote six prior opinions and write five hundred lines, on a point settled for two hundred years past?).  
 1911, *Comstock's Adm'r v. Jacobs*, 84 Vt. 277, 78 Atl. 1017.

[*Note 3 — continued*]

1910, *Wharton v. Tacoma F. D. Co.*, 58 Wash. 124, 107 Pac. 1057.

1912, *State v. Stone*, 66 Wash. 625, 120 Pac. 76.

The following corollary seems sensible:

1910, *People v. Leonardo*, 199 N. Y. 432, 92 N. E. 1060 (murder; identity of defendant's mother's cameo ring; the prosecution allowed to contradict the defendant's assertions as to the ring, made on cross-examination, because the defendant, by calling the mother to corroborate the defendant, had "voluntarily assumed to make the collateral issue a material one").

### § 1005. Facts Discrediting in Respect to Bias, etc.

[*Note 1, col. 1; add:*]

1909, *People v. Connelly*, 157 Mich. 260, 122 N. W. 80 (husband-murder; the wife's chastity before marriage, not allowed to be contradicted; *Hooker, J.*, diss., on the facts; neither of the opinions cites any of the foregoing rulings in this jurisdiction).

1909, *Schnase v. Goetz*, 18 N. D. 594, 120 N. W. 553.

[*Note 1; add:*]

1909, *Dotterer v. State*, 172 Ind. 357, 88 N. E. 689 (accomplice denying his presence, impeached by a judgment of conviction for his part in the battery).

1909, *Com. v. Racco*, 225 Pa. 113, 73 Atl. 1067.

[*Note 3, par. 1; add:*]

1905, *Morris v. State*, — Ala. —, 39 So. 608.

1906, *State v. Craft*, 117 La. 213, 41 So. 550 (similar to *Thomas v. David*, quoted *supra*).

1905, *State v. Malmberg*, 14 N. D. 523, 105 N. W. 614.

1911, *Gibbons v. Terr.*, 5 Okl. Cr. 212, 115 Pac. 129.

[*Text, p. 1164, par. (d), at the end; add:*]

*Arthur Train*, in the "Sunday Magazine," Nov. 7, 1908.

"Most cases turn on an unconsidered point. A prosecutor once lost what seemed to him the clearest sort of a case. When it was all over, and the defendant had passed out of the courtroom rejoicing, he turned to the foreman and asked the reason for the verdict.

'Did you hear your chief witness say he was a carpenter?' inquired the foreman.

'Why, certainly,' answered the district attorney.

'Did you hear me ask him what he paid for that ready-made pine door he claimed to be working on when he saw the assault?'

The prosecutor recalled the incident and nodded.

'Well, he said ten dollars — and I knew he was a liar. A door like that don't cost but four-fifty!'

It is, perhaps, too much to require a knowledge of carpentry on the part of a lawyer trying an assault case. Yet the juror was undoubtedly right in his deduction."

[*Note 6; add:*]

1908, *Pittsburgh, C. C. & St. L. R. Co. v. O'Conner*, 171 Ind. 686, 85 N. E. 969 (intoxication).

[*Text, p. 1166, at the end; add:*]

1903, *Hon. A. C. Plowden*, "Grain or Chaff; the Autobiography of a Police Magistrate," p. 154: "In the Tichborne Case, by a curious coincidence, at a sudden turn in the fortunes of the case, I was enabled to volunteer a piece of evidence which was considered sufficiently important to require my being called as a witness for the Crown. A witness had been called for the defence, Jean Luie; he was afterwards convicted of perjury, but at the moment his

[Text, p. 1166 — continued]

evidence was damaging, and unless it could be controverted there was no chance of a conviction. It was one of the sensational episodes of the trial. Among other lies, he swore that he came to London from New York, by a steamer called the *Circassian*, arriving on a certain day in May. As it happened, I had landed at Liverpool that same day, [returning from my American tour,] and *my* steamer was the *Circassian*, — only it had sailed from Quebec, not from New York. The coincidence was so striking that I immediately whispered it to Mr. Hawkins, Q. C., who was conducting the case for the Crown, and behind whom I was seated. He at once asked leave of the Court to interpose me as a witness, and I was examined where I stood, in my wig and gown."

[Note 7; add:]

1904, *Smith v. Lehigh Valley R. Co.*, 177 N. Y. 379, 69 N. E. 729 (plaintiff not allowed to contradict the defendant's engineer, who testified on cross-examination that the bell had been automatically ringing for several miles, by showing that it did not ring at certain points within that distance; the opinion by Parker, C. J., confuses the issue; Cullen, J., diss.).

A peculiar example of the operation of this principle is seen in the cases cited *ante*, § 228, n. 6, § 231, n. 1, and § 263, especially the last, where a witness has testified to a rumor or repute as causing a party's alleged *belief* or deranged mental state, and then the opponent offers to *disprove the fact* thus alleged to have been rumored or reported; its non-existence makes less probable the alleged report of it, and thus discredits the witness; from the point of view of the present rule, there ought to be no obstacle.

[Note 9, l. 1; add:]

and the following case: 1906, *State v. Goodson*, 116 La. 388, 40 So. 771 (a Syrian witness having insisted that he could not speak English, and having testified through an interpreter, the fact of his ability to speak and understand it was allowed to be shown to discredit him; sensible opinion by Porter, J., trial judge).

[Note 10; add:]

But the following exceptional case "proves the rule"; 1906, *Gulf C. & S. F. R. Co. v. Matthews*, 100 Tex. 63, 93 S. W. 1068 (a witness to the whereabouts of the deceased testified that he had told W. about the deceased M., soon after the death; W. was allowed to contradict this, because on the facts if the witness had not mentioned to anybody, on hearing of M.'s death, what he knew about M., it indicated that his testimony was fabricated; good opinion by Williams, J.).

## § 1006. Collateral Questions on Cross-Examination.

[Text, p. 1168, par. 1; add:]

1904, *James W. Osborne, Esq.*, former Assistant District Attorney of New York City, in the "Sunday Magazine," Nov. 27: "The rule in the case of bias is the familiar one of 'give the witness rope.' In other words, give his bias full swing, and he will reveal it so unmistakably that the truth will come out. In an amusing instance of this kind in Brooklyn the late Charles Patterson revealed the quickness of his perceptions and his salient possession of that ingenuity which every lawyer needs in order to be a good cross-examiner. The case was one for damages, a peddler's cart having been run over by a train and the peddler having been killed. The point at issue was that which has been laid down by the Courts as 'look and listen.' The question was as to whether the peddler, in driving across the track, looked and listened and exercised proper care. A highly respectable farmer testified that he saw the wagon drive upon the track; that he did not see the peddler, who was thus presumably lying back in the cart, asleep or dozing, and that he distinctly

[Text, p. 1168 — continued]

and unmistakably heard the engine blow its whistle and ring its bell. He insisted upon this, and although it did not appear to Mr. Patterson that the blowing whistle and ringing bell were true, the evidence could not be shaken. He accordingly asked: 'You came to town with the engineer and fireman of the train, didn't you?' 'Yes.' 'Good fellows, aren't they?' 'Yes.' 'Good friends of yours?' 'Yes.' 'What did they do for you, while in town? Did they take you around?' 'Yes.' 'Where did they take you?' 'To the Eden Musée.' 'You saw all there was to see at the Eden Musée?' 'Yes.' 'Are you sure?' 'Yes.' 'Saw the Chamber of Horrors?' 'Yes.' 'All the curiosities?' 'Yes.' 'Saw the little toy locomotive going around on the track?' 'Yes.' 'Hear its little whistle blow in the darkness?' 'Yes.' 'Hear it ring its little bell?' 'Yes.' 'Plainly?' 'Yes.' 'Now, sir,' said Mr. Patterson, '*there is no little locomotive at the Eden Musée; it never blew its whistle, and it never rang its bell. You explain to the jury how you can swear to such statements.*' The bias of the witness who, Mr. Patterson said, could 'hear bells and whistles anywhere, at any time,' had led him entirely astray, and his testimony, which was strongly biased, was completely discredited."

[Note 2, l. 7; add:]

1909, *R. v. Butterfield*, 18 Ont. L. R. 347 (cross-examination of a witness for the prosecution, on a charge of illegal liquor-selling, as to their knowledge of other sales on the same day, for which also a charge was pending against the same defendant, held refusable in the trial Court's discretion; following *Spenceley v. Wilmot*).

[Note 3; add, under *Contra*:]

1905, *Cook (Dan) v. State*, 85 Miss. 738, 38 So. 110 (conviction of crime).

#### § 1007. Contradicting Answers on the Direct Examination, etc.

[Note 1; add:]

1910, *Adams v. State*, 93 Ark. 260, 124 S. W. 766 (following *McArthur v. State*, 59 Ark. 431).

[Note 3; add:]

1905, *Louisville & N. R. Co. v. Quinn*, 146 Ala. 330, 39 So. 756.

The ruling in *Brown v. State*, 142 Ala. 287, 38 So. 268 (1904), that the opponent cannot show error in a *statement of the testimony of an absent witness* not formally introduced nor used is of course sound.

#### § 1008. *Falsus in Uno, Falsus in Omnibus.*

[Note 1; add:]

In *Turner v. State*, 95 Miss. 879, 50 So. 629 (1909), Smith, J., diss., approves the above views).

Distinguish the *general charge* that a witness' testimony may be rejected if the jury believe that he has not sworn truthfully in general:

1910, *Waldrop v. State*, 98 Miss. 567, 54 So. 66.

#### § 1010. *Falsus in Uno; Second Form of Rule.*

[Note 1, p. 1173; add:]

1903, *People v. Stevens*, 141 Cal. 488, 75 Pac. 62 ("distrust").

1906, *Ex parte Vandiveer*, 4 Cal. App. 650, 88 Pac. 993 (distrusted, not necessarily rejected).

1907, *People v. Grill*, 151 Cal. 592, 91 Pac. 515.

1909, *State v. O'Rourke*, — Nebr. —, 124 N. W. 138 (more inconclusive logic-chopping).

1911, *Henry v. State*, 6 Okl. Cr. 430, 119 Pac. 278.

1906, *Com. v. Ieradi*, 216 Pa. 87, 64 Atl. 889.

[*Note 2; add:*]

1907, *Addis v. Rushmore*, — N. J. L. —, 65 Atl. 1036 (it is “not a mandatory rule of evidence”).

1909, *Ducharme v. Holyoke St. R. Co.*, 203 Mass. 384, 89 N. E. 561 (“but it is also true that a jury may apply it”).

[The above Notes 1 and 2 are erroneously numbered in the original, and should be numbered 2 and 3.]

§ 1011. **Same: Third Form of Rule.**

[*Note 1; add:*]

1912, *Pelham & H. R. Co. v. Elliott*, 11 Ga. App. 621, 75 S. E. 1062.

§ 1012. **Same: Fourth Form of Rule.**

[*Note 1; add:*]

1906, *Chandler v. State*, 124 Ga. 821, 53 S. E. 91, *semble*.

1907, *State v. Penna*, 35 Mont. 535, 90 Pac. 787. 1907, *State v. Tracey*, 35 Mont. 552, 90 Pac. 791.

1905, *Titterington v. State*, 75 Nebr. 153, 106 N. W. 421. 1906, *Barber v. State*, 75 Nebr. 543, 106 N. W. 423.

1909, *Rea v. State*, 3 Okl. Cr. 269, 105 Pac. 381.

1909, *Steber v. Chicago & N. W. R. Co.*, 139 Wis. 10, 120 N. W. 502.

[*Note 2; add:*]

1905, *Little v. State*, 145 Ala. 662, 39 So. 674.

1905, *State v. Waln*, 14 Ida. 1, 80 Pac. 221.

1904, *Chicago & Alton R. Co. v. Kelley*, 210 Ill. 449, 71 N. E. 355 (but the corroborating evidence need not be believed by the jury, in order to make the rule applicable; this is a good instance of the jargon of futile intricacies to which this rule gives rise). 1904, *Weston v. Teufel*, 213 Ill. 291, 72 N. E. 908 (the corroboration must be by “credible,” not merely “competent” witnesses; a vain quibble). 1906, *United Breweries Co. v. O'Donnell*, 221 Ill. 334, 77 N. E. 547.

1906, *State v. Fuller*, 34 Mont. 12, 85 Pac. 369.

1904, *Suckow v. State*, 122 Wis. 156, 99 N. W. 440. 1909, *Miller v. State*, 139 Wis. 57, 119 N. W. 850 (this seems to be now the settled form in this State).

§ 1013. **Same: There must be a Conscious Falsehood.**

[*Note 1; add:*]

1906, *Hamilton v. State*, 147 Ala. 110, 41 So. 940.

1904, *Lee v. State*, 72 Ark. 436, 81 S. W. 385 (“wilfully”).

1904, *Glenn v. Augusta R. & E. Co.*, 121 Ga. 80, 48 S. E. 684.

1905, *Maguire v. People*, 219 Ill. 16, 76 N. E. 67 (“wilfully and corruptly”).

1907, *Pittsburg, C. C. & St. L. R. Co. v. Haislup*, — Ind. —, 79 N. E. 1035 (“knowingly and intentionally”).

1905, *Sardis & D. R. Co. v. McCoy*, 85 Miss. 391, 37 So. 706 (“wilfully, knowingly, and corruptly”).

1909, *Turner v. State*, 95 Miss. 879, 50 So. 629.

*Mont.*: 1907, *State v. Penna*, 35 Mont. 535, 90 Pac. 787.

1903, *Nielson v. Cedar Co.*, 70 Nebr. 637, 97 N. W. 826 (“knowingly and wilfully”).

1904, *Nielson v. Cedar Co.*, — Nebr. —, 98 N. W. 1090.

1912, *Douglas v. Terr.*, — N. M. —, 124 Pac. 339.

[Note 1 — continued]

1905, *State v. Johnson*, 14 N. D. 288, 103 N. W. 565.

1909, *Kaufman v. Boismier*, 25 Okl. 252, 105 Pac. 326 (a false statement is presumed to be wilful).

[Note 2; add:]

1905, *Powell v. State*, 122 Ga. 571, 50 S. E. 369 ("successfully impeached"). 1906, *Georgia R. & B. Co. v. Andrews*, 125 Ga. 85, 54 S. E. 76 ("successfully impeached" suffices; this is ruled under the authority of Code 1895, § 5295, quoted *ante*, § 1008, n. 1, which does not justify it).

Of course it is improper to charge that self-contradictions may *per se* create a reasonable doubt of guilt in a criminal case:

1904, *Brown v. State*, 142 Ala. 287, 38 So. 268.

[Note 3; add:]

1904, *Chicago City R. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28 (but wilful and knowing "exaggeration" equally involves the rule). 1906, *Chicago & S. L. R. Co. v. Kline*, 220 Ill. 334, 77 N. E. 229 (yet the rule does not apply to a witness who has "knowingly belittled any material fact"). 1906, *Chicago City R. Co. v. Ryan*, 225 Ill. 287, 80 N. E. 116. 1907, *Godair v. Ham Nat'l Bank*, 225 Ill. 572, 80 N. E. 407.

1908, *People v. Laudiero*, 192 N. Y. 304, 85 N. E. 132.

1911, *State v. Meyers*, 59 Or. 537, 117 Pac. 818 ("false" implies "wilfully").

#### § 1014. Same: Falsehood must be on a Material Point.

[Note 1; add:]

1904, *Doyle v. Burns*, 123 Ia. 488, 99 N. W. 195.

1905, *Boykin v. State*, 86 Miss. 481, 38 So. 725.

It is not necessary that the lie should be "palpable" to the jury: 1906, *Chicago C. R. Co. v. Shaw*, 220 Ill. 532, 77 N. E. 139; this is another example of the wretched and wasteful sophistry to which the rule leads.

#### § 1015. Same: Time of the Falsehood, etc.

[Note 1; add, in a new paragraph:]

Whether an *instruction* on this principle of *falsus in uno* may be demanded, is considered in *Pumorio v. Merrill*, 125 Wis. 102, 103 N. W. 464 (1905).

#### § 1018. Self-Contradictions; not admitted as Substantive Testimony.

[Note 2; add:]

1908, *Dibble's Case*, 1 Cr. App. 155 (from a hostile witness cross-examined by the calling party).

1906, *Perdue v. State*, 126 Ga. 112, 54 S. E. 820.

1904, *Fletcher v. Com.*, — Ky. —, 83 S. W. 588.

1905, *Whitt v. Com.*, — Ky. —, 84 S. W. 340.

1904, *McDonald v. N. Y. C. & H. R. R. Co.*, 186 Mass. 474, 72 N. E. 55.

1905, *Donaldson v. N. Y. N. H. & H. R. Co.*, 188 Mass. 484, 74 N. E. 915.

1904, *People v. Miner*, 138 Mich. 290, 101 N. W. 536.

1905, *Simms v. Forbes*, 86 Miss. 412, 38 So. 546.

1908, *Com. v. Deitrick*, 221 Pa. 7, 70 Atl. 275, *semble*.

1912, *State v. Chynoweth*, — Utah —, 126 Pac. 276.

It is this principle which so much affects Courts in reaching the rule forbidding *impeachment of one's own witness by self-contradiction* (*ante*, § 904).

§ 1021. **Two Classes of Facts not Collateral; (1) Facts Relevant, etc.**

[*Note 1; add:*]

Ark. St. 1905, c. 52 (cited *ante*, § 923, ignores this limitation). 1909, *Sellers v. State*, 93 Ark. 313, 124 S. W. 770 (example of incorrect ruling).  
 1905, *Western Union O. Co. v. Newlove*, 145 Cal. 772, 79 Pac. 542 (boundary).  
 1913, *Mitsunaga v. People*, 54 Colo. 102, 129 Pac. 241.  
 1906, *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755 (intoxication of testator).  
 1907, *State v. Sweeny*, 75 Kan. 265, 88 Pac. 1078 (rule of Attorney-General *v. Hitchcock* applied).  
 1905, *State v. Rogers*, 115 La. 164, 38 So. 952. 1910, *State v. Fletcher*, 127 La. 602, 53 So. 877.  
 1913, *Capital Traction Co. v. Contner*, 120 Md. 78, 87 Atl. 904 (motorman's admission that he lost control of his car, held not collateral).  
 1905, *Robinson v. Old Colony St. R. Co.*, 189 Mass. 594, 76 N. E. 190 (motorman's conduct).  
 1906, *American Woolen Co. v. Boston & M. R. Co.*, 190 Mass. 152, 76 N. E. 658 (records of a railroad).  
 1904, *People v. Row*, 135 Mich. 505, 98 N. W. 13 (rape).  
 1905, *Davis v. State*, 85 Miss. 416, 37 So. 1018 (here an over-strict ruling). 1905, *Bell v. State*, — Miss. —, 38 So. 795 ("Would the cross-examining party be allowed to prove it as a part or in support of his case?"). 1905, *Scott v. State*, — Miss. —, 39 So. 1012. 1909, *Cooper v. State*, 94 Miss. 480, 49 So. 178.  
 1904, *Ferguson v. State*, 72 Nebr. 350, 100 N. W. 800 (approving the last two Nebraska cases, but not noticing their difference).  
 1905, *Dillard v. U. S.*, 141 Fed. 303, 310, — C. C. A. — (rule of Attorney-General *v. Hitchcock* applied).

§ 1022. **Same: (2) Facts Discrediting the Witness, etc.**

[*Note 1; add:*]

1877, *Fincher v. State*, 58 Ala. 215, 219 (bias; admitted).  
 1911, *Roberts v. State*, 25 Del. 2 Boyce, 385, 79 Atl. 396 (lies told by defendant about having no money).  
 1914, *People v. Pfanschmidt*, 262 Ill. 411, 104 N. E. 804 (opinion; excluded).  
 1907, *Cook v. State*, 169 Ind. 430, 82 N. E. 1047 (murder; bias against the deceased; admitted).  
 1910, *Miller v. State*, 174 Ind. 255, 91 N. E. 930 (murder; erroneous ruling).  
 1912, *State v. Swartz*, 87 Kan. 852, 126 Pac. 1091 (that a witness was asleep at the time testified to, allowed).  
 1904, *People v. Row*, 135 Mich. 505, 98 N. W. 13 (attempt to persuade persons not to go surety for defendant; allowed).  
 1909, *Boche v. State*, 84 Nebr. 845, 122 N. W. 72 (the witness' statement that he had told two persons that one J. made utterances implicating J. as the real murderer, allowed to be contradicted; *Root, J.*, diss.).  
 1905, *Creeping Bear v. State*, 113 Tenn. 322, 87 S. W. 653 (here the witness had asked people not to sign a pardon for the defendant).

§ 1023. **Cross-Examination to Self-Contradiction, etc.**

[*Note 1; add:*]

1905, *Starke v. State*, 49 Fla. 41, 37 So. 850.  
 1911, *Chase v. Hoosac T. & W. R. Co.*, 85 Vt. 60, 81 Atl. 236 (trial Court's discretion).  
 1904, *Illinois Steel Co. v. Jeka*, 123 Wis. 419, 101 N. W. 399.  
 Compare the examples cited *ante*, § 1006, n. 2.

§ 1028. **Preliminary Warning; State of the Law in Various Jurisdictions.**

[*Note 1; add.*]

*England*: St. 1854, c. 125, § 22 (like the last half of ib. § 23, *infra*, for adverse witnesses).  
*Alta.*: St. 1910, 2d sess., Evidence Act, c. 3, § 21 (like Eng. St. 1854, c. 125, § 23).  
*Ont.*: St. 1909, c. 43, § 18 (like R. S. 1897, c. 73, § 18).  
*Sask.*: St. 1907, c. 12, Evidence Act, § 27, § 28 (the former section provides for the case of impeaching one's own witness).  
*Yukon*: St. 1904, c. 5, § 41.  
*United States*: 1909, *Jaynes v. People*, 44 Colo. 535, 99 Pac. 325.  
 1875, *State v. North*, 42 Conn. 79 (similar). 1875, *Tomlinson v. Derby*, 43 Conn. 211 (similar). 1909, *Adams v. Herald Pub. Co.*, 82 Conn. 448, 74 Atl. 755 (the prior warning is not indispensable, if the trial court "was of the opinion that the ends of fairness and justice would thereby be best served"; following *Hedge v. Clapp*).  
 1905, *Villeneuve v. Manchester St. R. Co.*, 73 N. H. 250, 60 Atl. 748 (same as *Titus v. Ash*).  
 1904, *McKinstry v. Collins*, 76 Vt. 221, 56 Atl. 985 (former testimony excluded, for lack of the inquiry to the witness).  
 1903, *Brown v. Gillett*, 33 Wash. 264, 74 Pac. 386 (rule adopted).

§ 1029. **Preliminary Question must be Specific, etc.**

[*Note 1; add.*]

1907, *R. v. Clarke*, 38 N. Br. 11 (the sufficiency of the question is in the trial Court's discretion; one judge diss.).  
 1904, *Bradley v. Gorham*, 77 Conn. 211, 58 Atl. 698.  
 1907, *Clinton v. State*, 53 Fla. 98, 43 So. 312.  
 1904, *Standcliff v. U. S.*, 5 Ind. T. 486, 82 S. W. 882 ("time, place, and other surroundings").  
 1908, *Gibson v. Seney*, 138 Ia. 383, 116 N. W. 325 (sufficient "if the witness understands that to which reference is made").  
 1911, *Higgins v. Com.*, 142 Ky. 647, 134 S. W. 1135.  
 1903, *Barton v. Shull*, 70 Nebr. 324, 97 N. W. 292.  
 1904, *State v. Gray*, 43 Or. 446, 74 Pac. 927.  
 1905, *State v. Strodemier*, 40 Wash. 608, 82 Pac. 915 (here the Court went to the other extreme, and rebuked a prosecuting attorney because in laying the foundation for impeachment of the defendant by his former testimony he asked the stenographer for the testimony "at the trial of the State of Washington v. Henry Strodemier;" this is finical; why might not the judge have tenderly suppressed all reference to the indictment in the present case, so as to prevent the unfortunate accused from being prejudiced by the grand jury's opinion of him).  
 1904, *Wysocki v. Wisconsin L. I. & C. Co.*, 121 Wis. 96, 98 N. W. 950.

§ 1031. **Testimony of Absent or Deceased Witness; (1) Depositions.**

[*Note 1; add.*]

1906, *Chany v. Hotchkiss*, 79 Conn. 104, 63 Atl. 947, *semble* (the trial Court has discretion; the question not indispensable where there is no danger of surprise).  
 1913, *Ebert v. Metropolitan St. R. Co.*, 174 Mo. App. 45, 160 S. W. 34 (rule properly applied to a prior written statement by deponent).  
 1903, *Brown v. Gillett*, 33 Wash. 264, 74 Pac. 386 (deposition; self-contradiction not admissible without asking). 1913, *Scandinavian-American Bank v. Long*, 75 Wash. 270, 134 Pac. 913 (a letter not allowed to be used to contradict a deposition for lack of the prior warning; but the date of the letter does not appear; careless opinion).

§ 1032. **Same: (2) Testimony at a Former Trial.**

[Note 1; *add*:]

- 1910, *Wilson v. Com.*, Ky., 130 S. W. 793 (question required; no authority cited).  
 1907, *People v. Peck*, 147 Mich. 84, 110 N. W. 495 (deceased witness' testimony at a former trial; rule enforced).  
 1906, *Lerum v. Geving*, 97 Minn. 269, 105 N. W. 967 (*Mattox v. U. S.*, *infra*, followed).  
 1900, *Ely Walker D. G. Co. v. Mansur*, 87 Mo. App. 105 (question not indispensable, in impeaching former testimony preserved in a bill of exceptions made admissible by Rev. St. 1899, § 3149, cited *post*, § 1668, n. 2; careful opinion by Goode, J.).  
 1905, *Omaha St. R. Co. v. Boesen*, 74 Nebr. 764, 105 N. W. 303 (testimony at a second trial offered on the sixth trial; the testimony at the first trial, excluded, for lack of asking at the second trial).

§ 1033. **Same: (3) Dying Declarations; (4) Attesting Witness, etc.**

[Note 1; *add*, under *Accord*:]

- 1904, *Gregory v. State*, 140 Ala. 16, 37 So. 259.  
 1911, *Salas v. People*, 51 Colo. 461, 118 Pac. 992 (Garrigues, J., diss.).  
 1906, *State v. Fleetwood*, 6 Pen. Del. 153, 65 Atl. 772.  
 1907, *State v. Uzzo*, 6 Pen. Del. 212, 65 Atl. 775.  
 1908, *Pyle v. State*, 4 Ga. App. 811, 62 S. E. 540 (following *Battle v. State*).  
 1904, *State v. Charles*, 111 La. 933, 36 So. 29.  
 1908, *State v. Fuller*, 52 Or. 42, 96 Pac. 456.  
 1906, *Arnwine v. State*, 50 Tex. Cr. 254, 96 S. W. 4. 1906, *McCorquodale v. State*, 54 Tex. Cr. 344, 98 S. W. 879 (excluded on the facts).  
 1906, *State v. Mayo*, 42 Wash. 540, 85 Pac. 251.

[Note 3, l. 1:]

For "2 Johns." read "2 Hill."

[Note 3; *add*, under *Accord*:]

- 1910, *Mobley v. Lyon*, 134 Ga. 125, 67 S. E. 668 (careful opinion by Atkinson, J.; Evans P. J., and Holden, J., diss.).

[Note 4; *add*, under *Accord*:]

- 1909, *Speer v. Speer*, 146 Ia. 6, 123 N. W. 176 (deceased attesting witness' declarations negating testator's capacity, excluded; careful opinion by McClain, J., following *Stobart v. Dryden*; the fallacy of the opinion seems to lie in its statement that "the will stands as to the mental capacity of testator upon a presumption of law *regardless of any testimony by subscribing witnesses* to that effect"; the better view, *post*, § 1511, n. 4, does not support this).

[Text, last line; at the end, *add* a new note 5:]

<sup>5</sup> Quoted, but held not applicable:

- 1912, *Gordon v. Munn*, 87 Kan. 624, 125 Pac. 1 (deceased husband's statements as to an ante-nuptial contract).

§ 1034. **Same: (5) Testimony admitted by Stipulation, etc.**

[Note 1; *add*, under *Accord*:]

- 1878, *State v. Miller*, 67 Mo. 604, 608 (under statute).  
 1904, *Nagel v. St. Louis T. Co.*, 104 Mo. App. 438, 79 S. W. 502.

[*Note 1; add, under Contra:*]

1904, *Gregory v. State*, 140 Ala. 16, 37 So. 259.

1905, *Funderburk v. State*, 145 Ala. 661, 39 So. 672.

**§ 1036. Recall for Putting the Question, etc.**

[*Note 1, par. 1, col. 1; add:*]

1904, *Vann v. State*, 140 Ala. 122, 37 So. 158.

1906, *Hammond v. State*, 147 Ala. 79, 41 So. 761.

1906, *Pitman v. State*, 148 Ala. 612, 42 So. 993.

1908, *Johnson v. State*, 55 Fla. 46, 46 So. 155.

1905, *United States Wringer Co. v. Cooney*, 214 Ill. 520, 73 N. E. 803.

1907, *Hirsch & S. I. & R. Co. v. Coleman*, 227 Ill. 149, 81 N. E. 21.

1912, *State v. Owens*, 130 La. 746, 58 So. 557.

1905, *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668.

[*Text, par. (2); at the end, add a new note 2:*]

<sup>2</sup> But of course the *oral* asking is not necessary where the contradictory statement is in a *writing shown to the witness* as required by the rule in *The Queen's Case* (*post*, § 1259): 1903, *Illinois C. R. Co. v. Wade*, 206 Ill. 523, 69 N. E. 565.

**§ 1037. Contradiction admissible, no matter what the Answer, etc.**

[*Text, p. 1024, l. 2:*]

After "does," insert "not."

[*Note 2, col. 1; add:*]

1911, *Waycaster v. State*, 136 Ga. 95, 70 S. E. 883.

1910, *Searway v. U. S.*, 8th C. C. A., 184 Fed. 716.

[*Note 3; add, under Accord:*]

1912, *People v. Singh*, 20 Cal. App. 146, 128 Pac. 420.

1904, *Chicago City R. Co. v. Matthieson*, 212 Ill. 292, 72 N. E. 443 (here the witness said "he might have" made the statement).

[*Note 4; in l. 12, add:*]

1903, *Illinois C. R. Co. v. Wade*, 206 Ill. 523, 69 N. E. 565, *semble*.

1905, *Chicago & E. I. R. Co. v. Crose*, 214 Ill. 602, 73 N. E. 865 (rule applied).

1907, *Rice v. State*, — Tex. Cr. —, 100 S. W. 949.

Moreover, the cross-examiner may *continue the probing* (if he cares to risk it) by further asking, "Is that former statement true or false?"; compare Sir Charles Russell's cross-examination of Pigott in the Parnell Case, quoted *post*, § 1260, and the cases cited *ante*, § 959, n. 1.

**§ 1038. Assertion to be Contradicted must be Independent, etc.**

[*Note 2, l. 5; add:*]

1905, *Bell v. State*, — Miss. —, 38 So. 795.

**§ 1039. Preliminary Question not necessary, etc.**

[*Note 1; add:*]

Of course the rule has also no application to proof of error by *contradiction* through other witnesses (*ante*, § 1006, n. 3);

[*Note 1 — continued*]

nor to proof of bad character by a *record of conviction for crime* (*ante*, § 980); nor, of course, does it apply to proof of any *conduct* of the witness: 1907, *Bliss v. Beck*, 80 Nebr. 290, 114 N. W. 162 (intoxication).

§ 1040. **Tenor and Form of Inconsistent Statements, etc.**

[*Note 2; add:*]

1905, *Cox v. State*, 124 Ga. 95, 52 S. E. 150 (assault).  
 1905, *State v. Rogers*, 115 La. 164, 38 So. 952 (letter excluded, on the facts).  
 1907, *Blickley v. Luce*, 148 Mich. 233, 111 N. W. 752 (action against a landlord for loss of goods in a building which collapsed and then burned; the plaintiff's suit against the insurer claiming loss by fire, not admitted as inconsistent).  
 1913, *Uggen v. Bazille*, — Minn. —, 143 N. W. 112 (whether a warning was given, in the witness' understanding; the above text approved).  
 1913, *Liles v. May*, — Miss. —, 63 So. 217 (alleged scrivener of a will; later statements indicating different belief as to the succession, admitted).  
 1906, *Rossenbach v. Supreme Court*, 184 N. Y. 92, 76 N. E. 1085 (insured's intoxication).

[*Note 3; add:*]

1905, *People v. Hoffmann*, 142 Mich. 531, 105 N. W. 838 (defendant's own affidavit for a continuance, admitted).  
 1905, *Glasgow v. Metropolitan St. R. Co.*, 191 Mo. 347, 89 S. W. 915 (deposition not certified nor filed, but signed).

[*Note 3, l. 4; insert:*]

see the cases cited *ante*, § 278, n. 3 (false affidavits by the accused), and *post*, § 1075, n. 2 (depositions used).

[*Note 5*] For “§ 816,” read “§ 821.”

Note that by the doctrine of *waiver of the privilege against self-crimination* an accused taking the stand could be impeached by former self-contradictions contained in testimony otherwise privileged under U. S. Rev. St. 1878, § 860 and similar statutes (quoted *post*, § 2281). But thus far the decisions have taken the opposite view: cases cited *post*, § 2282, n. 8, and § 2276, n. 9.

[*Note 9; add:*]

Other cases are noted *post*, § 1041, n. 3.

§ 1041. **Opinion, as Inconsistent.**

[*Note 2; add:*]

1912, *Denver C. T. Co. v. Lomovt*, 53 Colo. 292, 126 Pac. 276 (trolley-car track-homicide; eye-witness testifying for defendant; former statement that “the motorman ought to be lynched,” admitted).  
 1904, *Jordan v. State*, 120 Ga. 864, 48 S. E. 352 (seduction; a witness to lewd conduct of the prosecutrix impeached by expressions of belief in her chastity). 1908, *Bates v. State*, 4 Ga. App. 486, 61 S. E. 888 (“Sam is coming clear,” admitted to impeach an eye-witness for the prosecution).  
 1904, *State v. Crea*, 10 Ida. 88, 76 Pac. 1013 (murder; a witness for the defendant having testified to seeing a part of the difficulty, it was held improper to admit his statement that he had “seen the killing of M., and that it was as cold-blooded as you ever saw”; this is indeed bigotry in favor of technicality). 1913, *Sanger v. Bacon*, — Ind. —, 101 N. E. 1001 (here a legatee's opinions as to the testator's mental condition, here excluded).

*[Note 2 — continued]*

1905, *State v. Matheson*, 130 Ia. 440, 103 N. W. 137 (the defendant's father, having testified that he, though present, did not see the defendant use his pistol, allowed to be impeached by a statement that the boy "has shot the deputy sheriff").

1903, *Shinkle v. McCullough*, 116 Ky. 960, 77 S. W. 196 (negligence of an automobile; the driver's statement that he considered himself responsible, admitted).

1905, *Jacobs v. Boston El. R. Co.*, 188 Mass. 245, 74 N. E. 349 (a paper bearing the alleged signature of the witness, excluded; the reason for the ruling is unascertainable from the opinion). 1906, *Cotton v. Boston El. R. Co.*, 191 Mass. 103, 77 N. E. 698 (damage by eminent domain; the petitioner's offer to sell at a price exceeding the value as testified to by him, admitted). 1907, *Gleason v. Daly*, 194 Mass. 348, 80 N. E. 486 (a witness present but not attesting a will; his statement "that it was a shame to make that man make a will, they might as well have a dead man," held not improperly excluded by the trial Court; the opinion sails rather close to the wind, in order to avoid overthrowing the trial Court's ruling). 1911, *Smith v. Holyoke St. R. Co.*, 210 Mass. 202, 96 N. E. 135 (a witness in a personal-injury case to the fact of the car-gong not being rung until the collision; whether he could be contradicted by his opinion expressed to the conductor "it is no fault of you people," not clear).

1909, *Clow v. Smith*, 85 Nebr. 668, 124 N. W. 140 (opinion admitted, on the facts).

1905, *State v. Exum*, 138 N. C. 599, 50 S. E. 283 ("Little did I think I would have married a murderer," admitted against the defendant's wife).

1907, *Holder v. State*, 119 Tenn. 178, 104 S. W. 225 (murder; to impeach a witness who testified to an alibi, her positive statement that the accused "did it," admitted).

1904, *Eastern Texas R. Co. v. Scurlock*, 97 Tex. 305, 78 S. W. 490 (witness to the value of his own property).

1904, *Parker v. State*, 46 Tex. Cr. 461, 80 S. W. 1008 (defendant's daughter, not allowed to be impeached by the statement "I believe that my father killed T.").

1905, *Kirk v. State*, 48 Tex. Cr. 624, 89 S. W. 1067 ("I tried to keep K. from killing him," etc., excluded).

1905, *Coolidge v. Ayers*, 77 Vt. 448, 61 Atl. 40 (failure to assert a fact in former testimony, admitted).

1913, *State v. Hazzard*, 75 Wash. 5, 134 Pac. 514 (murder by starvation; a prior statement by the prosecution's witness that the defendant had done nothing wrong, here excluded).

*[Note 3; add:]*

1901, *O'Regan v. Trench*, L. R. 1 Ire. 274, 287, 297 (value of land; inconsistent statements admitted).

## § 1042. Silence, Omissions, or Negative Statements, etc.

*[Note 2; add:]*

1902, *R. v. Higgins*, 36 N. Br. 18, 24 (accused's silence, until his trial, as to G. being the real murderer, admissible against him; good opinion by Harrington, J.).

1905, *Hampton v. State*, 50 Fla. 55, 39 So. 421 ("Have you testified to material facts here to-day that you did not testify to before the coroner's jury?" excluded; this is unsound).

1906, *Larrance v. People*, 222 Ill. 155, 78 N. E. 50 (failure to mention a fact in testimony at an inquest; not admitted, unless on a showing that he was asked on that point or asked for all relevant facts).

1910, *Parks v. State*, 113 Md. 338, 77 Atl. 603 (robbery; prosecuting witness identified defendant; a letter of his, stating that he did not know who struck him, admitted).

1905, *Thompson v. Mecosta*, 141 Mich. 175, 104 N. W. 694 (witness' failure to deny a statement of R. in his presence, not admitted, there being on the facts no duty to speak).

1904, *State v. Rosa*, 71 N. J. L. 316, 58 Atl. 1010 (omitting to state a material circumstance in former testimony, admitted).

[*Note 2 — continued*]

1906, *Green v. Dodge*, 79 Vt. 73, 64 Atl. 499 (former failure to dispute the amount of rent, admitted).

1913, *Hilton v. Hayes*, 154 Wis. 27, 141 N. W. 1015 (excluded; no authority cited).

**§ 1043. Silence, etc., as constituting the Testimony to be Impeached.**

[*Note 1; add:*]

1904, *People v. Creeks*, 141 Cal. 532, 75 Pac. 101 (rule approved). 1905, *People v. Cook*, 148 id. 334, 83 Pac. 43 (rule affirmed). 1909, *Bollinger v. Bollinger*, 154 Cal. 695, 99 Pac. 196.

1913, *South Covington & C. St. R. Co. v. Finan's Adm'r.*, 153 Ky. 340, 155 S. W. 742.

1914, *Corsick v. Boston Elevated R. Co.*, — Mass. —, 105 N. E. 600.

1903, *Dunk v. State*, 84 Miss. 452, 36 So. 609 (following, but misconceiving, the ruling in *Williams v. State*, Miss. quoted *ante*, § 1038).

1913, *State v. D'Adame*, 84 N. J. L. 386, 86 Atl. 414 (on failure to identify on the stand, a former identification was admitted). 1913, *State v. Kysilka*, 84 N. J. L. 6, 87 Atl. 79 (similar).

1910, *State v. Yee Gueng*, 57 Or. 509, 112 Pac. 424 (a ruling which exhibits the useless quibbling induced by over-particularity in drawing this distinction).

1907, *Ozark v. State*, 51 Tex. Cr. 106, 100 S. W. 927 (prior affirmative statements by the prosecution's witness, not allowed to be proved by the prosecution where the witness had failed to testify to that effect).

Where the witness *now expressly denies* a fact, on direct examination, *contrary* to the expectation of the party calling, the principle of *impeaching one's own witness* by showing a former contrary assertion becomes involved (*ante*, §§ 905, 1018, n. 2).

**§ 1044. Explaining away the Inconsistency; in general.**

[*Note 1; add:*]

1903, *People v. Glover*, 141 Cal. 233, 74 Pac. 745 (explaining that the former statement was not true).

1904, *Spearman v. Sanders*, 121 Ga. 468, 49 S. E. 296.

1907, *Hirsch & S. I. & R. Co. v. Coleman*, 227 Ill. 149, 81 N. E. 21.

1904, *Strebin v. Lavengood*, 163 Ind. 478, 71 N. E. 494 (affidavits).

1908, *Tonopah Lumber Co. v. Riley*, 30 Nev. 312, 95 Pac. 1001 (conversation with R., admitted by way of explanation).

1906, *Hoggan v. Cahoon*, 31 Utah 172, 87 Pac. 164 (reasons for the inconsistent statements).

[*Note 1; add, at the end:*]

For the use of *prior consistent statements*, to corroborate a witness who has been impeached by an inconsistent failure to speak on a former occasion, see *post*, § 1129.

**§ 1045. Putting in the Whole of the Contradictory Statement.**

[*Note 2; add:*]

1906, *Hupfer v. National Dist. Co.*, 127 Wis. 306, 106 N. W. 831 (witness allowed to put in parts of his former testimony in explanation; English rule followed).

**§ 1048. Nature of Admissions.**

[*Note 4; add:*]

1905, *Castner v. Chicago, B. & Q. R. Co.*, 126 Ia. 581, 102 N. W. 499 ("substantive evidence").

1908, *McManus v. Nichols-Chisholm L. Co.*, 105 Minn. 144, 117 N. W. 223 (here the opinion

[*Note 4 — continued*]

was merely pointing out that admissions are something more than self-contradictions of the party's testimony if he testifies).

The following opinion illustrates the failure of justice that may occur where any stress is laid on this doctrine of admissions being "affirmative proof."

1909, *Gibson v. Boston*, 75 N. H. 405, 75 Atl. 103.

[*Text*, p. 1218; at the end, *add* a new note 5:]

<sup>5</sup> The oft-repeated warning against the *slight weight* of oral admissions or confessions on account of their liability to misunderstanding or distortion by the witness hearing them, is due to the principle of Completeness, and is considered thereunder (*post*, § 2094, *ante*, § 866).

#### 1049. Admissions, distinguished, etc.; Death not Necessary.

[*Note 2; add:*]

1910, *Abbott v. Walker*, 204 Mass. 71, 90 N. E. 405.

1905, *Stewart v. Doak Bros.*, 58 W. Va. 172, 52 S. E. 95.

#### § 1051. Admissions, distinguished, etc.; Prior Warning not Necessary.

[*Note 1*, par. 1; *add*, under *Accord:*]

1911, *Roberts v. State*, 25 Del. 2 Boyce, 385, 79 Atl. 396.

1911, *Howard v. Illinois Central R. Co.*, 116 Minn. 256, 133 N. W. 557.

1906, *State v. Allen*, 34 Mont. 403, 87 Pac. 177.

1905, *State v. Wertz*, 191 Mo. 569, 90 S. W. 838.

1907, *Southern Bank v. Nichols*, 202 Mo. 309, 100 S. W. 613.

1907, *State v. Emerson*, 78 S. C. 83, 58 S. E. 974.

1905, *Coolidge v. Ayers*, 77 Vt. 448, 61 Atl. 40.

1905, *State v. Strodemeier*, 40 Wash. 608, 82 Pac. 915.

*Not decided:*

1907, *Goss v. Goss*, 102 Minn. 346, 113 N. W. 690 (not decided.)

[*Note 2; add:*]

1916, *Carey v. Nissle*, 145 Mich. 383, 108 N. W. 733 (vendor testifying).

So also the following peculiar situation: 1911, *Johnson v. Johnson*, 78 N. J. Eq. 507, 80 Atl. 119 (divorce for adultery, the adulterous act being a rape; the defendant's plea of *nolo contendere* on the rape charge, here received to impeach the defendant testifying for himself, as involving both a crime and a self-contradiction; whether receivable as an admission, not decided; this hesitation of the Court was unfounded).

[*Note 3*, l. 5; *add:*]

1905, *Miller v. People*, 216 Ill. 309, 74 N. E. 743 (a defendant's testimony on a former trial may be read against him as containing admissions, though he does not take the stand now; three judges dissenting, on the principle of § 2272, *post*, citing no authority; the dissent is totally without grounds).

[*Note 3*, at the end; *add:*]

The following ruling is preternaturally finicky and marks an acme of technicalism:

1909, *State v. Minnick*, 54 Or. 86, 102 Pac. 605 (the defendant having testified and having denied certain contradictory statements, they were proved on rebuttal; held that if admissions, they should have been proved in chief, and if only testimonial self-contradictions, the Court should have limited them to that purpose).

§ 1053. **Admissions, etc.; Personal Knowledge, Infancy.**

[*Note 1, par. 1; add:*]

*Accord*: 1906, *Stone v. Stone*, 191 Mass. 371, 77 N. E. 845 (opinion).

1908, *Binewicz v. Haglin*, 103 Minn. 297, 115 N. W. 271, *semble* (admissions of negligence).

1913, *Hilton v. Hayes*, 154 Wis. 27, 141 N. W. 1015 (held not improperly excluded on the facts).

*Contra*: 1913, *Murdock v. Adamson*, 12 Ga. App. 275, 77 S. E. 181 (father's action for son's death; father's admissions of son's negligence, based solely on son's statements, held inadmissible; no authority cited on the present point; opinion confused).

[*Note 2; add:*]

*Contra*: 1904, *Knights Templar & M. L. I. Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066 (this is "suggested").

Compare § 1063, n. 1, *post*, at the end.

For a *guardian's admissions*, see *post*, § 1076.

[*Text*, p. 1222; l. 6 of this §; after "testimonial credit," *add* a new note 1a:]

<sup>1a</sup> *Accord*: 1908, *Binewicz v. Haglin*, 103 Minn. 297, 115 N. W. 271.

§ 1054. **Admissions excluded as evidence of Certain Facts.**

[*Text*, p. 1223, l. 3 of the section; *add* a new note 1a:]

<sup>1a</sup> The following statute belongs here:

Wis. St. 1911, c. 123, p. 125 (adding a new § 4079m to Stats.: "in civil actions for damages caused by personal injury no statement made or writing signed by the injured party within 72 hours of the time the injury happened or accident occurred shall be used in evidence against the party making or signing the same unless such evidence would be admissible as part of the *res gestæ*"; this is a wretched piece of partisan legislation which merely adds another artificial gag-rule to that series of manoeuvres that calls itself a trial; the basis of the statute is, of course, the supposed chicanery of defendants' claim-agents in securing admissions during the injured person's disabled condition; but the true remedy would be to punish a few such agents where sharp practice is proved).

§ 1055. **Admissions as Insufficient, etc.**

[*Text*, par. (3); *add* a new note 1:]

<sup>1</sup> For the doctrine that *oral admissions* are to be received with caution, owing to their liability to being misunderstood and misreported, see *post*, § 2094, n. 4.

[*Text*, p. 1224; *add* a new par. (4):]

(4) There is no fixed general rule that in *civil cases* an opponent's extrajudicial admission is insufficient, without other evidence, as the foundation of a verdict for one or more facts. But when the admission concerns the main controverted fact in the case, and the opponent's admission is the only evidence offered, some Courts show an inclination to follow a general maxim that it is insufficient, at least, when the admission is one of conduct only.<sup>1</sup> This is of course merely an application of the general function of the judge to control a verdict based on insufficient evidence (*post*, §§ 2494, 2551).

<sup>1</sup> 1908, *Binewicz v. Haglin*, 103 Minn. 297, 115 N. W. 271 (admissions of negligence).

§ 1056. **Admissions, as distinguished from Estoppels, etc.**

[Text, p. 1225; in the quotation from *Corser v. Paul*, l. 1:]

For "31 N. H.," read "41 N. H."

[Note 5; add:]

1914, *Peterson v. Pittsburg S. P. G. M. Co.*, — Nev. —, 140 Pac. 519.

1904, *Lambeck v. Stiefel*, 71 N. J. L. 320, 59 Atl. 460.

[Text, p. 1226, l. 2 from above; add new note 4a:]

<sup>4a</sup> An admission in evidence is different from a waiver in the substantive law of contracts, property, etc. Whether the insurer's sending of a blank form for proof of claim, after he knows of a fact negating the claim, is a waiver, has been the subject of many rulings, but the use of the phrase in such forms "shall not be construed as an admission" is misleading; it may be an admission evidentially, yet not a waiver; e. g. 1909, *McCord v. Masonic Casualty Co.*, 201 Mass. 473, 88 N. E. 6.

§ 1058. **Admissions not Conclusive, etc.**

[Note 2; add:]

1911, *Massey-Harris Co. v. Horning*, 4 Sask. 448 (entries of payment in collection-books of the plaintiff creditor, held not conclusive against him).

1907, *Furlong & Meloy v. American Central F. Ins. Co.*, 136 Ia. 499, 113 N. W. 107 (plaintiff's invoices and inventories).

1903, *Davis v. Davis*, 98 Me. 135, 56 Atl. 588 ("No mere admissions *in pais*, however express or formal, are conclusive, unless they operate as an estoppel").

1909, *Conant v. Evans*, 202 Mass. 34, 88 N. E. 438 (admissions in correspondence).

1902, *State v. Paxton*, 65 Nebr. 110, 134, 90 N. W. 983 (mistake of law may be shown).

1904, *Wesnieski v. Vanek*, — Nebr. —, 99 N. W. 258 (malicious prosecution; plaintiff's plea of guilty in the criminal prosecution, not conclusive).

1909, *Mahon v. Rankin*, 54 Or. 328, 102 Pac. 608.

1906, *Com. v. Monongahela Bridge Co.*, — Pa. —, 64 Atl. 1058 (pleadings in another suit; cited *post*, § 1066, n. 2).

1909, *Morgan v. U. S.*, 8th C. C. A., 169 Fed. 242 (affidavit allowed to be explained by defendant as to his purpose in making it).

1906, *Mullins v. Shrewsbury*, 60 W. Va. 694, 55 S. E. 736 (pleading in another suit).

1909, *Dudley v. Niswander*, 65 W. Va. 461, 64 S. E. 745 (controversy over a note; terms of a contract made by one of the parties allowed to be contradicted, being merely used as an admission).

1913, *Hamilton v. Diefenderfer*, — Wyo. —, 133 Pac. 1081.

[Note 4; add:]

1906, *State v. Morin*, 102 Me. 290, 66 Atl. 650 (liquor-nuisance; why the defendant took out a Federal license, allowed to be explained).

1905, *Chamberlain v. Iba*, 181 N. Y. 486, 74 N. E. 481 (meaning of a letter, explained).

1907, *Yeska v. Swendrzynski*, 133 Wis. 475, 113 N. W. 959 (explanation of an admission made in a plea of guilty to a prosecution for the same act, allowed).

[Note 8; add:]

Unless of course the doctrine of *estoppel by judicial admissions* applies:

1912, *Central Trust Co. v. Culver*, 23 Colo. App. 317, 129 Pac. 253.

§ 1060. **Implied Admissions ; Sundry Instances.**

1905, *People v. Hoffmann*, 142 Mich. 531, 105 N. W. 838 (defendant's affidavit for a continuance, used as an admission).

1911, *Wichita F. & N. W. R. Co. v. Holloman*, 28 Okl. 419, 114 Pac. 700 (admissions of owner as to value in condemnation suit, received).

1905, *Chadwick v. U. S.*, 141 Fed. 225, 238, — C. C. A. — (conspiracy to defraud ; letters written by defendant, though not shown to have been sent, received as admissions).

For admissions *by conduct*, see *ante*, §§ 274-291.

§ 1061. **Hypothetical Admissions ; Offers to Compromise, etc. ; General Principle.**

[*Note 1 ; add :*]

Another amusing instance (probably originating in the same anecdote of Mr. Chitty) is found in Mr. Guppy's celebrated proposal "without prejudice," to Esther Summerson ("Bleak House," c. IX) ; cited by Mr. (now Judge) John Marshall Gest, of Philadelphia, in his richly interesting essay on *The Law and Lawyers of Charles Dickens* (44 *Amer. Law Reg. N. S.* 401 ; 1905 ; now reprinted in his "*The Lawyer in Literature*," Boston, 1913).

[*Note 3, l. 1 ; add :*]

1906, *Mackey v. Kerwin*, 222 Ill. 371, 78 N. E. 817 (though a tender pleaded or paid into court is a conclusive admission, a tender before trial not pleaded nor paid into court is not conclusive).

[*Note 3, l. 4 ; add :*]

Cases cited in *Greenleaf on Evidence*, I, § 205, and in 18 *Harvard Law Review*, 460.

[*Note 4 ; add :*]

1905, *Cecil v. Terr.*, 16 Okl. 197, 82 Pac. 654 (rape under age ; offer of settlement by defendant's father, excluded).

Here compare the rulings as to impeaching a witness or a party by his *agent's corrupt offers* (*ante*, §§ 278, 280, 962).

§ 1062. **Offer to Compromise ; Law in Various Jurisdictions.**

[*Note 1, p. 1235 ; add, under Alabama :*]

1912, *Guimond v. Fidelity P. F. Ins. Co.*, N. Br. S. C., 2 D. L. R. 654, 662 (fire loss ; Barker, C. J. : "Interviews and negotiations with a view to a settlement of dispute, especially where they are expressly stated to be without prejudice, are inadmissible).

1913, *Corby v. Foster*, 29 Ont. L. R. 83, 13 D. L. R. 663 (father sued for son's tort ; defendant's conduct showing an inclination to pay and settle, held no evidence of a *scienter* of the son's dangerous propensity).

1904, *Matthews v. Farrell*, 140 Ala. 298, 37 So. 325 (performance of contract ; admissions of "distinct facts" made in the course of compromise negotiations, received).

1906, *Sanders v. State*, 148 Ala. 603, 41 So. 466 (rape ; offer of money to the prosecutrix' father, to "squash" the charge, excluded).

1909, *Hudson v. Williams*, 6 Pen. Del. 550, 72 Atl. 985 (distinct admissions, though made during negotiations for compromise, receivable).

1904, *Teasley v. Bradley*, 120 Ga. 373, 47 S. E. 925 (prior ruling in this case, 110 Ga. *supra*, affirmed).

1906, *McBride v. Georgia R. & E. Co.*, 125 Ga. 515, 54 S. E. 674 (a subsequent offer to compromise does not exclude prior independent admissions).

1905, *Georgia R. & E. Co. v. Wallace*, 122 Ga. 547, 50 S. E. 478 (plaintiff's wagon and driver

[*Note 1 — continued*]

were injured by defendant's car; defendant's settlement with the driver for \$25, not admitted on his re-direct examination).

1903, *Kroetch v. Empire M. Co.*, 9 Ida. 277, 74 Pac. 868 (offer of compromise, excluded).

1905, *Castner v. Chicago, B. & Q. R. Co.*, 126 Ia. 581, 102 N. W. 499 (an admission may be explained by the party's uncommunicated intent to accept a lower amount in compromise).

1905, *State v. Campbell*, 129 Ia. 154, 105 N. W. 395 (defendant's settlement of a former claim against the defendant, excluded).

1908, *State v. Richmond*, 138 Ia. 494, 116 N. W. 609 (burglary; defendant's offer to settle with the robbed party, admitted).

1904, *List's Ex'r v. List*, — Ky. —, 82 S. W. 446 (rule applied).

1906, *Finn v. New England T. & T. Co.*, 101 Me. 279, 64 Atl. 490 (an offer of money, made before any demand for redress by the plaintiff, falls within the rule excluding offers of compromise).

1907, *Acker M. & C. Co. v. McGaw*, 106 Md. 536, 68 Atl. 17 (offer made with a view to compromise, excluded).

1904, *Snow v. N. Y. N. H. & H. R. Co.*, 185 Mass. 321, 70 N. E. 205 (plaintiff's letter of claim, admitted on the facts).

1910, *Grebenstein v. Stone & Webster Eng. Co.*, 205 Mass. 431, 91 N. E. 411 (mere offer to compromise, held inadmissible).

1904, *Comstock v. Georgetown*, 137 Mich. 541, 100 N. W. 788 (injury to a traction engine and plaintiff at a bridge; the township's settlement with the engine-owner, excluded).

1904, *Musselman G. Co. v. Casler*, 138 Mich. 24, 100 N. W. 997 (offer to settle, excluded).

1912, *Crane v. Ross*, 168 Mich. 623, 135 N. W. 83 (offer to settle for \$25, excluded).

1905, *Misner v. Strong*, 181 N. Y. 163, 73 N. E. 965 (compromise negotiations admitted; the error, if any, held harmless; two judges diss.).

1906, *Hindley v. Manhattan R. Co.*, 185 N. Y. 335, 78 N. E. 276 (damage by eminent domain, the defendant pleading prescription; the defendant's settlement with two hundred other abutters, not admitted to rebut the claim of prescription; "the acknowledgment of title in Tom and Dick is not an acknowledgment by implication of title in Harry").

N. C. Rev. 1905, § 860, Code 1883, § 573 (offer to allow judgment, unaccepted, "cannot be given in evidence").

1904, *State v. Wideman*, 69 S. C. 119, 46 S. E. 769 (malicious arson; defendant's statement of willingness to pay, though denying his guilt, admitted).

1910, *Toledo St. L. & W. R. Co. v. Burr & Jeakle*, 82 Oh. 129, 92 N. E. 27 (defendant's offer of settlement for a fire loss, not allowed to be alluded to by counsel for the plaintiff in addressing the jury).

1912, *Anadarko v. Argo*, 35 Okl. 115, 128 Pac. 500 (city council's committee recommendation of a sum to be paid in settlement, with a finding that the city was indebted to the plaintiff in that sum, admitted, but on the wrong theory).

1911, *Weiss v. Kohlhausen*, 58 Or. 144, 113 Pac. 46 (injury by an excavation; that the defendant had settled with others "in the same position as plaintiff," allowed).

1909, *Rabinowitz v. Sullivan*, 223 Pa. 139, 72 Atl. 378 (distinct admission, made during compromise proposals, admitted).

1906, *Nickles v. Seaboard A. L. R. Co.*, 74 S. C. 102, 54 S. E. 255 (railroad wreck; that one of the injured employees, testifying for defendant, had received a sum in settlement from the defendant, admitted, citing no authority; Woods, J., diss. on the present ground; but it was really admissible, if at all, on the principle of § 961, *ante*). 1911, *Wade v. Southern R. Co.*, 89 S. C. 280, 71 S. E. 859 (death by wrongful act; defendant introduced a release; held that being in the case it might be considered, with reference to its interpretation as an admission of liability).

1908, *New York Life Ins. Co. v. Rankin*, 8th C. C. A., 162 Fed. 103 (correspondence between attorneys during an unsuccessful attempt to effect a compromise, excluded).

[Note 1 — continued]

1905, *Chesapeake & O. R. Co. v. Stock*, 104 Va. 97, 51 S. E. 161 (an offer of settlement of claims, construed as not "an effort to buy peace," and admitted).  
 1906, *Wade v. McDougle*, 59 W. Va. 113, 52 S. E. 1026 (an expression of willingness to compromise as to a boundary, held ineffective).  
 1907, *Taylor v. Tigerton Lumber Co.*, 134 Wis. 24, 114 N. W. 122 (offers made during negotiations for compromise, excluded).

§ 1063. **Admissions in Pleadings; Attorney's Admissions.**

[Note 1, par. 1; add:]

1910, *Godwin v. State*, 1 Boyce, 24 Del. 173, 74 Atl. 1101 (bribery of a voter; the prosecuting attorney before offering evidence addressed the Court stating certain admissions by the defendant in conference with him; held that the silence of defendant's counsel was evidence of assent to the correctness of the statements thus made by the prosecuting attorney).  
 1908, *McDermott v. Mahoney*, 139 Ia. 292, 115 N. W. 32, *semble* (counsel's statements during a former trial making a concession upon the opponent's offer of evidence, admissible).  
 1906, *Liberty v. Haines*, 101 Me. 402, 64 Atl. 665 (letter from the plaintiff's attorney stating an assignment of the claim, admissible).  
 1906, *Cadigan v. Crabtree*, 192 Mass. 233, 78 N. E. 412 (counsel's answer to a question of the judge at a prior hearing of the same issue, excluded).  
 1905, *Hicks v. Naomi F. M. Co.*, 138 N. C. 319, 50 S. E. 703 (certain admissions of the attorney at a former trial, excluded).  
 1907, *Virginia-Carolina C. Co. v. Knight*, 106 Va. 674, 56 S. E. 725 (letter of an attorney naming the witnesses to be summoned, excluded).  
 1910, *United States, for use of E. L. C. Co. v. U. S. Fidelity & G. Co.*, 83 Vt. 278, 75 Atl. 280 (counsel's admissions of fact of issue, made during presentation of evidence, held binding).

[Note 1; add a new paragraph 3:]

It is sometimes said that the incompetency of evidence (here in a partition suit) cannot be waived by counsel for *infant* defendants:

1906, *Compher v. Browning*, 219 Ill. 429, 76 N. E. 678 (no authority cited).

1904, *Jespersion v. Mech*, 213 Ill. 488, 72 N. E. 1194 (no authority cited).

But surely this is erroneous; for if counsel are authorized to act at all, in particular, to raise objections, they are certainly empowered to waive them. Compare § 1053, n. 2, *ante*, and § 1076, n. 7, *post*.

A counsel has of course the same authority for *infant's guardian ad litem* as for any other client:

1911, *Byrnes v. Butte Brewing Co.*, 44 Mont. 328, 119 Pac. 788.

§ 1064. **Common-Law Pleadings in the Same Cause, etc.**

[Note 1; add:]

1904, *Yates v. People*, 207 Ill. 316, 69 N. E. 775 (if introduced by the opponent, he is bound by them).

1905, *Palmer T. Co. v. Eaves*, — Ky. —, 85 S. W. 750 (here erroneously said that the opponent's pleadings may be "introduced in evidence").

1911, *Holbrook v. Quinlan & Co.*, 84 Vt. 411, 80 Atl. 339 (plea of former judgment, held conclusive as to two items remitted therefrom).

[Note 2, col. 1; add:]

1905, *Fudge v. Marquell*, 164 Ind. 447, 73 N. E. 895 (contract; confession and avoidance).

1906, *Fifer v. Clearfield & C. C. Co.*, 103 Md. 1, 62 Atl. 1122.

[Note 2, at the end; *add*.:]

1905, *People v. Hoffmann*, 142 Mich. 531, 105 N. W. 838 (affidavit for a continuance).

### § 1066. Common-Law Pleadings in Other Causes.

[Note 2; *add*.:]

1905, *De Montague v. Bacharach*, 187 Mass. 128, 72 N. E. 938 (subsequent pleading of defendant in a second suit concerning the same contract, admitted merely to show that the defendant had pleaded the statute of limitations; *Dennie v. Williams*, *supra*, distinguished).

1913, *Salo v. Duluth & I. R. Co.*, 121 Minn. 78, 140 N. W. 188 (original of an amended complaint, not verified nor signed by the plaintiff, excluded, following *Vogel v. Osborne*).

1906, *Com. v. Monongahela Bridge Co.*, 216 Pa. 108, 64 Atl. 909 (quo warranto; the defendant's answer in a prior suit for taxes, admitted, but not as conclusive).

1902, *Murmurt v. State*, — Tex. Cr. App. —, 67 S. W. 508 (plea of guilty on a charge of theft, admitted on a charge of burglary).

U. S. Rev. St. 1878, § 860 (now repealed; quoted *post*, § 2281, n. 5). 1904, *Miller v. U. S.*, 133 Fed. 337, 350, 66 C. C. A. 399 (conspiracy to use the mails to defraud; arguments of the defendant's attorney before a State insurance commissioner when opposing a rival's attempt to do business there, not admitted). 1913, *Oregon & Cal. R. Co. v. Grubissich*, 9th C. C. A., 206 Fed. 577 (sworn answer in another suit bearing the party's name, but not shown to have been personally signed by or known to the party, excluded).

[Note 7; *add*.:]

1904, *Wesneski v. Vanek*, — Nebr. —, 99 N. W. 258 (malicious prosecution; plaintiff's plea of guilty in the criminal prosecution, admitted).

Some instances of the use of a former plea in a *criminal* case used in a subsequent criminal case will be found in the citations *supra*, n. 2, and *post*, § 1067.

[Note 9; *add*.:]

1912, *Coleman v. Jones & Pickett*, 131 La. 803, 60 So. 243 (attorney's testimony that the allegation was made without knowledge of the party).

[Text, p. 1249; at the end of § 1066, *add*.:]

The complicated doctrine of *judicial estoppel* is here to be distinguished.<sup>10</sup>

<sup>10</sup> A careful examination of the doctrine and its precedents will be found in the following opinion by Provosty, J.: 1913, *Farley v. Frost-Johnson L. Co.*, 133 La. 497, 63 So. 122.

### § 1067. Superseded or Amended Pleadings.

[Text, p. 1250, l. 3 from below; *add*.:]

1903, Hon. A. C. Plowden, "Grain or Chaff; the Autobiography of a Police Magistrate," p. 156: "[When I was barrister on the Stafford Assizes,] I had been briefed to defend a man on a charge of horse-stealing; and, as briefs were scarce, I had no idea of letting the case go without a fight. As chance would have it, the prisoner was arraigned during the luncheon hour when I had left the court, and I was disgusted to find on return that he had actually pleaded 'Guilty.' I at once sought the judge, [Baron Bramwell,] and asked him privately to let the plea be withdrawn, explaining to him my position, and assuring him that had I been in court I should have advised the prisoner differently. The learned Baron demurred at first, but seeing my earnestness he gave way, and the prisoner was permitted to withdraw his plea. The trial came on; and after I had addressed the jury with much fervor, the learned Baron proceeded to sum

[Text, p. 1250 — continued]

up as follows: 'Gentlemen of the jury, the prisoner at the bar is indicted for stealing a horse. To this charge he has pleaded Guilty; but the learned counsel is convinced this was a mistake. The question, therefore, is one for you, gentlemen, which of them you will believe. If you should have any doubt, pray bear in mind that the prisoner was there and the learned counsel wasn't.' Laughter from every part of the court seemed to follow this terse exposition. . . . I could not doubt, however, the absolute justice of the verdict that followed."

[Note 1; add:]

1907, *Pollitz v. Wickersham*, 150 Cal. 238, 88 Pac. 911 (the California rule as to superseded pleadings held not applicable to exclude a creditor's claim formerly presented by plaintiffs to defendant and differing from the later one relied on at the trial).

1909, *Arkansas City v. Payne*, 80 Kan. 353, 102 Pac. 781 (answer and dismissed cross-petition, allowed to be read).

1889, *Com. v. Brown*, 150 Mass. 330, 23 N. E. 49 (accused's plea of guilty before the magistrate on complaint, admitted).

1888, *People v. Gould*, 70 Mich. 240, 38 N. W. 232 (request to the justice to be allowed to withdraw a plea of not guilty, and to plead guilty, admitted).

1904, *Bernard v. Pittsburg Coal Co.*, 137 Mich. 279, 100 N. W. 396 (not decided).

1905, *Stearns v. Kennedy*, 94 Minn. 439, 103 N. W. 212 (verified amended answer, admitted).

1913, *Salo v. Duluth & I. R. Co.*, 121 Minn. 78, 140 N. W. 188 (cited *ante*, § 1066, n. 2).

1906, *Overton v. White*, 117 Mo. App. 576, 93 S. W. 363 (abandoned answers, admitted).

1882, *Adams v. Utley*, 87 N. C. 356 (amended answer, admitted; "as a declaration of the defendant, it can lose none of its vigor because of that circumstance").

1906, *Norcum v. Savage*, 140 N. C. 472, 53 S. E. 289 (parts of an original answer, admitted).

1909, *Leistikow v. Zuelsdorf*, 18 N. D. 511, 122 N. W. 340 (not decided).

1906, *Page v. Geiser Mfg. Co.*, 17 Okl. 110, 87 Pac. 851 (here the original of an amended pleading in the probate court below was erroneously treated as a binding admission; "the plaintiff . . . is bound by the admissions made in his original answer"). 1906, *Limerick v. Lee*, 17 Okl. 145, 87 Pac. 859 (the original of an amended petition in a lien proceeding held admissible but not conclusive; this Court has not let its left hand know what its right was inditing, for this and the preceding opinion were written by the same judge, and were filed on the same day, but neither opinion distinguishes or refers to the other; illustrating that a youthful Commonwealth can quickly enough plunge into that mire of legal uncertainty which has been supposed to be an inheritance of the older ones only).

1909, *Elliff v. Oregon R. & N. Co.*, 53 Or. 66, 99 Pac. 76 (withdrawn complaint, receivable).

1905, *O'Connell v. King*, 26 R. I. 544, 59 Atl. 926, *semble* (a withdrawn plea of tender may be used as an admission, subject to explanation).

1903, *Orange R. M. Co. v. McIlhenny*, 33 Tex. Civ. App. 592, 77 S. W. 428 (abandoned pleading, admitted). 1903, *Texas & P. R. Co. v. Goggin*, 33 Tex. Civ. App. 667, 77 S. W. 1053 (similar; that it is not signed or sworn to by the party is immaterial).

1905, *State v. Bringgold*, 40 Wash. 12, 82 Pac. 132 (accused's plea of guilty before the justice of the peace, afterwards withdrawn, admitted).

1883, *Norris v. Cargill*, 57 Wis. 251, 256 (original of an amended answer, allowed to be read to the jury as an admission "for what it was worth"). 1905, *Schultz v. Culbertson*, 125 Wis. 169, 103 N. W. 234 (original of an amended pleading, unverified and unsigned, admitted). 1909, *Schoette v. Drake*, 139 Wis. 18, 120 N. W. 393 (original answer, admitted).

[Note 2; add:]

1906, *Liberty v. Haines*, 101 Me. 402, 64 Atl. 665 (attorney's letter, not offered in evidence, but merely placed on file for a motion, not regarded as introduced).

1908, *Raapke & K. Co. v. Schmoeller & M. P. Co.*, 82 Nebr. 716, 118 N. W. 652 (but not when the amendment was made after trial begun).

**§ 1070. Admissions by Reference to a Third Person.***[Note 1; add:]*

1904, *Drake v. Holbrook*, — Ky. —, 78 S. W. 158 (defendant told F. to tell the witness "anything I wanted to know"; admitted).

1904, *Skidmore v. Johnson*, 70 N. J. L. 674, 57 Atl. 450 (a letter written by the defendant's daughter, which he had directed her to write, "without her telling what to write or being told what she did write," admitted).

1907, *State v. Werner*, 16 N. D. 83, 112 N. W. 60 (conversation in which the defendant referred a third person to a doctor for information, allowed to be proved by the doctor, though the doctor's own knowledge might have been privileged).

**§ 1071. Third Person's Statement assented to by Party's Silence.***[Note 1; add:]*

1911, *Gibbons v. Terr.*, 5 Okl. Cr. 212, 115 Pac. 129.

1906, *State v. Sudduth*, 74 S. C. 498, 54 S. E. 1013.

Where all conditions exist except that it does not appear whether the party was *silent* or denied, an objection based on this point must specifically point it out at the time (applying the principle of § 18, n. 21, *ante*).

1908, *Raymond v. State*, 154 Ala. 1, 45 So. 895 (McClellan, J., diss.).

**§ 1072. Same; Specific Rules, etc.***[Note 1; add:]*

1906, *People v. Weber*, 149 Cal. 325, 86 Pac. 671 (a mother's statement in the defendant's presence, excluded). 1910, *Snowball's Estate*, 157 Cal. 301, 107 Pac. 598 (statements of ill-treatment, by testatrix in the presence of an heir, admitted). 1910, *People v. Rollins*, 14 Cal. App. 134, 111 Pac. 123 (evasive replies upon hearing letters read aloud to him; the letters admitted).

1906, *Kevern v. People*, 224 Ill. 170, 79 N. E. 574 (rape; the father's repetition to the accused of his daughter's charge against him, admitted, but only "in substance," and not the precise words; this is trivial and unsound; three judges diss.).

1906, *Eaton v. Com.*, — Ky. —, 90 S. W. 972 (general rule stated).

1906, *Finch v. Com.*, — Ky. —, 92 S. W. 940.

1907, *State v. Quirk*, 101 Minn. 334, 112 N. W. 409 (defendant's silence when his wife stated why he killed, admitted).

1911, *State v. Lovell*, 235 Mo. 343, 138 S. W. 523 (by deceased, in defendant's presence, admitted).

1906, *State v. Johnson*, 73 N. J. L. 199, 63 Atl. 12 (liquor at a polling-place; remarks about it, in defendant's presence, admitted).

1913, *Boney v. Boney*, 161 N. C. 614, 77 S. E. 784.

1905, *State v. Major*, 70 S. C. 387, 50 S. E. 13 (larceny).

1906, *State v. Mungeon*, 20 S. D. 612, 108 N. W. 552 (incest; the father's silence when charged by the daughter as her child's father, in the presence of a Children's Home agent, admissible).

1905, *Phelan v. State*, 114 Tenn. 483, 88 S. W. 1040 (defendant's silence, just after a homicide, when his wife stated that he had provoked the affray; an over-strict opinion).

1909, *Crowell v. State*, 56 Tex. Cr. 480, 120 S. W. 897 (murder).

1909, *Hauger v. U. S.*, 4th C. C. A., 173 Fed. 54, 59 (defendant's wife's statements, in his presence, to the arresting officer, excluded).

*[Note 3; add:]*

1904, *Watson v. Bigelow Co.*, 77 Conn. 124, 58 Atl. 741 (whether the acceptance of goods without protest is an admission that they comply with the contract).

[Note 3 — *continued*]

1905, *Nichols v. New Britain*, 77 Conn. 965, 60 Atl. 655 (failure to include an item in a claim of damages; inference allowed).

1904, *People ex rel. Hillel Lodge v. Rose*, 207 Ill., 352 69 N. E. 762 (St. 1901, May 10, applied and held constitutional; the statute makes a corporation's failure to file an annual report *prima facie* evidence of non-user).

1911, *Donovan v. Selinas*, 85 Vt. 80, 81 Atl. 235 (ownership as between husband and wife; the husband's failure to make claim, admitted).

Compare the cases cited *ante*, § 284, which are sometimes hardly distinguishable in practice.

[Note 4; *add*.:]

1905, *State v. Rosa*, 72 N. J. L. 462, 62 Atl. 695 (conversation in a jail).

1913, *Gila Valley G. & N. R. Co. v. Hall*, 232 U. S. 94, 34 Sup. 229 (person less than 20 yards away; left to the trial Court).

[Note 5; *add*.:]

1909, *Sorenson v. U. S.*, 8th C. C. A., 168 Fed. 785 (*Weightnovel v. State* followed, in a ruling over-strict).

[Note 7; *add*.:]

1905, *Bloomer v. State*, 75 Ark. 297, 87 S. W. 438 (statement in the presence of the accused when drunk, excluded).

1913, *State v. Kysilka*, 84 N. J. L. 6, 87 Atl. 79 (identification of the accused by a witness speaking another language; excluded).

1906, *Parulo v. Philadelphia & R. R. Co.*, 145 Fed. 664, 669, C. C. A. (remarks by a railroad employee to a physician in the presence of the injured plaintiff, excluded).

[Note 8; *add*.:]

1906, *Lumpkin v. State*, 125 Ga. 24, 53 S. E. 810 (excluded on the facts).

1907, *State v. Barath*, 47 Wash. 283, 91 Pac. 977 (statements by the injured person, made in adjoining room and not addressed to defendant, excluded, under the circumstances; also statements relating to matters prior to the assault).

[Note 10; *add*.:]

1910, *Thompson's Case*, 4 Cr. App. 45 (accomplice's statement, read out by a policeman in the presence of the accused, who immediately said, "This is a pack of lies"; held admissible; the opinion shows a most singular and apparently hopeless misunderstanding of the principles applicable to this class of evidence; on appeal, [1910] 1 K. B. 640, affirmed, but the opinion, while repudiating the extreme view that only statements expressly admitted to be true are receivable, holds that any statement read in the accused's presence is admissible subject to such weight as may be given, and ignores the vital fact that the accused here promptly denied the statement *in toto*). 1910, *Norton's Case*, 5 Cr. App. 7, 65, 2 K. B. 496 (rape under age; the child made a charge in the accused's presence, which he denied; held inadmissible; here an admirable opinion, by Pickford, J., accurately and fully expounds the principle). 1910, *Atherton's Case*, 5 Cr. App. 233 (*Norton's Case* followed). 1911, *Murtrie's Case*, 6 Cr. App. 128 (similar). 1911, *Hickey's Case*, 6 Cr. App. 200 (similar). 1911, *Stroud's Case*, 7 Cr. App. 38 (*Norton's Case* followed).

1908, *Raymond v. State*, 154 Ala. 000, 45 So. 895 (larceny; the owner's statement, charging defendant under arrest, and not denied, admitted; approving the text above). 1913, *Simmons v. State*, — Ala. —, 61 So. 466 (statement in presence of accused under arrest, admitted).

1911, *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829 (excluded on the facts).

[Note 10 — *continued*]

1913, *People v. Tielke*, 259 Ill. 88, 102 N. E. 229 (interview between the accused under arrest, his sister, two policemen, and the prosecuting attorney; the sister's statements admitted, as being impliedly assented to by him). 1914, *People v. Pfanschmidt*, 262 Ill. 411, 104 N. E. 804 (statements excluded on the facts).

1904, *Merriweather v. Com.*, 118 Ky. 870, 82 S. W. 592 (*Com. v. Kenney*, Mass., followed; here the defendant was under arrest, at a railroad depot, in the presence of spectators and fellow-prisoners).

1905, *State v. Swisher*, 186 Mo. 1, 84 S. W. 911 (*State v. Foley* followed). 1905, *State v. Ethridge*, 188 Mo. 352, 87 S. W. 495 (defendant's wife's statements made in his presence to the constable arresting him, excluded). 1906, *State v. Richardson*, 194 Mo. 326, 92 S. W. 649 (*State v. Foley* followed).

1907, *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470 (statements by the deceased in the presence of the accused under arrest, excluded).

1907, *O'Hearn v. State*, 79 Nebr. 513, 113 N. W. 130 (excluded, on the facts).

1906, *People v. Cascone*, 185 N. Y. 317, 78 N. E. 287 (deceased's statement, made in the accused's presence, excluded, because on the facts, the parties being Italians but English also being used, it did not appear that the accused understood questions and answers).

1911, *People v. Conrow*, 200 N. Y. 356, 93 N. E. 943 (here the district attorney improperly recounted in detail the accomplice's story to which the defendant had refused to make answer).

1904, *Geiger v. State*, 70 Oh. 400, 71 N. E. 721 (wife-murder; the accused was brought before the chief of police, under arrest, and in his presence his child of four years recounted a story of the murder in answer to questions of the police; his silence was held not to admit this conversation; an over-strict ruling; the Court inappropriately stigmatizes the occasion as a "star-chamber investigation").

1910, *Com. v. Aston*, 227 Pa. 112, 75 Atl. 1019 (failure to deny accomplice's confession before chief of police, admitted).

1906, *State v. Sudduth*, 74 S. C. 498, 54 S. E. 1013 (dying victim's accusation of the accused in the jail, admitted). 1913, *State v. McIntosh*, 94 S. C. 439, 78 S. E. 327 (excluded on the facts).

1910, *Couch v. State*, 58 Tex. Cr. 505, 126 S. W. 866 (*Gardiner Case* approved).

1912, *Hardy v. State*, 150 Wis. 176, 136 N. W. 638 (rape; identification of the accused, when arrested, by the victim, without response by the accused, admitted).

[Note 11; *add*.]

1906, *Foster v. Hobson*, 131 Ia. 58, 107 N. W. 1101 (plaintiff's silence during counsel's assertion in another trial, when she was not a party, that her husband owned the farm now claimed by her, held not an admission).

1904, *Thayer v. Usher*, 98 Me. 468, 57 Atl. 839 (statements of U. in a court on the stand, the defendant being present and not denying, excluded).

1907, *Hauser v. Goodstein*, 75 N. J. L. 66, 66 Atl. 932 (defendant's silence during testimony to an agency, excluded).

1909, *State v. Jackson*, 150 N. C. 831, 64 S. E. 376 (silence during testimony at an election commissioners' hearing, not received as an admission).

1909, *Thorp's Will*, 150 N. C. 831, 64 S. E. 379 (testator's silence during a former trial when his counsel argued that he was insane, not received as an admission).

1911, *Parrott v. State*, 125 Tenn. 1, 139 S. W. 1056 (defendant's silence at other trials, when hearing witnesses' charges; inference not allowed).

[Note 13; *add*.]

1914, *People v. Harrison*, 261 Ill. 517, 104 N. E. 259 (the accused's reply that the narrator is a liar is a sufficient negation of silent assent to any part of the statement).

1907, *Johnson v. State*, 90 Miss. 317, 43 So. 435.

[Note 13 — *continued*]

1913, *State v. D'Adame*, 84 N. J. L. 386, 86 Atl. 414.

1910, *State v. Swenson*, 26 S. D. 589, 129 N. W. 119.

### § 1073. Third Person's Document; Unanswered Letter, etc.

[Note 1; *add.*]

1906, *Rogers v. Krumrei*, 143 Mich. 15, 106 N. W. 279 (memorandum of a contract, made by one party in the sight of the other, admitted against the latter).

1905, *Pacific Export L. Co. v. North P. L. Co.*, 46 Or. 194, 80 Pac. 105 (memorandum dictated by A in B's presence to a stenographer, typewritten, and a copy given to B, received for A as an admission of B).

[Note 2, par. 1; *add.*]

1909, *Snell v. Wilson*, 239 Ill. 279, 87 N. E. 1022 (similar to *Razor v. Razor*; cited more fully *ante*, § 260).

1905, *Knox v. State*, 164 Ind. 226, 73 N. E. 255 (letter found on the accused when arrested, admitted).

1909, *Sorenson v. U. S.*, 8th C. C. A., 168 Fed. 785 (certain incriminating letters from defendant's wife, not admitted).

The following case is peculiar:

1912, *State v. McFarland*, 83 N. J. L. 474, 83 Atl. 993 (wife-murder; the defendant's intention to rid himself of his wife being in issue, letters of his paramour addressed to him, referring to his expressed intention to get a divorce, and retained by him, were held inadmissible for the purpose, as not having been impliedly assented to; five judges dissenting; the dissent is clearly correct; the majority opinion overstrains the test of admissibility; mere possession should suffice, leaving the possessor to explain if he can; the learned judge's statement that the reference in the text above to the consideration that "the party may always exculpate himself," etc., is "an amazing suggestion in view of the disability of parties to testify at common law" might be answered by noting that that was precisely what Lord Chief Justice Eyre permitted Horne Tooke to do, *supra*, one hundred years ago; the learned Chief Justice's remark made in that case contains the good sense of the whole subject).

[Note 3, par. 1; *add.*]

1912, *SeEVERS v. Cleveland Coal Co.*, — Ia. —, 138 N. W. 793 (contract; certain unanswered letters, excluded, in a too finical ruling).

1905, *Parker v. Farmers' F. Ins. Co.*, 188 Mass. 257, 74 N. E. 286 (insurer's failure to answer a letter of the insured about the agent, held not an admission of its statement; the ruling seems wrong on its facts).

1904, *State Bank v. McCabe*, 135 Mich. 479, 98 N. W. 20 (demand of money; failure to reply held not to admit the statement of claim; making an arbitrary distinction between written and oral statements).

1905, *Klein v. East River E. L. Co.*, 182 N. Y. 27, 74 N. E. 495 (receipt of a letter of the defendant's attorney advising him that certain instruments were valid, held not an admission by the defendant).

1912, *Curtsinger v. McGown*, — Tex. Civ. App. —, 149 S. W. 303 (statement of claim for services; failure to reply, held not an admission).

1906, *Rumble v. U. S.*, 143 Fed. 772, 780, C. C. A. (unanswered letter, admitted on the facts). 1913, *Thrush v. Fullhart*, 4th C. C. A., 210 Fed. 1 (breach of marriage promise; plaintiff's letters to defendant after breach and after controversy arisen, excluded; no authority cited).

1911, *State v. Greene*, 38 Utah 389, 115 Pac. 181 (a statement charging the defendant with being the father of a bastard by M., shown to and read by him, and only partly denied; the statement admitted).

[Note 4, par. 1; *add*.:]

1904, *Daytona Bridge Co. v. Bond*, 47 Fla. 136, 36 So. 445 (the objection to the account need not have been made immediately, but within a reasonable time).

Haw. St. 1905, No. 52, p. 102, Apr. 24 (account rendered, undisputed for six months, to be *prima facie* evidence).

1908, *Davis v. Stephenson*, 149 N. C. 113, 62 S. E. 900 (exception to the rule, here applied).

[Note 4, par. 2; *add*, under (1):]

1906, *Little & H. I. Co. v. Pigg*, — Ky. —, 96 S. W. 455.

1909, *Ripley v. Sage L. & I. Co.*, 138 Wis. 304, 119 N. W. 108.

[Note 4, par. 2, at the end; *add*.:]

So also the principle applies where a *duplicate original* of a delivery entry is handed to the buyer at the time of a delivery: 1911, *Federal U. Surety Co. v. Indiana L. & M. Co.*, 176 Ind. 328, 95 N. E. 1104.

[Note 5; *add*.:]

1905, *Haughton v. Aetna L. Ins. Co.*, 165 Ind. 32, 73 N. E. 592.

1904, *Knights Templar & M. L. I. Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066 (not conclusive).

1906, *Jackman v. Brotherhood*, 132 Ia. 64, 106 N. W. 350 (*Supreme Tent v. Stensland*, 206 Ill. 124, approved).

1908, *Supreme Lodge K. of P. v. Bradley*, — Ky. —, 109 S. W. 1178 (doctor's certificate).

1906, *Krapp v. Metrop. L. Ins. Co.*, 143 Mich. 369, 106 N. W. 1107 (proofs of death in general).

1886, *Goldschmidt v. Ins. Co.*, 102 N. Y. 486, 492 (coroner's verdict, expressly denied in the proofs to be true, excluded). 1896, *Hanna v. Connecticut M. L. Ins. Co.*, 150 N. Y. 526, 44 N. E. 1099.

1903, *Stevens v. Continental C. Co.*, 12 N. D. 463, 97 N. W. 862 (excluded as against an infant).

1883, *Insurance Co. v. Schmidt*, 40 Oh. St. 112 (physician's answers, based on hearsay excluded).

1906, *Felix v. Fidelity M. L. Ins. Co.*, 216 Pa. 95, 64 Atl. 903 (suicide; physician's statement, etc., in proofs of death, admitted).

1904, *Fey v. I. O. O. F. Ins. Soc'y*, 120 Wis. 358, 98 N. W. 206. 1913, *Krogh v. Modern Woodman*, 153 Wis. 397, 141 N. W. 276.

The cases are collected and examined in an article by Professor A. M. Kales, in 6 *Columbia Law Review*, 509 (1906), "Declarations of the Insured against the Beneficiary."

In *Kentucky*, the "proofs of loss" are not receivable at all against the beneficiary, except as containing his own statements: 1904, *American Benevolent Ass'n v. Stough*, — Ky. —, 83 S. W. 126.

## § 1074. Books of a Corporation or Partnership.

[Note 3, l. 1; *add*.:]

*Chesapeake & O. R. Co. v. Deepwater R. Co.*, 57 W. Va. 641, 50 S. E. 890 (1905).

[Note 4; *add*.:]

In *Chesapeake & O. R. Co. v. Deepwater R. Co.*, 57 W. Va. 641, 50 S. E. 890 (1905), there is a full collection of rulings; but the opinion of the majority does not appreciate the inherent distinctions of the subject; Brannon, P., diss. on this point, expounds the correct view, illustrating the discrimination above taken.

[Note 5; *add*.:]

1908, *Schlicher v. White*, 74 N. J. L. 839, 71 Atl. 337 (suit for accounting).

[Note 6; add:]

1911, *Brown v. First Nat'l Bank*, 49 Colo. 393, 113 Pac. 483 (embezzlement; bank's books admitted).

1904, *Norman P. S. Co. v. Ford*, 77 Conn. 461, 59 Atl. 499 (a corporation record-book, containing a certificate by a majority of the directors reciting a receipt of assets, excluded, as not a regular entry in a book of account).

1905, *Lowry Nat'l Bank v. Fickett*, 122 Ga. 489, 50 S. E. 396 (not clear).

1912, *Howard v. Strode*, 242 Mo. 210, 146 S. W. 792 (whether L. J. H., deceased, was in Decatur or St. Louis on Jan. 15, 1883; minutes of a stockholders' meeting in St. Louis, reciting the presence of L. J. H., signed by him as secretary, and dated Jan. 16, 1883, also an order-book with an entry by the same person on Jan. 15, 1883, admitted, as a regular entry in the course of business).

Against an active officer the books are of course admissible, on the principle of § 1073, par. (2), *ante*:

1908, *State v. Hoffman*, 120 La. 949, 45 So. 951 (knowing receipt of deposits, while insolvent, by a bank cashier; bank book entries admissible against defendant, though actual knowledge must also be believed by the jury before finding guilt).

[Note 7; add:]

St. 1908, 8 Edw. VII, c. 69, § 220 (Companies Act; "where any company is being wound up, all books and papers of the company and of the liquidators shall, as between the contributors of the company, be *prima facie* evidence of the truth of all matters purporting to be therein recorded").

[Note 8, par. 1; add:]

1904, *French v. Millville Mfg. Co.*, 70 N. J. L. 969, 59 Atl. 214 (question not decided; here the books were used to refresh the secretary's memory).

1905, *Harrison v. Remington P. Co.*, 140 Fed. 385, 402, C. C. A. (Carey v. Williams, *supra*, followed; but here the defendant's admissions were received, in the shape of certificates signed on the stubs and corresponding assignments written in the certificate book).

1913, *Oregon & Cal. R. Co. v. Grubissich*, 9th C. C. A., 206 Fed. 577 (corporate records — here of the plaintiff — not admitted to show the contents of a deed purporting to have been made to the corporation 40 years before and copied in the minutes; Ross, J., diss.).

1906, *State ex rel. Biddle v. Superior Court*, 44 Wash. 108, 87 Pac. 40 (following *Turnbul v. Payson*, U. S.).

[Note 8, par. 2; add:]

*Eng.*: St. 1908, 8 Edw. VII, c. 69, § 33 (Companies Act; "the register of members shall be *prima facie* evidence of any matters by this Act directed or authorized to be inserted therein").

*Ont.*: St. 1907, 7 Edw. VII, c. 34, § 119 (like Rev. St. 1897, c. 191, § 76).

*Yukon*: Consol. Ord. 1902, c. 56, § 53 (like Ont. Rev. St. 1897, c. 191, § 76).

*Colo.*: St. 1903, c. 77 (stock-book to be evidence against a stockholder).

## § 1075. Depositions in Another Trial, used, etc.

[Note 2, par. 1; add:]

1913, *McCarty v. Kepreta*, 24 N. D. 395, 139 N. W. 992, 1007 (affidavit of a third person, filed with the defendant's affidavit, held not necessarily to be taken as true in all parts).

1908, *Patty v. Salem F. Co.*, 53 Or. 350, 96 Pac. 1106 (testimony of B., called for defendant in another suit, not admitted; the opinion treats it as a question of § 1072, *ante*, and apparently ignores the present principle).

1907, *Becker v. Philadelphia*, 217 Pa. 344, 66 Atl. 564 (personal injuries; the testimony of

[Note 2 — continued]

a physician, offered by the plaintiff in a former suit against another defendant, admitted for the present defendant as "adopted and used as her own" by the plaintiff).

So, also, on other principles, a party's *own deposition or affidavit* may be used as a self-contradiction (*ante*, § 1040, n. 3) or as a falsification showing consciousness of guilt (*ante*, § 278, n. 3).

#### § 1076. Admissions of Other Parties to the Litigation, etc.

[Note 4; *add*.:]

1904, *State v. Brady*, 71 N. J. L. 360, 59 Atl. 6 (rape-prosecutrix).

1905, *State v. Hummer*, 72 id. 328, 62 Atl. 388 (same).

1906, *Brown v. State*, 127 Wis. 193, 106 N. W. 536 (rape-prosecutrix).

[Note 5; *add*.:]

Yet in some cases the contrary is a practically better rule: 1904, *Starr B. G. Ass'n v. North L. C. Ass'n*, 77 Conn. 83, 58 Atl. 467 (admissions of members of a corporation may sometimes be received against the corporation; good opinion by Hamersley, J.).

[Note 6; *add*.:]

1914, *Whisner v. Whisner*, — Md. —, 89 Atl. 393.

1906, *Stone v. Stone*, 191 Mass. 371, 77 N. E. 845 (executor; admitted).

1909, *Gibson v. Boston*, 75 N. H. 405, 75 Atl. 103.

[Note 7; *add*.:]

1904, *Knights Templar & M. L. I. Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066.

But not of a guardian *against the minor*: 1905, *Kidwell v. Ketler*, 146 Cal. 12, 79 Pac. 514; this is really on the principle of § 1078, *post*.

For an *infant's admissions* against himself, see § 1053, *ante*, and § 1063, n. 1, at the end.

[Note 8; *add*.:]

1903, *Stevens v. Continental C. Co.*, 12 N. D. 463, 97 N. W. 862 (infant).

A *counsel* has of course the same authority for an infant's guardian *ad litem* as for any client; *ante*, § 1063, note 1.

[Note 10; *add*, under *Accord*.:]

1907, *Postal Tel. C. Co. v. Likes*, 225 Ill. 249, 80 N. E. 136.

1905, *Illinois C. R. Co. v. Houchins*, 121 Ky. 526, 89 S. W. 530 (but the Court must instruct as to its limited use).

[Note 10, at the end; *add*.:]

1910, *McCullough Bros. v. Sawtell*, 134 Ga. 512, 68 S. E. 89 (joint claim; admissions received).

[Note 11, par. 1; *add*.:]

So on a charge of *adultery*: 1868, *Com. v. Thompson*, 99 Mass. 444 (adultery).

1902, *Terr. v. Castro*, 14 Haw. 131 (adultery).

#### § 1077. Privies in Obligation, etc.

[Note 2, par. 1; *add*.:]

1910, *Sanders v. Keller*, 18 Ida. 590, 111 Pac. 350.

1911, *Federal U. Surety Co. v. Indiana L. & M. Co.*, 176 Ind. 328, 95 N. E. 1104.

1904, *Knott v. Peterson*, 125 Ia. 404, 101 N. W. 173 (citing cases).

[Note 2 — continued]

- 1908, Kuhl v. Chamberlain, 140 Ia. 546, 118 N. W. 776 (banker's books).  
 1911, Atlas Shoe Co. v. Bloom, 209 Mass. 563, 95 N. E. 952 (debtor's admissions not received against the guarantor).  
 1906, Jangraw v. Perkins, 79 Vt. 107, 64 Atl. 449.  
 1911, United American F. Ins. Co. v. American Bonding Co., 146 Wis. 573, 131 N. W. 994.

This principle is occasionally ignored through the tendency to look only at the state of the parties under § 1076, *ante*; e. g.: 1904, McGowan v. Davenport, 134 N. C. 526, 47 S. E. 27 (trust deed of wife's separate property, to secure a debt recited to be that of husband and wife; the deceased husband's admissions that the debt was unpaid were excluded, because his estate was not a party to the action to foreclose).

§ 1078. **Agent, Partner, Attorney, etc.**

[Note 1; add:]

The provision in *Georgia*, Code 1895, § 3034, that "the declarations of an agent . . . are not admissible against his principal unless they were a part of the negotiation and constituting the *res gesta*, or else the agent be dead," has been properly construed to mean, not that a deceased agent's statements are always receivable though not a part of the *res gesta*, but that, apart from the present rule of *res gesta*, the deceased agent's statements may be received as exceptions to the Hearsay rule whenever they fulfil the requirements of any of those exceptions, e. g. as regular entries, statements against interest, etc.: 1905, Turner v. Turner, 123 Ga. 5, 50 S. E. 969.

[Text, p. 1278, last line, after "argument"; add a new note 1a:]

<sup>1a</sup> The following enlightened opinion here marks a new departure:

- 1911, United American F. Ins. Co. v. American Bonding Co., 146 Wis. 573, 131 N. W. 994 (a report by an agent, made under a duty, but after his agency contract had expired, held admissible; opinion by Barnes, J.; Kerwin and Timlin, J.J., diss.).

[Note 2, l. 3; add:]

- 1903, Luman v. Golden A. C. M. Co., 140 Cal. 700, 74 Pac. 307.  
 1904, Redmon v. Metropolitan St. R. Co., 185 Mo. 1, 84 S. W. 26.  
 1904, Cook v. Stimson Mill Co., 36 Wash. 36, 78 Pac. 39.

[Note 2, l. 8; add:]

- 1913, Forrester v. Southern Pacific R. Co., — Nev. —, 134 Pac. 753.  
 1904, Havens v. R. I. Suburban R. Co., 26 R. I. 48, 58 Atl. 247.

[Note 3; add:]

- 1903, Sweeney v. Sweeney, 119 Ga. 76, 46 S. E. 76 (agent of land).  
 1904, National Bldg. Ass'n v. Quin, 120 Ga. 358, 47 S. E. 962 (contract of loan).  
 1904, Baier v. Selke, 211 Ill. 512, 71 N. E. 1074 (brewmaster).  
 1904, Parker's Adm'r v. Cumberland T. & T. Co., — Ky. —, 77 S. W. 1109 (foreman).  
 1906, Shelbyville W. & L. Co. v. McDade, 122 Ky. 639, 92 S. W. 568 (engineer).  
 1905, Bachant v. Boston & M. R. Co., 187 Mass. 392, 73 N. E. 642 (railroad station-agent).  
 1906, McDonough v. Boston El. R. Co., 191 Mass. 509, 78 N. E. 141 (motorman).  
 1905, Poindexter & O. L. S. Co. v. Oregon S. L. R. Co., 33 Mont. 338, 83 Pac. 886 (railroad section boss).  
 1904, Clancy v. Barker, 71 Nebr. 83, 98 N. W. 440 (hotel).  
 1905, Alden v. Grande R. L. Co., 46 Or. 593, 81 Pac. 385 (foreman of a logging camp).  
 1905, Austin v. Forbis, 99 Tex. 234, 89 S. W. 405 (injury by electricity).  
 1906, Baker v. Washington I. Co., 44 Wash. 697, 86 Pac. 1125 (driver).  
 1904, Kamp v. Coxe Bros. & Co., 122 Wis. 206, 99 N. W. 366.

[Note 4, col. 1; *add*.:]

- 1904, *Russell v. Washington S. Bank*, 23 D. C. App. 398, 406.  
 1906, *Peyton v. Old Woolen M. Co.*, 122 Ky. 361, 91 S. W. 719.  
 1907, *Ryle v. Manchester B. & L. Ass'n*, 74 N. J. L. 840, 67 Atl. 87.  
 1905, *Jackson v. American T. & T. Co.*, 139 N. C. 347, 51 S. E. 1015.  
 1914, *Surbaugh v. Butterfield*, — Utah —, 140 Pac. 757.  
 1913, *Livingstone Mfg. Co. v. Rizzi*, 86 Vt. 419, 85 Atl. 912.

[Note 4, at the end; *add*.:]

- 1905, *Aultman T. & E. Co. v. Knoll*, 71 Kan. 109, 79 Pac. 1074.  
 1907, *Superior Drill Co. v. Carpenter*, 150 Mich. 262, 114 N. W. 67.  
 1911, *Marcus v. Gimbel Bros.*, 231 Pa. 200, 80 Atl. 75.

[Note 5; *add*.:]

- 1906, *Fifer v. Clearfield & C. C. Co.*, 103 Md. 1, 62 Atl. 1122 (requiring the evidence of agency to precede the declarations).  
 1905, *Singer Mfg. Co. v. Christian*, 211 Pa. 534, 60 Atl. 1087.  
 1911, *Henderson v. Coleman*, 19 Wyo. 183, 115 Pac. 439.  
 Compare the cases cited *post*, § 1777.

### § 1079. Co-Conspirators, etc.

[Note 1, par. 1; *add*.:]

- 1913, *Crowell v. State*, — Ariz. —, 136 Pac. 279 (murder).  
 1906, *Chapline v. State*, 77 Ark. 444, 95 S. W. 477 (bribery). 1906, *Butt v. State*, 81 Ark. 173, 98 S. W. 723.  
 1905, *Johnson v. People*, 33 Colo. 224, 80 Pac. 133 (abortion; the woman a co-conspirator).  
 1905, *Rawlins v. State*, 124 Ga. 31, 52 S. E. 1.  
 1904, *Miller v. John*, 208 Ill. 173, 70 N. E. 27.  
 1904, *Graff v. People*, 208 id. 312, 70 N. E. 299.  
 1905, *Knox v. State*, 164 Ind. 226, 73 N. E. 255. 1907, *Sanderson v. State*, 169 Ind. 301, 82 N. E. 525 (murder). 1910, *Baker v. State*, 174 Ind. 708, 92 N. E. 14. 1911, *Malone v. State*, 176 Ind. 338, 96 N. E. 1.  
 1904, *State v. Walker*, 124 Ia. 414, 100 N. W. 354. 1906, *State v. Brown*, 130 Ia. 57, 106 N. W. 379 (instigator of a crime). 1907, *State v. Crofford*, 133 Ia. 478, 110 N. W. 921 (murder). 1910, *State v. Manning*, 149 Ia. 205, 128 N. W. 345. 1911, *State v. Gilmore*, 151 Ia. 618, 132 N. W. 53 (abortion).  
 1907, *Com. v. Hargis*, 124 Ky. 356, 99 S. W. 348.  
 1911, *Higgins v. Com.*, 142 Ky. 647, 134 S. W. 1135 (murder).  
 1906, *Lawrence v. State*, 103 Md. 17, 63 Atl. 96 (conspiracy to defraud).  
 1911, *Com. v. Stuart*, 207 Mass. 563, 93 N. E. 825.  
 1904, *State v. Boatright*, 182 Mo. 33, 81 S. W. 450. 1906, *State v. Ruck*, 194 Mo. 416, 92 S. W. 706 (the co-conspirator need not be a party to the record). 1906, *State v. Darling*, 199 Mo. 168, 97 S. W. 592. 1906, *State v. Forshee*, 199 Mo. 142, 97 S. W. 933.  
 1908, *State v. Merchants' Bank*, 81 Nebr. 704, 116 N. W. 667 (fraud on creditors).  
 1906, *Terr. v. Neatherlin*, 13 N. M. 491, 85 Pac. 1044.  
 1912, *People v. Storrs*, 207 N. Y. 147, 100 N. E. 730 (forgery).  
 1909, *Sturgis v. State*, 2 Okl. Cr. 362, 102 Pac. 57 (liquor-selling).  
 1905, *State v. Ryan*, 47 Or. 338, 82 Pac. 703 (larceny). 1906, *State v. White*, 48 Or. 416, 87 Pac. 137.  
 1905, *Smith v. State*, 48 Tex. Cr. 233, 89 S. W. 817 (reviewing prior cases). 1908, *Richards v. State*, 53 Tex. Cr. 400, 110 S. W. 432 (whether the declarations of one already acquitted are admissible).  
 1903, *State v. Dix*, 33 Wash. 405, 74 Pac. 570 (embezzlement).

[Note 1 — *continued*]

1906, *State v. Dilley*, 44 Wash. 207, 87 Pac. 133 (robbery). 1912, *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 984 (bribery).  
 1905, *Schutz v. State*, 125 Wis. 452, 104 N. W. 90 (bribery).  
 1905, *Sprinkle v. U. S.*, 141 Fed. 811, C. C. A. (revenue frauds). 1905, *Brown v. U. S.*, 142 Fed. 1, C. C. A. (misappropriation of bank funds). 1909, *Doyle v. U. S.*, 6th C. C. A., 169 Fed. 625. 1909, *West Pub. Co. v. Edward Thompson Co.*, C. C. E. D. N. Y., 169 Fed. 833, 863 (digest and cyclopedia). 1910, *Jones v. U. S.*, 9th C. C. A., 179 Fed. 584, 601 (fraudulent acquisition of public lands). 1912, *Keliher v. U. S.*, C. C. A., 193 Fed. 8 (embezzlement).  
 1909, *Miller v. State*, 139 Wis. 57, 119 N. W. 850. 1911, *Tarasinski v. State*, 146 Wis. 508, 131 N. W. 889 (murder).

[Note 2; *add.*:]

1904, *R. v. Hutchinson*, 11 Br. C. 24, 33 (good opinion, by Hunter, C. J.).  
 1904, *People v. Donnolly*, 143 Cal. 394, 77 Pac. 177.  
 1873, *Solander v. People*, 2 Colo. 48, 64.  
 1904, *Lorenz v. U. S.*, 24 D. C. App. 337, 373.  
 1907, *Cook v. State*, 169 Ind. 430, 82 N. E. 1047.  
 1904, *State v. Walker*, 124 Ia. 414, 100 N. W. 354 (good opinion, by McClain, J.).  
 1911, *State v. Fields*, 234 Mo. 615, 138 S. W. 518.  
 1904, *Wells v. Terr.*, 14 Okl. 436, 78 Pac. 124.  
 1911, *Thompson v. State*, 6 Okl. Cr. 50, 117 Pac. 216.  
 1912, *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.

[Note 4; *add.*:]

1905, *State v. Mann*, 39 Wash. 144, 81 Pac. 561.  
*Contra*: 1912, *State v. Beebe*, 66 Wash. 463, 120 Pac. 122 (distinguishing *State v. Mann*. but certainly unsound in result).

### § 1081. Decedent, Insured, Co-Legatee, etc.

1905, *O'Brien v. Knotts*, 165 Ind. 308, 75 N. E. 582 (indebtedness of an estate).

[Note 2, l. 4; *add.*:]

1906, *Cross v. Iler*, 103 Md. 592, 64 Atl. 33 (husband's admissions, in an action by his widow against the administratrix).  
 1905, *Benson v. Raymond*, 142 Mich. 357, 105 N. W. 870 (declarations of grantee of a deed, as to grantor's insanity, received against the grantee's heirs).  
 1903, *Dixon v. Union Ironworks*, 90 Minn. 492, 97 N. W. 375 (wife-administratrix' action for death of husband).

Compare the rule for *statements of facts against interest* (*post*, § 1461, n. 1).

[Note 3; *add.*:]

1906, *Jacksonville El. Co. v. Sloan*, 52 Fla. 257, 42 So. 516 (action by a widow, in her own right, for the death of her husband).

[Text, p. 1287, par. (1), l. 3 from below:]

*Omit* the sentence beginning, "The distinction sometimes taken."

[Note 6; *add.*:]

These cases, with the others on the subject, are exhaustively analyzed and the correct theory lucidly expounded in an article by Professor A. M. Kales, "Declarations of the Insured against the Beneficiary," 6 *Columbia Law Rev.* 509 (1906).

[Note 6 — continued]

Add the following cases: 1913, *Logia Suprema v. Aguirre*, 14 Ariz. 390, 129 Pac. 503. 1907, *Taylor v. Grand Lodge*, 101 Minn. 72, 111 N. W. 919. 1906, *Hews v. Equitable L. A. Soc'y*, 143 Fed. 850, C. C. A.

[Text, par. (1), at the end; add a new note 6a:]

\* For the question whether an *insurer's* admissions, as the real plaintiff in an action for loss by fire, are receivable, see a careful opinion by Gray, J., in *Judd v. N. Y. & T. S. S. Co.*, 128 Fed. 7, 62 C. C. A. 515 (1904):

[Note 9; add:]

Nor of a *prior mortgagee*: 1903, *Lang v. Metzger*, 206 Ill. 475, 69 N. E. 493 (a first mortgagee's admissions, not received against a second mortgagee).

[Note 11; add:]

1848, *Roberts v. Thawick*, 13 Ala. 68, 80 (mental incapacity).  
 1906, *Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695 (mental incapacity). 1908, *Dolbeer's Estate*, 153 Cal. 652, 96 Pac. 266. 1910, *Snowball's Estate*, 157 Cal. 301, 107 Pac. 598.  
 1889, *Dale's Appeal*, 57 Conn. 127, 140, 17 Atl. 757 (undue influence).  
 1906, *Robinson v. Duvall*, 27 D. C. App. 535, 548 (caveatee's admissions of testator's sanity, excluded, except to contradict him as a witness).  
 1891, *Campbell v. Campbell*, 138 Ill. 612, 615, 28 N. E. 1080 (undue influence). 1912, *Cunniff v. Cunniff*, 255 Ill. 407, 99 N. E. 654 (excluding statements of undue influence made by one devisee; citing *Campbell v. Campbell*, 138 Ill. 612, but not *Egbers v. Egbers*, *infra*, n. 12).  
 1879, *Hayes v. Burkam*, 67 Ind. 359, 363 (mental incapacity). 1913, *Sanger v. Bacon*, — Ind. —, 101 N. E. 1001 (excluded; but noting that such statements may be admissible as self-contradictions).  
 1879, *Ames' Will*, 51 Ia. 596, 602, 2 N. W. 408 (undue influence).  
 1905, *Fothergill v. Fothergill*, 129 Ia. 93, 105 N. W. 377. 1912, *Lawless v. Lawless*, — Ia. —, 135 N. W. 560.  
 1906, *Kelly v. Kelly*, 103 Md. 548, 63 Atl. 1082 (admissions of the testator's insane conduct, made before his death, by K., the executor and sale devisee, excluded; this is an *absurditas absurditatum*).  
 1804, *Phelps v. Hartwell*, 1 Mass. 71 (mental capacity; but see *Atkins v. Sanger*, 1822, 1 Pick. 192, *semble, contra*). 1891, *McConnell v. Wildes*, 153 Mass. 487, 26 N. E. 114 (undue influence). 1908, *Gorham v. Moor*, 197 Mass. 522, 84 N. E. 436 (but here admitted as self-contradictions to impeach). 1913, *Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487 (silence of a beneficiary of a will is not to be taken as an admission).  
 1893, *O'Connor v. Madison*, 98 Mich. 183, 190, 57 N. W. 105 (undue influence). 1904, *Roberts v. Bidwell*, 136 Mich. 191, 98 N. W. 1000.  
 1855, *Prewett v. Coopwood*, 30 Miss. 369, 388 (pecuniary claim).  
 1905, *King v. Gilson*, 191 Mo. 307, 90 S. W. 367. 1906, *Meier v. Buchter*, 197 Mo. 68, 94 S. W. 883 (rule in *Schierbaum v. Schemme*, *supra*, not applied, where the devisees were charged as co-conspirators to defraud). 1907, *Seibert v. Hatcher*, 205 Mo. 83, 102 S. W. 962 (*Schierbaum v. Schemme* followed).  
 1888, *Carpenter v. Hatch*, 64 N. H. 573, 15 Atl. 219 (mental incapacity).  
 1907, *Myers v. Myers*, 75 N. J. L. 610, 68 Atl. 82.  
 1906, *Myer's Will*, 184 N. Y. 54, 76 N. E. 920 (admissions of the principal legatee as to testatrix' incapacity, excluded).  
 1906, *Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709 (*semble*, not decided in general, but here excluded).  
 1862, *Thompson v. Thompson*, 13 Oh. St. 356 (mental capacity).

[Note 11 — continued]

- 1825, *Nussear v. Arnold*, 13 S. & R. 323.  
 1851, *Mullins v. Lyles*, 1 Swan 337 (fraud and undue influence).  
 1889, *Ormsby v. Webb*, 134 U. S. 47, 65, 10 Sup. 478 (excluded, except to contradict as a witness, where the declarant was not sole legatee).  
 1913, *In re Thompson*, N. J. D., 205 Fed. 558 (bankrupt).  
 1899, *Whitelaw v. Whitelaw*, 96 Va. 712, 32 S. E. 358 (mental incapacity).  
 1871, *Forney v. Ferrell*, 4 W. Va. 729, 739 (undue influence).  
*Undecided*: 1905, *Arnold's Estate*, 147 Cal. 583, 82 Pac. 252.

[Note 12; add:]

- 1904, *Powers' Ex'r v. Powers*, — Ky. —, 78 S. W. 152 (devisee's admissions).  
 1910, *McConnell's Ex'r v. McConnell*, 138 Ky. 783, 129 S. W. 106.  
 1914, *Scott v. Townsend*, — Tex. —, 166 S. W. 1138 (second wife and her child as devisees).  
 1906, *Miller's Estate*, 31 Utah 415, 88 Pac. 338 (sole legatee's admissions, received).

[Note 13; add:]

For the same reason, an *executor's* admissions should be receivable: *Contra*: 1911, *Fowler's Will*, 156 N. C. 340, 72 S. E. 357 (undue influence).

#### § 1082. Grantor, etc.; Admissions before Transfer.

[Note 1; add:]

- 1908, *Kitchell v. Hodgen*, 78 Kan. 551, 97 Pac. 369 (sale of realty).  
 1910, *Abbott v. Walker*, 204 Mass. 71, 90 N. E. 405 (but here the Court erroneously states limitation of § 1567, *post*, i. e. that the declarations were made while on land).  
 1911, *Northrup v. Columbian Lumber Co.*, C. C. A., 186 Fed. 770 (received, where made before title transferred).  
 1905, *Stewart v. Doak Bros.*, 58 W. Va. 172, 52 S. E. 95 (boundaries).

[Note 2; add:]

- 1911, *Washoe Copper Co. v. Junila*, 43 Mont. 178, 115 Pac. 917 (title not shown at all).

#### § 1083. Same: Personality, etc.

[Note 4; add:]

- 1905, *Conkling v. Weatherwax*, 181 N. Y. 258, 73 N. E. 1028 (*Foot v. Beecher*, *Merkle v. Beidleman*, *supra*, approved, *obiter*).  
 1912, *People v. Storrs*, 207 N. Y. 147, 100 N. E. 730 (forgery by a wife of a marriage settlement, dated Aug. 21, 1909, by the husband, reciting the gift of an automobile, etc., to her; the deceased husband's declarations, made at some time in the summer of 1909, that he had so given the automobile, held admissible for the defence, on the theory that the *Paige v. Cagwin* is subject to an exception allowing a deceased owner's disclaimers to be used against his representative in defence to a claim of title; but this is hardly an exception, as the rule of *Paige v. Cagwin* was expressly limited to purchasers for value).

#### § 1084. Same: Negotiable Instruments.

[Note 2; add:]

- 1911, *Smith v. Goethe*, 159 Cal. 628, 115 Pac. 223 (admissions by holders of notes as against subsequent holders taking after maturity, received).

**§ 1085. Admissions after Transfer; in general.**

[*Note 1; add:*]

1903, *Lang v. Metzger*, 206 Ill. 475, 69 N. E. 493.

1906, *Jones v. Tennis C. Co.*, — Ky. —, 94 S. W. 6.

1905, *Conkling v. Weatherwax*, 181 N. Y. 258, 73 N. E. 1028 (a mortgagor, who was also executor; his admissions, made after execution of the mortgage, that the legacies had not been paid, not admitted against the mortgagee).

1905, *Leonard v. Fleming*, 13 N. D. 629, 102 N. W. 308.

1909, *Gowdy v. Gowdy*, 83 S. C. 349, 65 S. E. 385 (by a mortgagee after sale).

1905, *West v. Houston Oil Co.*, 136 Fed. 343, 348, 69 C. C. A. 169 (land).

**§ 1086. Same: Transfers in Fraud of Creditors.**

[*Note 2; add:*]

1904, *Urdangen v. Doner*, 122 Ia. 533, 98 N. W. 317 (*Bixby v. Carskaddon* followed).

1905, *Hart v. Brierley*, 189 Mass. 598, 76 N. E. 286 (personalty; excluded).

1906, *Borden v. Lynch*, 34 Mont. 503, 87 Pac. 609 (debtor's declarations of fraud, prior to the plaintiff's mortgage, held admissible against him, but here excluded for lack of evidence of his knowledge of the fraud).

1904, *Woods v. Faurot*, 14 Okl. 171, 77 Pac. 346 (attachment of H.'s goods, F. claiming by prior sale from H.; H.'s declarations of claim to the sheriff, not admitted for the creditor; no authority cited).

1903, *Walker v. Harold*, 44 Or. 205, 74 Pac. 705 (vendor's declarations after deed, executed, admitted, after evidence of a "prior dishonest combination").

1906, *Mower v. McCarthy*, 79 Vt. 142, 64 Atl. 578 (defendant loaned money to his son to buy a stock of goods and took a mortgage; the son's declarations of intent to defraud creditors, not admitted against the father, except on evidence of a conspiracy).

[*Note 3; add:*]

*Accord:* 1906, *Mower v. McCarthy*, 79 Vt. 142, 64 Atl. 578.

*Contra:* 1903, *Lumm v. Howells*, 27 Utah 80, 74 Pac. 432 (no authority cited).

**§ 1105. Good Character, after Evidence of General Character.**

[*Note 1; add:*]

For the rebuttal of testimony to the *unchaste character* of the prosecutrix in *seduction*, see *post*, § 1620.

**§ 1106. Same: After Evidence of Particular Instances, etc.**

[*Note 2; add:*]

1909, *Shields v. Conway*, 133 Ky. 35, 117 S. W. 340 (good opinion, by Carroll, J.).

1913, *Kovacs v. Mayoras*, 175 Mich. 582, 141 N. W. 662 (*Hitchcock v. Moore* followed).

1912, *State v. Diple*, 242 Mo. 461, 147 S. W. 111 (allowed, after evidence of prize-fighting and assault). 1912, *State v. Lovitt*, 243 Mo. 510, 147 S. W. 484 (allowed, after evidence of unchaste conduct by a prosecutrix in rape).

1907, *First National Bank v. Blakeman*, 19 Okl. 106, 91 Pac. 868 (admissible; leading case, with careful opinion by Burford, C. J.).

**§ 1107. Same: After Evidence of Bias, etc.**

[*Note 2; add:*]

1907, *First National Bank v. Blakeman*, 19 Okl. 106, 91 Pac. 868 (admissible; careful opinion by Burford, C. J.).

**§ 1108. Good Character, after Evidence of Self-Contradiction.**

[*Note 1; add.*]

1904, *Brown v. State*, 142 Ala. 287, 38 So. 268 (same).

1907, *State v. Hoffman*, 134 Ia. 587, 112 N. W. 103 (excluded).

1903, *Runnels v. State*, 45 Tex. Cr. 446, 77 S. W. 458 (admitted).

**§ 1109. Same: After Contradiction by Other Witnesses.**

[*Note 1; add.*]

1908, *Title Ins. & Trust Co. v. Ingersoll*, 153 Cal. 1, 94 Pac. 94 (accounting as trustee; defendant's good character of the defendant-witness not admitted where only contradictions of his testimony on minor points had been introduced).

1907, *First National Bank v. Blakeman*, 19 Okl. 106, 91 Pac. 868 (excluded; except in special cases, in the trial Court's discretion).

**§ 1111. Discrediting the Impeaching Witness, etc.**

[*Note 1; add.*]

1908, *Harms v. Proehl*, 104 Minn. 303, 116 N. W. 587 (allowing inquiry, not only to the names of the persons, but also to their statements).

1909, *State v. Osborne*, 54 Or. 289, 103 Pac. 62 (rape; defendant's witness to the woman's bad repute, not allowed to be cross-examined to his own knowledge of her good behavior; the Court mistakenly applies the rule of § 988, *ante*, as to a sustaining witness, and ignores the present rule).

[*Note 2; add.*]

1884, *State v. Woodworth*, 65 Ia. 141, 21 N. W. 490.

1905, *Hofacre v. Monticello*, 128 Ia. 239, 103 N. W. 488 (Deemer, J.: "The writer would be inclined to adopt a contrary rule. . . . But as there seems to be nothing sustaining such a [contrary] rule save an unsupported remark of Professor W. in his new work on Evidence, § 1111, it is better, perhaps, to follow the current of authority").

1908, *Harms v. Proehl*, 104 Minn. 303, 116 N. W. 587.

*Contra*: 1905, *Johnson v. State*, 75 Ark. 427, 88 S. W. 905, *semble* (cited *post*, § 1117, n. 6).

1913, *Fort Worth Belt R. Co. v. Cabell*, — Tex. Civ. App. —, 161 S. W. 1083 (after testimony to plaintiff's bad repute for truth and honesty, which the witness said was based on plaintiff's failure to pay his debts, plaintiff was allowed to explain the facts of his indebtedness).

**§ 1116. Rehabilitation of Witness; Denial of the Fact, etc.**

[*Note 4; add.*]

1904, *People v. Rodawald*, 177 N. Y. 408, 70 N. E. 1 (*Sims v. Sims* approved).

[*Note 5; add.*]

1904, *Gallagher v. People*, 211 Ill. 158, 71 N. E. 842.

**§ 1117. Same: Explaining away the Fact.**

[*Note 3; add.*]

*Contra*: 1913, *O'Brien v. Boston Elevated R. Co.*, 214 Mass. 277, 101 N. E. 365 ("No evidence is competent to explain the circumstances of the particular crime"; but counsel may argue hypothetically on the principle of § 1807, *post*).

1912, *Smith v. State*, 102 Miss. 330, 59 So. 96.

[Note 4; add:]

1912, *Neal v. State*, 178 Ind. 154, 98 N. E. 872 (after the witness has on cross-examination answered negatively to questions about attempts to kill other persons etc., he may not on re-direct examination explain the actually innocent complexion of the acts referred to in the questions; this is theoretically sound, but practically unfair; though the cross-examiner cannot prove the facts in contradiction, yet the insinuation is often equally effective (*ante*, § 983, *post*, § 1808), and the re-examination is the only means of removing its insidious effect).

1904, *McKinstry v. Collins*, 76 Vt. 221, 56 Atl. 985 (assault; plaintiff's explanation of his plea of guilty to a charge of assault on the same occasion, allowed on re-examination).

[Note 6; add:]

1905, *Johnson v. State*, 75 Ark. 427, 88 S. W. 905 (*semble*, charges brought out by an impeaching witness to character, may be denied in rebuttal, if no rule of estoppel applies).

#### § 1124. Prior Consistent Statements; Offered in Chief, etc.

[Note 1; add:]

1909, *Bennett v. State*, 160 Ala. 25, 49 So. 296.

1904, *Boyd v. State*, 84 Miss. 414, 36 So. 525.

1904, *Ranck v. Brackbill*, 209 Pa. 499, 58 Atl. 884.

1913, *State v. Turley*, — Vt. —, 88 Atl. 563.

#### § 1126. Same: After Impeachment by Inconsistent Statements.

[Note 3; add:]

*Semble*, approved in *State v. Turley*, — Vt. —, 88 Atl. 563.

[Note 4; add:]

1906, *Burks v. State*, 78 Ark. 271, 93 S. W. 983 (similar statements, not admitted, though the witness denied making the self-contradictory ones; rule of Cooley, J., in *Stewart v. People*, Mich., *supra*, repudiated).

1874, *Georgia R. Co. v. Oaks*, 52 Ga. 410, 416 (excluded). 1893, *Fussell v. State*, 93 id. 450, 456, 21 S. E. 97 (same). 1901, *Knight v. State*, 114 id. 48, 39 S. E. 928 (same).

1906, *Cook v. State*, 124 Ga. 653, 53 S. E. 104 (same).

1904, *Chicago City R. Co. v. Matthieson*, 212 Ill. 292, 72 N. E. 443 (excluded). 1909, *Reavely v. Harris*, 239 Ill. 526, 88 N. E. 238 (excluded).

1905, *Hicks v. State*, 165 Ind. 440, 75 N. E. 641 (admitted; but only such statements as corroborate the impeached parts, not other parts, of the testimony).

1913, *Hopkins v. State*, — Ind. —, 102 N. E. 851 (admitted).

Md. St. 1904, c. 661 (preserves this part of the above statute, while amending the rest; quoted *ante*, § 488).

1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127.

1904, *State v. Sharp*, 183 Mo. 715, 82 S. W. 134 (admitted, purporting to follow *State v. Taylor*, *supra*). 1913, *State v. Maggard*, 250 Mo. 335, 157 S. W. 354 (admitted, following *State v. Sharp*).

1906, *Driggers v. U. S.*, 21 Okl. 60, 95 Pac. 612 (excluded).

1906, *Cincinnati Traction Co. v. Stephens*, 75 Oh. 171, 79 N. E. 235 (excluded, where the witness admitted the making of the inconsistent statements).

1904, *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384 (excluded).

1913, *State v. Turley*, — Vt. —, 88 Atl. 563.

§ 1127. **Same: After Impeachment by Contradiction.**

[Note 1; *add.*]

1905, *Maryland Steel Co. v. Engleman*, 101 Md. 661, 61 Atl. 314 (this sort of corroboration is not permitted for parties, under St. 1874, now Pub. G. L. 1904, art. 35, § 3, cited *ante*, § 1126, n. 4).

1906, *Inman v. Dudley & D. L. Co.*, 146 Fed. 449, 456, C. C. A. (excluded).

§ 1128. **Same: After Impeachment by Bias, etc.**

[Note 1; *add.*]

1904, *Waller v. People*, 209 Ill. 284, 70 N. E. 681.

1913, *State v. Maggard*, 250 Mo. 335, 157 S. W. 352.

1908, *Driggers v. U. S.*, 21 Okl. 60, 95 Pac. 612 (admissible).

1903, *Legere v. State*, 111 Tenn. 368, 77 S. W. 1059 (rule conceded, but held not applicable on the facts).

1906, *Welch v. State*, 50 Tex. Cr. 28, 95 S. W. 1035 (excluded on the facts).

• 1906, *Anderson v. State*, 50 id. 134, 95 S. W. 1037 (excluded on the facts).

1905, *State v. Bean*, 77 Vt. 384, 70 Atl. 807 (*State v. Flint* followed).

1913, *State v. Turley*, — Vt. —, 88 Atl. 563 (evidence held here not to be within the rule).

[Note 2; *add.*]

1906, *Green v. State*, 49 Tex. Cr. 238, 90 S. W. 1115.

*Contra*: 1913, *People v. Katz*, 209 N. Y. 311, 103 N. E. 305 (*People v. Vane* said to be still law).

§ 1129. **Same: After Impeachment as to Recent Contrivance.**

[Note 1; *add.*]

1913, *Benjamin's Case*, 8 Cr. App. 146 (detective's note-book entry).

1912, *People v. Ferrara*, 18 Cal. App. 271, 122 Pac. 1089 (identification of accused).

1904, *Sweeney v. Sweeney*, 121 Ga. 293, 48 S. E. 984.

1911, *State v. Louie Moon*, 20 Ida. 202, 117 Pac. 757.

1904, *Waller v. People*, 209 Ill. 284, 70 N. E. 681 (the witness was impeached by certain former narrations of his omitting an essential fact; his statement at the time of the occurrence, including that fact, was admitted).

1906, *Kesselring v. Hummer*, 130 Ia. 145, 106 N. W. 501 (the present exception held not applicable on the facts).

1907, *National Cereal Co. v. Alexander*, 75 Kan. 537, 89 Pac. 923 (principle applied).

1909, *Lanasa v. State*, 109 Md. 602, 71 Atl. 1058 (a statement made to a detective by a co-indictee 39 days after the crime, excluded).

1904, *Com. v. Kelly*, 186 Mass. 403, 71 N. E. 807 (here, to rebut an alleged failure of the witness to identify the accused at the time). 1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127 (rule recognized). 1910, *Webb G. & C. Co. v. Boston & M. R. Co.*, 206 Mass. 572, 92 N. E. 717 (the trial Court's discretion to control).

1913, *People v. Katz*, 209 N. Y. 311, 103 N. E. 305 (accomplice testifying under promise of immunity; his statement written down shortly after arrest and a year before the promise, admitted).

1908, *Driggers v. U. S.*, 21 Okl. 60, 95 Pac. 612 (admissible).

1912, *Lyke v. Lehigh Valley R. Co.*, 236 Pa. 38, 84 Atl. 595 (rule not clearly stated).

1907, *McClellan's Estate*, 21 S. D. 209, 111 N. W. 540 (prior consistent statements, admitted to explain away the suggestion of recent fabrication; former opinion modified, as applied to the evidence here offered).

1911, *Jessie v. Com.*, 112 Va. 887, 71 S. E. 612 (statements by one also accused, made before the accusation, admitted).

**§ 1130. Same: Statements Identifying an Accused, etc.**

[*Note 1; add, under Contra:*]

1912, *Warren v. State*, 103 Ark. 165, 146 S. W. 477 (burglary; identification of the defendant by the house-occupant, immediately after arrest, excluded: "Prof. W.'s views on this subject are not in accord with the weight of authority"; but it is respectfully suggested that an equally important inquiry would be whether they are in accord with sound principle, common sense, and universal practice in proof outside of the courtroom).

1909, *People v. Lukoszus*, 242 Ill. 101, 89 N. E. 749 (no authority cited).

1904, *State v. Egbert*, 125 Ia. 443, 101 N. W. 191.

1914, *People v. Jung Hing*, — N. Y. —, 106 N. E. 105 (identification at the police station just after arrest, to corroborate the witness' identification on the stand, excluded; it is really astonishing how reluctant modern courts are to accept this bit of common sense; the learned judge's reference to the above text pays it an undeserved compliment; because the above text has unfortunately failed to express itself as intended, to the learned reader; the text means to say that a prior act or utterance of identification by a now witness is, or ought to be, admissible *in chief*, whenever identity is in dispute, *without any conditions whatever as to impeachment on the ground of recent contrivance or any other ground*).

1906, *Turman v. State*, — Tex. Cr. —, 95 S. W. 533 (rape; approving *Murphy v. State*, and prior cases; here the prosecutrix testified that as soon as she had identified the accused in the presence of the sheriff, and upon a further question by him, she fainted; the fainting was held improperly proved, as it "was calculated to greatly imperil and jeopardize the defendant's rights"; such a maudlin rule defies reason).

1908, *Gillotti v. State*, 135 Wis. 634, 116 N. W. 252 (a person robbed testified on cross-examination that he had shortly thereafter described the robbers to the sheriff; the sheriff's testimony to that description was excluded; *Marshall, J.*, diss., in a careful opinion).

**§ 1131. Same: After Cross-Examination, etc.**

[*Note 1; add:*]

1913, *Cross v. State*, 118 Md. 660, 86 Atl. 223 (*Cooke v. Curtis* followed).

1904, *State v. Sharp*, 183 Mo. 715, 82 S. W. 134 (*State v. Taylor* approved).

1905, *State v. Exum*, 138 N. C. 599, 50 S. E. 283 (why does the Court devote two pages discussing this rule, after it has been so long settled in this State?).

1912, *Allred v. Kirkman*, 160 N. C. 392, 76 S. E. 244.

The following case is unique:

1914, *People v. Jung Hing*, — N. Y. —, 106 N. E. 105 (besides the impeachment of the witness, it must be shown that the corroborating statements themselves "were made under circumstances which precluded the probability of their being inspired by others"; no authority is cited; the limitation is needless and unsound, and appears never to have been thought of by any other court).

**§ 1133. Statements of Claim by a Party, etc.**

[*Note 1; add:*]

1903, *Rulofson v. Billings*, 140 Cal. 452, 74 Pac. 35 (action on a contract by defendant's testator to adopt and support the plaintiff; after admitting for the plaintiff declarations by the testator that plaintiff was his son, the Court excluded for the defendant declarations of the testator that he was only guardian; the present principle not noticed).

1906, *McBride v. Georgia R. & E. Co.*, 125 Ga. 515, 54 S. E. 674 (with possible exceptions; here in an action for personal injuries).

1908, *Louisville & N. R. Co. v. Varner*, 129 Ga. 844, 60 S. E. 162 (personal injury; excluded).

1912, *Gordon v. Munn*, 87 Kan. 624, 125 Pac. 1 (ante-nuptial contract; the widow having

## [Note 1 — continued]

offered the deceased husband's statements that it was destroyed by mutual consent, the heir was allowed to offer other declarations of the deceased that the contract was lost and not destroyed).

1904, *Bernard v. Pittsburg Coal Co.*, 137 Mich. 279, 100 N. W. 396 (the original unamended declaration of the plaintiff having been offered as an admission, his letter to his counsel stating the fact as now claimed was received).

§ 1135. **Rape Complaint; First Theory, etc.**

## [Note 1, l. 3; add:]

*Accord*: 1912, *Kramer v. Weigand*, 91 Nebr. 47, 135 N. W. 230 (civil action for rape).

*Contra*: 1898, *R. v. Kiddle*, 19 Cox Cr. 77 (indecent assault on a child of six).

1905, *R. v. Osborne*, 1 K. B. 551 (indecent assault on a child of twelve; "such complaints are admissible, not merely as negating consent, but because they are consistent with the story of the prosecutrix").

1905, *State v. Oswalt*, — Kan. —, 82 Pac. 513 (said to be "at least doubtful").

Yet in California it is inconsistently held that the *fact of complaint* is on such a charge admissible: 1907, *People v. Gonzalez*, 6 Cal. App. 255, 91 Pac. 1013.

[Note 1, l. 5; after "*sodomy*," add:]

1908, *Soto v. Terr.*, 12 Ariz. 36, 94 Pac. 1104 (sodomy upon a child of four).

*Contra*: 1908, *State v. Sebastian*, 81 Conn. 1, 69 Atl. 1054.

## [Note 1, l. 6; add:]

Whether on a charge of *indecent liberties* seems doubtful: 1909, *People v. Scattura*, 238 Ill. 313, 87 N. E. 332 (excluded).

## [Note 2, col. 2, l. 14; add:]

1905, *State v. Willett*, 78 Vt. 157, 62 Atl. 48.

The only contrary ruling is based on inattention to the different theories: 1911, *People v. Lewis*, 252 Ill. 281, 96 N. E. 1005 (the fact of fresh complaint by the woman, excluded, because she had not testified, being dead before the trial).

## [Note 1, col. 2, par. 1, l. 5 from the end; add:]

1912, *Totten v. Totten*, 172 Mich. 565, 138 N. W. 257 (civil action for rape).

1906, *State v. Winslow*, 30 Utah 403, 85 Pac. 433 (incest with a minor daughter, there being no consenting fact).

## [Note 3; add:]

1904, *State v. Icenbice*, 126 Ia. 16, 101 N. W. 273.

## [Note 4; add:]

1906, *State v. Griffin*, 43 Wash. 591, 86 Pac. 951 (complaint six months afterwards, excluded, on the facts).

1907, *People v. Gonzalez*, 6 Cal. App. 255, 91 Pac. 1013 (time is material).

## [Note 5, l. 3; add:]

1908, *State v. Sebastian*, 81 Conn. 1, 69 Atl. 1054.

1904, *State v. Bebb*, 125 Ia. 494, 101 N. W. 189. 1910, *Smith v. Hendrix*, 149 Ia. 255, 128 N. W. 360.

1911, *Conger v. State*, 63 Tex. Cr. 312, 140 S. W. 1112.

1909, *State v. Williams*, 36 Utah 273, 103 Pac. 250 (complaint made nearly three years later, admitted; but the delay may affect its weight).

[Note 5, at the end; *add*.:]

The *total failure to complain* is of course not fatal *per se* to the prosecution :

1906, *Garvik v. Burlington, C. R. & N. R. Co.*, 131 Ia. 415, 108 N. W. 327.

**§ 1136. Same : Consequences of this Theory, etc.**

[Note 1; *add*.:]

1905, *Posey v. State*, 143 Ala. 54, 38 So. 1019.

1904, *People v. Scalamiero*, 143 Cal. 343, 76 Pac. 1098.

1910, *Huey v. State*, 7 Ga. App. 398, 66 S. E. 1023 (*Stephen v. State* followed).

1904, *State v. Harness*, 10 Ida. 18, 76 Pac. 788.

1908, *People v. Weston*, 236 Ill. 104, 86 N. E. 188.

1910, *Pulley v. State*, 174 Ind. 542, 92 N. E. 550 (the name of the alleged assailant must not be mentioned).

1905, *State v. Andrews*, 130 Ia. 609, 105 N. W. 215 (the precise scope of the "fact" of the complaint here seems to be enlarged to include "who her assailant was and what he did to her," with further qualifications; the rule is now loose and unsettled in this State; see § 1761, *post*).

1905, *State v. Barkley*, 129 Ia. 484, 105 N. W. 506 (the rule further obscured; preceding case not cited). 1910, *State v. Dudley*, 147 Ia. 645, 126 N. W. 812. 1911, *State v. Novak*, 151 Ia. 536, 132 N. W. 26 (preceding rule applied; but pointing out that details not receivable under the present principle may be admissible under the Spontaneous Declarations exception to the Hearsay rule, *post*, §§ 1139, 1760).

1907, *Younger v. State*, 80 Nebr. 201, 114 N. W. 170 (here the ruling goes further and admits the naming or describing of the assailant; the foregoing cases are not cited). 1909, *Henderson v. State*, 85 Nebr. 444, 123 N. W. 459 (unless the complaint was part of the *res gestae*).

1906, *State v. Griffin*, 43 Wash. 591, 86 Pac. 951 (statement naming the accused, excluded).

For the admissibility of a *child's* complaint, compare § 1751, *par. c*, § 1761, *n. 2*, *post*.

[Note 2, *par. 1*; *add*, under *England*.:]

1898, *R. v. Kiddle*, 19 Cox Cr. 77, *semble, contra* (indecent assault; the prosecutrix being too young to be sworn, her unsworn testimony was admitted by virtue of St. 1885, quoted *post*, § 1828; an objection to the admission of the complaint, on the ground that "there was no evidence on oath to be corroborated," was overruled).

1905, *R. v. Osborne*, 1 K. B. 551, 558, *semble, accord* (indecent assault; the opinion appears to proceed on this theory; quoted *ante*, § 1135, *n. 1*).

[Note 2, *par. 1*; *add*, under *American Courts*.:]

1910, *Huey v. State*, 7 Ga. App. 398, 66 S. E. 1023.

**§ 1138. Same : Second Theory ; Consequences of this Theory.**

[Note 2; *add*.:]

1907, *State v. Werner*, 16 N. D. 83, 112 N. W. 60 (and noting that, on this theory, the statement need not be "so recently after the commission of the offence," as it must be when admitted on the theory of § 1761, *post*).

1913, *State v. Apley*, 25 N. D. 298, 141 N. W. 740 (following *State v. Werner*).

[Note 3; *add*.:]

1910, *Gaines v. State*, 167 Ala. 70, 52 So. 643 (*Oakley v. State* approved).

1907, *State v. Fowler*, 13 Ida. 317, 89 Pac. 757.

1906, *State v. Bateman*, 198 Mo. 221, 94 S. W. 843.

1913, *State v. Lawhorn*, 250 Mo. 293, 157 S. W. 344 (affirming *State v. Jones* and *State v. Bateman*).

[*Note 3 — continued*]

1888, *State v. Campbell*, 20 Nev. 126, 17 Pac. 620 (excluded, unless after impeachment).

1905, *Re Kelly*, 28 Nev. 491, 83 Pac. 223 (*State v. Campbell* followed).

1904, *State v. Parker*, 134 N. C. 209, 46 S. E. 511 (a technical rule laid down as to the judge's charge).

1907, *State v. Werner*, 16 N. D. 83, 112 N. W. 60 (but without formally accepting either specific theory).

§ 1139. **Third Theory, etc.**

[*Text*; at the end, *add* a new paragraph:]

(4) If the prosecutrix is *too young to be a witness*, nevertheless the statement is receivable.

§ 1141. **Complaint in Travail by a Bastard's Mother.**

[*Note 3*; *add*.:]

1905, *Shailer v. Bullock*, 78 Conn. 65, 61 Atl. 65 (*Booth v. Hart* approved).

[*Note 4*; *add*.:]

1908, *State v. Sebastian*, 81 Conn. 1, 69 Atl. 1054 (rule applied in a prosecution for rape under age, to admit the woman's statement made at the time of a miscarriage).

Haw. St. 1913, No. 101, p. 142, Apr. 23, § 6 (bastardy; "if upon examination under the provisions of § 2, and also in the time of her travail, she accuses the same person of being the father of the child, and continues constant in such accusation, her accusation in time of travail shall be admissible in evidence upon the trial to corroborate her testimony").

1904, *Burns v. Donoghue*, 185 Mass. 71, 69 N. E. 1060 (statute applied).

1904, *Baxter v. Gormley*, 186 Mass. 168, 71, N. E. 575 (her testimony on the complaint-hearing suffices).

In *Ontario*, the action for support of a bastard is not maintainable unless the mother while pregnant or within six months after birth made affidavit charging the now defendant as father; but this affidavit is expressly declared not to be "evidence of the fact of the defendant being the father of the child": Ont. Rev. St. 1897, c. 169, § 4, as re-enacted in St. 1911, 1 Geo. V, c. 169, §§ 2, 3.

[*Note 6*; *add*.:]

1905, *Johnson v. Walker*, 86 Miss. 757, 39 So. 49 (declarations of paternity made during travail are admissible to corroborate the mother's testimony apart from the statute cited *supra*, n. 5, and even though the mother is alive).

[*Notes 7*, par. 1; *add*.:]

1909, *Palmer v. State*, 165 Ala. 329, 51 So. 358 (excluded; no authority cited).

1904, *State v. Lowell*, 123 Ia. 427, 99 N. W. 125 (since a complaint would be inadmissible, the failure to complain is equally so).

1905, *People v. Stison*, 140 Mich. 216, 103 N. W. 542 (incest; dying declarations of paternity, made at childbirth, excluded).

§ 1142. **Owner's Complaint after Robbery or Larceny.**

[*Note 2*; *add*.:]

See an article by W. C. Maude, in 71 *Justice of the Peace* 411 (1907).

[*Note 4*; *add*.:]

1913, *Robinson v. State*, 8 Okl. Cr. 667, 130 Pac. 121 (complaint of owner received).

§ 1151. **Real Evidence (Autoptic Preference); General Principle.**

[Text, p. 1347, at the end; add a new note 1:]

<sup>1</sup> Quoted with approval in *Moorhead v. Arnold*, 73 Kan. 132, 84 Pac. 742 (1906).

§ 1152. **Sundry Instances of Production, etc.**

[Note 12; add:]

1906, *State v. Wallace*, 78 Conn. 677, 63 Atl. 448 (photograph of a building, examined with a magnifying glass).

1906, *Cotton v. Boston El. R. Co.*, 191 Mass. 103, 77 N. E. 698 (damage by eminent domain; the trial Court's refusal to allow the jury to look through a microscope at particles of steel collected in the building and emanating from the defendant road, held to be within his discretion).

§ 1154. **Irrelevant Facts, etc.**

[Note 2; add:]

*Br. C.*: St. 1903-4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 3 (the judge, jury, etc., "may infer as a fact the nationality or race of the person in question from the appearance of such person"; the foregoing to be § 53 of Rev. St. 1897, c. 71.)

*Ia.*: 1911, *State v. Nathoo*, 152 Ia. 665, 133 N. W. 129 (rape; profert of the child, as resembling the Hindoo defendant; not decided).

*U. S.*: 1904, *U. W. v. Hung Chang*, 134 Fed. 19, 23, 67 C. C. A. 93 (Chinese descent, evidenced by the person's appearance; "it is a case of *res ipsa loquitur*").

[Note 5, par. 1; add:]

1913, *Watts v. State*, 8 Ala. App. 264, 63 So. 18 (seduction; exhibition of child, allowed).

1904, *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904 (seduction; child's presence in court held not improper). 1911, *People v. Richardson*, 161 Cal. 552, 120 Pac. 20. 1912, *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435.

1909, *State v. Hunt*, 144 Ia. 257, 122 N. W. 902 (exhibition of a child two months old, in a seduction trial held improper as evidence by resemblance).

1905, *Johnson v. Walker*, 86 Miss. 757, 39 So. 49 (not decided).

1904, *Esch v. Graue*, 72 Nebr. 719, 101 N. W. 978 (mere presence of the child, held not improper on the facts).

1906, *State v. Palmberg*, 199 Mo. 233, 97 S. W. 566 (rape under age; child exhibited).

[Note 7, par. 1; add:]

*Eng. St.* 1904, 4 Edw. VII, c. 15, § 17 (offences concerning children; where "the child appears to the Court to be under that age" alleged, such child shall "be deemed to be under that age, unless the contrary is proved").

*P. E. I. St.* 1910, c. 15, § 25 (neglected children; child's appearance as under age is sufficient as evidence).

1911, *Quinn v. People*, 51 Colo. 350, 117 Pac. 996 (but, if there is no other evidence, the jury's attention must be called, by instruction).

1909, *Stevenson v. Haynes*, 220 Mo. 199, 119 S. W. 346 (defendant's presence before the jury is some evidence as to his being over 16 years of age).

*N. Y. St.* 1909, c. 65, p. 22, Feb. 17 (places St. 1883, c. 340, in C. C. P. as § 961a).

[Note 7, par. 2; add:]

and Illinois.

[Note 7; add a new par.:]

For the possible quibble here, under the Opinion rule, see *post*, § 1974.

[Note 13; add:]

1913, *Baltimore & O. R. Co. v. Fouts*, — Oh. —, 104 N. E. 544 (negligence of an engineer in disobeying an arm-signal of the conductor, mistaking the go-ahead signal for the back-up signal; the witness' reproduction of the signal before the jury, held improper, the conditions of light and distance not being the same).

[Note 16; add:]

Compare the unreasonable ruling in *State v. Landry*, 29 Mont. 218, 74 Pac. 418 (1903), cited *post*, § 1163, n. 6.

### § 1157. Unfair Prejudice to an Accused Person.

[Text; note to quotation from *Scintillæ Juris*:]

This *libellus*, by Mr. C. J. (later Justice) Darling, published at first anonymously, has recently gone into its sixth edition.

[Note 3; add:]

1909, *Rollings v. State*, 160 Ala. 82, 49 So. 329 (murder; a futile distinction drawn between the clothing, etc. and the suspenders, etc. of deceased).

1913, *Tiner v. State*, — Ark. —, 158 S. W. 1087 (exhibiting deceased's clothing).

1905, *State v. Powell*, 5 Pen. Del. 24, 61 Atl. 966 (photographs of wounds on the deceased, admitted).

1905, *Roberts v. State*, 123 Ga. 146, 51 S. E. 374 (curtain-pole as a weapon for killing, shown).

1912, *People v. Morris*, 254 Ill. 559, 98 N. E. 975 (clothing of murdered woman shown).

1905, *Osburn v. State*, 164 Ind. 262, 73 N. E. 601 (knife found on defendant).

1909, *State v. Moore*, 80 Kan. 232, 102 Pac. 475 (murder; bloody jacket exhibited; leading opinion, by Burch, J).

1910, *Catron v. Com.*, 140 Ky. 61, 130 S. W. 951 (bloody garment of witness, admitted).

1908, *State v. Harris*, 209 Mo. 423, 108 S. W. 28 (clothes of deceased, showing place of wounds, admitted).

1905, *State v. Laster*, 71 N. J. L. 586, 60 Atl. 361 (articles found on accused, exhibited).

1912, *State v. Strong*, 83 N. J. L. 177, 83 Atl. 506 (neck of the mutilated deceased person, said to have been strangled, excluded).

1904, *People v. Davey*, 179 N. Y. 345, 72 N. E. 244 (rape of a child; asking questions of the defendant as to similar acts upon other children who are made to stand up for identification by him, held improper on the facts).

1904, *People v. Rimieri*, 180 N. Y. 163, 72 N. E. 1002 (murder; the deceased left a widow and child, and there was some issue as to whether the deceased when shot was crossing the street to overtake the child or to seek the defendant; the widow testified that she was then pregnant with another child, and the living child was brought into court and shown; these facts were held to be hardly called for, but the error if any "entirely harmless"; this ruling, and *People v. Davey*, *supra*, are further commented on *ante*, § 21, n. 15).

1908, *Reed v. Terr.*, 1 Okl. Cr. 481, 98 Pac. 583 (liquor offence; the whiskey bottle inspected and smelt by the jury).

1910, *Saunders v. State*, 4 Okl. Cr. 264, 111 Pac. 965 (deceased's coats and gloves, exhibited).

1911, *Morris v. State*, 6 Okl. Cr. 29, 115 Pac. 1030 (photographs of wounds on body, admitted).

1910, *State v. Jacobs*, 26 S. D. 183, 128 N. W. 162 (revolver-experiments, to prove an immaterial fact, held improper, on the present ground).

1903, *State v. Miller*, 43 Or. 325, 74 Pac. 658 (photographs of gunshot wounds on the deceased, excluded as "gruesome" and unnecessary; unsound on the facts).

1904, *Melton v. State*, 47 Tex. Cr. 451, 83 S. W. 822 (deceased's bloody garments, held improperly exhibited by his wife, there being no controversy as to that part of the case).

[Note 3 — continued]

1909, *State v. Roby*, 83 Vt. 121, 74 Atl. 638 (assault, by throwing iron etc. at the complainant's house; the articles of iron, etc., held not improperly exhibited; approving the above principle).

1905, *Roszczyńska v. State*, 125 Wis. 414, 104 N. W. 113 (rape; accused's shirt and trousers, admitted).

Compare also the cases cited *ante*, § 789, n. 3, as to *dramatic modes of testifying* so as to excite undue prejudice.

§ 1158. Unfair Prejudice to a Civil Defendant, etc.

[Note 2; add:]

1905, *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521 (amputated hand preserved in liquid admitted).

1905, *Chicago & A. R. Co. v. Walker*, 217 Ill. 605, 75 N. E. 520 (injured ankle).

1906, *Pittsburgh C. C. & St. L. R. Co. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033 (injured foot exhibited).

1907, *Ford v. Providence C. Co.*, 124 Ky. 517, 99 S. W. 609 (plaintiff's amputated leg).

1909, *Farrell v. Haze*, 157 Mich. 374, 122 N. W. 197 (amputated bones, not allowed on the facts to be shown).

1907, *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45 (injured arm, exhibited, to illustrate the expert testimony).

1904, *Chicago B. & Q. R. Co. v. Kraysenbuhl*, 70 Nebr. 766, 98 N. W. 44 (maimed leg exhibited, even though the defendant did not deny the injury).

1904, *Minden v. Vedene*, 72 Nebr. 657, 101 N. W. 330 (personal injury; the lame plaintiff's act of walking to the witness-stand, held not objectionable). 1904, *Felsch v. Babb*, 72 Nebr. 736, 101 N. W. 1011 (plaintiff's exhibition and movements of arm and legs, allowed).

1909, *Lapointe v. Berlin Mills Co.*, 75 N. H. 294, 73 Atl. 406 (here refused, because not offered in season).

1909, *Ewing v. Lanark Fuel Co.*, 65 W. Va. 726, 65 S. E. 200 (injured limb exhibited).

§ 1159. Indecency, or other Impropriety, etc.

[Note 2; add:]

1904, *Garvik v. Burlington C. R. & N. R. Co.*, 124 Ia. 691, 100 N. W. 498 (action for rape by D., an employee of the defendant; the trial Court permitted the jury to inspect the private parts of D., with his consent, in a separate room, on an allegation that the parts were defective; held improper, first, because it was not shown that the man's condition was the same as at the time alleged, and secondly, because it was a "shocking and indecent performance." As to the latter reason, such false judicial morality is so odd as to be incredible in these days; why was it "indecent" for the jury, but not for the experts, who made a similar examination? The Court declares that it found no authority for such examination, and "doubts if there is any to be found in the books"! It is regrettable for modern justice not only that Sir Matthew Hale, in the instance above cited, should have shown more good sense two centuries ago than we now possess, but that his celebrated example should even have become buried in oblivion from some of his learned successors).

1907, *State v. Stevens*, 133 Ia. 684, 110 N. W. 1037 (rape; the defendant's request to have the jury examine his parts in a private room was denied; following *Garvik v. R. Co.*; this is another perverse ruling).

[Note 4; add:]

1905, *State v. Schmidt*, 71 Kan. 862, 80 Pac. 948 (liquor sales; handing labelled bottles to the jury, held not improper on the facts).

[*Note 4 — continued*]

1905, *State v. Olson*, 95 Minn. 104, 103 N. W. 727 (liquor offence; jurors allowed to take the sample as an exhibit, without tasting).

[*Note 5; add:*]

1905, *Benson v. Raymond*, 142 Mich. 357, 105 N. W. 870 (bill by a grantor to set aside his deed for mental incompetency; the Court held it proper to bring the complainant in court, "and afford the judge an opportunity of seeing him, and, if he desired, of questioning him").

**§ 1160. Incapacity of the Jury, etc.**

[*Note 1; add:*]

1905, *Spire v. Stale*, 50 Fla. 121, 39 So. 181 (experiment with a gun in the jury-room, refused in discretion; see the citation *ante*, § 460, n. 1).

1895, *Moore v. R. Co.*, 93 Ia. 484, 61 N. W. 992 (collision on a railroad track; the jury having been taken to view the place, and an engine having been run over the track in their sight to illustrate the occurrence, this very sensible proceeding was held fatally improper). 1907, *Chicago Telephone S. Co. v. Marne & E. T. Co.*, 134 Ia. 252, 111 N. W. 935 (sale of telephones; tests of the instruments in the jury's presence, held not improperly refused in the trial Court's discretion).

1907, *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45 (paralysis evidenced by the medical witness sticking a needle into the plaintiff's hand).

1906, *Train*, "The Prisoner at the Bar," 312 (N. Y.; a striking experiment in testing poisons was performed before the jury).

**§ 1161. Physical or Mechanical Inconvenience, etc.**

[*Note 1; add:*]

1907, *District of Columbia v. Duryee*, 29 D. C. App. 327 (injury at a hitching-post; the post was dug up and exhibited at the trial).

[*Note 1; at the end, add:*]

and *ante*, §§ 451-460.

**§ 1163. View by Jury; (2) View allowable upon any Issue, etc.**

[*Note 3, par. 1; add:*]

1904, *Terr. v. Watanabe*, 16 Haw. 196, 220 ("It has been the practice" to allow it; question left undecided).

1913, *People v. Auerbach*, — Mich. —, 141 N. W. 869 (murder; view of premises allowed, under Comp. L. § 11952).

[*Note 6; add:*]

1904, *O'Berry v. State*, 47 Fla. 75, 36 So. 440 (larceny of cattle; under Rev. St. 1892, §§ 1087, 2918, a view of the cattle was held proper).

1913, *Adamson v. Harper*, — Ia. —, 143 N. W. 844 (ownership of cattle; view held not improperly refused in trial Court's discretion).

1913, *South Covington & C. St. R. Co. v. Finan's Adm'x*, 153 Ky. 340, 155 S. W. 742 (jury's inspection of broken car-wheels out of court, held proper).

*Contra*: 1912, *Peterson v. Lott*, 11 Ga. App. 536, 75 S. E. 834 (mule levied by attachment; jury's view of the mule, refused, for lack of judicial power; one would think that Courts would not treat themselves like infants, insisting on being fed with a legislative spoon; even Lord Eldon was less conservative).

[Note 6 — continued]

1903, *State v. Landry*, 29 Mont. 218, 74 Pac. 418 (larceny of a mare; the jury went to view another mare claimed by the defendant to be the mother of the one in controversy; the mare claimed by the prosecuting witness to be the mother was also present, and the behavior of the mare in controversy "indicated a preference" for the latter; the Court held the view of the horses improper, going upon the narrow wording of P. C. § 2097, cited *infra*, n. 6, and citing no other authority on this point; although the behavior in question was plainly evidential on the principle of §§ 167, 177, 1154, *ante*, and the defendant himself had requested the view; this ruling, when compared with Lord Eldon's celebrated experiment, quoted *ante*, § 1154, seems to discountenance the optimistic belief that the world grows wiser as it grows older, and that the judges of a new community are less encased than others in narrow formalism).

[Note 7; add:]

Newf. St. 1904, c. 3, Rules of Court, 46, par. 4-6 (like Eng. Rules of 1883, Ord. 50, RR. 3-5).

[Note 8; add:]

1903, *McMillen v. Ferrum M. Co.*, 32 Colo. 38, 74 Pac. 461 (statute held not to make a view-order obligatory where the applicant had not other sufficient evidence to go to the jury). Ind. St. 1905, p. 584, § 264 (re-enacts the foregoing statute). Mont. St. 1907, c. 113, p. 285, Mar. 6 (amending P. C. § 2097; after "occurred," inserting "or in cases involving the brand or mark or identity of live stock or other personal property," with other clauses suitable to this amendment; this amendment apparently was designed merely to cure cases like *State v. Landry*, n. 6, *supra*; but why was not the Legislature courageous enough to give really unlimited powers, as in the English and Canadian statutes?).

#### § 1164. Same: (3) View allowable in Trial Court's Discretion.

[Note 1; add:]

1909, *Louisville & N. R. Co. v. Wilson*, 162 Ala. 588, 50 So. 188 (machine).  
 1909, *Jones v. Royster Guano Co.*, — Ga. —, 65 S. E. 361 (nuisance).  
 1906, *Mier v. Phillips F. Co.*, 130 Ia. 570, 107 N. W. 621 (action for coal mined by the defendant under the plaintiff's land; view held properly refused; this ruling seems absurdly pedantic; the evidence was in conflict; is it an enlightened rule of law that forbids the jury to take the common-sense method of getting at the truth?).  
 1898, *Henderson & C. G. R. Co. v. Cosby*, 103 Ky. 184, 44 S. W. 639 (discretion). 1904, *Green's Adm'r v. Maysville & B. S. R. Co.*, — Ky. —, 78 S. W. 439 (discretion). 1904, *Mise v. Com.*, — Ky. —, 80 S. W. 457 (homicide). 1906, *Louisville v. Caron*, — Ky. —, 90 S. W. 604 (discretion). 1906, *Cohankus Mfg. Co. v. Rogers' Gdn.*, — Ky. —, 96 S. W. 438 (injury at a machine; view revised in discretion).  
 1904, *Blanchard v. Holyoke St. R. Co.*, 186 Mass. 582, 72 N. E. 94 (personal injuries; view of plaintiff in her home, held not improperly refused in the trial Court's discretion). 1907, *Yore v. Newton*, 194 Mass. 250, 80 N. E. 472 (time of view during trial is in the trial Court's discretion; but a motion by one of the parties is necessary).  
 1906, *Dupuis v. Saginaw V. T. Co.*, 146 Mich. 151, 109 N. W. 413 (view of the scene of a street-car accident, and an experiment under the same conditions).  
 1913, *People v. Auerbach*, — Mich. —, 141 N. W. 869 (murder).  
 1904, *Maloney v. King*, 30 Mont. 158, 76 Pac. 4 (applying C. C. P. § 1081).  
 1907, *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45 (refusal to permit a view of the defendant's mine where the plaintiff was injured, held proper in discretion).  
 1913, *Serdan v. Falk Co.*, 153 Wis. 169, 140 N. W. 1035 (foundry where the injury was received).

[*Note 1 — continued*]

A view may be taken of a place in *another county*, unless a statute expressly limits the scope : 1908, *Beck v. Staats*, 80 Nebr. 482, 114 N. W. 633 (conveyance of land in another county; the trial Court in discretion authorized to order a view anywhere in the State; other cases collected in the opinion).

### § 1166. Unauthorized View.

[*Note 2; add.*]

That a *judge himself, sitting without a jury*, may not take a private view of premises without notice to the parties, is held in *Elston v. McGlaulin* (1914), — Wash. —, 140 Pac. 396. No doubt, as a matter of ordinary fairness, such should be the practice; but the reversal of the above case, merely because the judge did so, and because he happened also as a resident of the district to be less ignorant of conditions than most judges would be, is a serious error. It perpetuates the judicial straitjacket. It puts off the day when our judges shall be given more trust and more power, — more discretion to bend stiff rules of substantive law where elasticity will do justice, — more liberty to apply in the procedure of law-courts that directness and common sense which all of us employ outside the courts.

We commend the perusal of the above opinion to all lawyers who desire to test themselves. He who on reading it finds it perfectly natural in result and unrepugnant in reasoning, will know that he is as yet unaware of the spirit of the coming generation, and that he must seek earnestly for light. — A good volume for him to read would be “*The Science of Legal Method*” (vol. IX of the *Modern Legal Philosophy Series*, 1915).

### § 1168. Non-Transmissibility of Evidence on Appeal.

[*Note 1; add.*]

1904, *Wistrand v. People*, 213 Ill. 72, 72 N. E. 748 (rape; the jury not allowed to consider the defendant's appearance “to fix his age”; citing and following the erroneous theory of *Stephenson v. State*, Ind., *infra*).

[*Note 5; add.*]

1906, *Pittsburgh C. C. & St. L. R. Co. v. Lichteiser*, 168 Ind. 438, 78 N. E. 1033 (injured foot exhibited; *L. N. A. & C. R. Co. v. Wood* followed).

1895, *Moore v. R. Co.*, 93 Ia. 484, 61 N. W. 992 (collision on a railway track; view held improper because of an experiment with an engine).

1906, *Mier v. Phillips F. Co.*, 130 Ia. 570, 107 N. W. 621 (trespass in mining coal; “evidence afforded by the condition of the premises on a view” is not permissible).

1904, *Rose v. Harlee*, 69 S. C. 523, 48 S. E. 541 (a statute provided that a mortgage of chattels should not be valid unless the description in the document was “in writing or typewriting, but not printed”; in an action on such a mortgage, the jury found a verdict based on the document being valid, and the judge ordered a new trial because the description was printed; held, that the order could not be reversed “on the ground that there was no evidence of the description being printed”).

[*Note 7; add.*]

1905, *People v. Wood*, 145 Cal. 659, 79 Pac. 367 (map used by witness).

1907, *Forbes v. Omaha*, 79 Nebr. 6, 112 N. W. 326.

1905, *Harmon v. Terr.*, 15 Okl. 147, 79 Pac. 757, 765.

*Contra*: 1913, *Rockford v. Mower*, 259 Ill. 604, 102 N. E. 1032.

[*Note 12; add.*]

1899, *Seaverns v. Lischinski*, 181 Ill. 358, 54 N. E. 1043 (rope exhibited to the jury; error can be assigned, even though the bill of exceptions cannot embody all the evidence; but a

[*Note 12 — continued*]

verdict cannot be "based exclusively on knowledge so acquired"; this is a correct way of stating such a rule).

1903, *Spohr v. Chicago*, 206 Ill. 441, 69 N. E. 515.

1903, *Groves & S. R. R. Co. v. Herman*, 206 id. 34, 69 N. E. 36.

1904, *Illinois, I. & M. R. Co. v. Humiston*, 208 id. 100, 69 N. E. 880.

1908, *Mercer Co. v. Wolff*, 237 Ill. 74, 86 N. E. 708.

1906, *Moorhead v. Arnold*, 73 Kan. 132, 84 Pac. 742 (ballots tampered with).

1903, *State v. Landry*, 29 Mont. 218, 74 Pac. 418 (view of a mare; jury's view is only to "enable them to understand and apply the evidence").

1908, *Hinners v. Edgewater & F. L. R. Co.*, 75 N. J. L. 514, 69 Atl. 161 (jury's view may be used).

1905, *Blincoe v. Choctaw, O. & W. R. Co.*, 16 Okl. 286, 83 Pac. 903 (eminent domain; "you have a right to exercise your own judgment, based upon your inspection and observation, together with all the evidence, etc.," held a proper instruction; good opinion by Gillette, J.).

1913, *Roberts v. Philadelphia*, 239 Pa. 339, 86 Atl. 926 (approving *Flower v. R. Co.*).

1896, *Kimball v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901 (view does not authorize jury to base verdict on their inspection).

1912, *Murphy v. Chicago M. & S. P. R. Co.*, 66 Wash. 663, 120 Pac. 525 (approving *R. Co. v. Roeder*).

1907, *Chadister v. Baltimore & O. R. Co.*, 62 W. Va. 566, 59 S. E. 523 (approving the preceding cases).

1906, *Hughes v. Chicago, St. P., M. & O. R. Co.*, 126 Wis. 525, 106 N. W. 526 (preceding rulings held not to forbid a juror testifying on a subsequent trial from knowledge obtained by a view at a former trial). 1909, *American States S. Co. v. Milwaukee N. R. Co.*, 139 Wis. 199, 120 N. W. 844.

#### § 1177. Documentary Originals; History of the Rule.

[*Note 6; add:*]

Compare further the historical data in Professor James Barr Ames' article on "Specialty Contracts and Equitable Defences," *Harvard Law Review*, IX, 49 (1895).

#### § 1181. Rule not applicable to Uninscribed Chattels.

[*Note 1; add:*]

1881, *McClary v. State*, 75 Ind. 260, 265 (failure of prosecution to produce the knife used in an assault, not error).

#### § 1182. Rule as applicable to Inscribed Chattels.

[*Note 1; add:*]

1904, *Kirkland v. State*, 141 Ala. 45, 37 So. 352 (rule of production applied to the date and postmark of a letter).

1906, *Young v. People*, 221 Ill. 51, 77 N. E. 536 (a card inscribed: "L. Y., 3030 Indiana Avenue, phone Douglas 2685"; production required).

1906, *Mattson v. Minn. & N. W. R. Co.*, 98 Minn. 296, 108 N. W. 517 (death by a dynamite explosion; to prove the numbers marked on the wrappers of the dynamite sticks, the trial Court's refusal in discretion to order production of the dynamite in wrappers was held proper).

[*Note 6, par. 2, l. 4 from bottom of page; add:*]

N. Y. St. 1913, c. 412, p. 871 (amending C. C. P. § 2618).

[*Note 8; add.:*]

Whether in such a case a *layman* may testify by *comparison of specimens*, who had seen the lost original but did not know whose handwriting it was, is examined *post*, § 2004.

**§ 1186. Production of Original Always Allowable.**

[*Note 1; add.:*]

1907, *Sellers v. Page*, 127 Ga. 633, 56 S. E. 1011 (record of same court).  
 Kan. St. 1905, c. 323 (quoted *post*, § 1225, n. 1; nothing therein "shall prevent the production of the original").  
 1907, *Carp v. Queen Ins. Co.*, 203 Mo. 295, 101 S. W. 78 (judicial record).  
 1913, *Harmening v. Howard*, — N. D. —, 141 N. W. 131 (U. S. land-office records).  
 1904, *Manning v. State*, 46 Tex. Cr. 326, 81 S. W. 957 (judicial record).  
 U. S. St. 1904, April 19, c. 1398, Stat. L. vol. 33, p. 186 (original applications, etc., in the land office, may be produced; cited more fully *post*, § 1676, n. 11).

[*Note 7; add.:*]

Distinguish also the question whether *ballots* produced are to be preferred as evidence to the finding or certificate of the election officers who first counted them (*post*, § 1351).

**§ 1187. Dispensing with Authentication does not dispense with Production.**

[*Note 1, par. 1; add.:*]

1910, *Fidelity & D. Co. v. Aultman*, 58 Fla. 228, 50 So. 991 (suit on injunction bond, the bond's execution not being denied).

**§ 1189. Order of Proof, etc.**

[*Note 2; add.:*]

1910, *Felker v. Breece*, 226 Mo. 320, 126 S. W. 424.

**§ 1190. Production made; may a Copy also be Offered?**

[*Note 2; add.:*]

1902, *Hong Quon v. Chea Sam*, 14 Haw. 276 (like *Walker v. Walker*, *post*, § 1226, n. 7).  
 1853, *Foulke v. Bray*, 1 Wis. 104 (judgment).

**§ 1192. General Principle of Unavailability.**

[*Text*, p. 1404, l. 5; *add* a new par. (4):]

(4) In several Canadian provinces, the principle of unavailability has been *abandoned*, for certain documents in which ordinarily no real dispute arises. This measure is a sensible and progressive one and deserves universal adoption. Its essential feature is that a *copy may be used unconditionally*, if the opponent has been given an opportunity to inspect it.<sup>2</sup>

<sup>2</sup> Statutes cited *post*, § 1223, n. 11.

**§ 1193. Loss or Destruction; History.**

[*Note 2; add.:*]

The history can be further seen in other lines of cases cited in Professor Ames' article, "Specialty Contracts and Equitable Defences," *Harvard Law Review*, IX, 49 (1895).

§ 1194. **Same: General Tests, etc.**

[*Note 4; add:*]

- 1909, *Robinson v. Singerly P. & P. Co.*, 110 Md. 382, 72 Atl. 828.  
 1904, *Liles v. Liles*, 183 Mo. 326, 81 S. W. 1101.  
 1910, *Felker v. Breece*, 226 Mo. 320, 126 S. W. 424 (deed burned).  
 1904, *Koehler v. Schilling*, 70 N. J. L. 585, 57 Atl. 154.  
 1905, *Tucker v. Tucker*, 72 S. C. 295, 51 S. E. 876.  
 1906, *Leesville Mfg. Co. v. Morgan W. & I. Wks.*, 75 S. C. 342, 55 S. E. 768.  
*Contra*: 1904, *Avery v. Stewart*, 134 N. C. 287, 46 S. E. 519 (a reactionary ruling).

§ 1195. **Same: Specific Tests, etc.**

[*Note 1; add:*]

- 1906, *Saunders v. Tuscumbia, R. & P. Co.*, 148 Ala. 519, 41 So. 982 (approving *Foster v. State*).  
 1904, *Prussing v. Jackson*, 208 Ill. 85, 69 N. E. 771 (libel in a letter printed in a newspaper; the rule is that "the person in whose possession it was last traced must be produced, unless shown to be impossible, in which case search among his papers must be proved, if that can be done").  
 1883, *Kearney v. Mayor*, 92 N. Y. 617, 621.

[*Note 2; add:*]

- 1905, *Tagert v. State*, 143 Ala. 88, 39 So. 293 (search for a note, held not sufficient on the facts). 1905, *Alabama Const. Co. v. Meador*, 143 Ala. 336, 39 So. 216 (similar, for a letter).  
 1906, *Saunders v. Tuscumbia R. & P. Co.*, 148 Ala. 519, 41 So. 982 (mechanics' lien, search held sufficient on the facts).  
 1906, *Mortgage T. Co. v. Elliott*, 36 Colo. 238, 84 Pac. 980 (note; loss sufficiently shown).  
 1904, *Rhodus v. Heffernan*, 47 Fla. 206, 36 So. 573 (administrator's schedule; loss sufficiently shown).  
 1903, *Sweeney v. Sweeney*, 119 Ga. 76, 46 S. E. 76 (sheriff's *fi. fa.*, sufficiently shown lost).  
 1904, *Wolters v. Redward*, 16 Haw. 25 (bond; loss sufficiently shown).  
 1906, *Interstate Inv. Co. v. Bailey*, — Ky. —, 93 S. W. 578 (deed; loss sufficiently shown).  
 1904, *Koehler v. Schilling*, 70 N. J. L. 585, 57 Atl. 154 (contracts; *Johnson v. Arnwine* followed).  
 1904, *Avery v. Stewart*, 134 N. C. 287, 46 S. E. 519 (postal card; loss not sufficiently shown).  
 1912, *Greene v. Messick Grocery Co.*, 159 N. C. 78, 74 S. E. 812 (telegram; here the ruling seems to be unconscionably strict).  
 1904, *State v. Leasia*, 45 Or. 410, 78 Pac. 328 (letter; loss sufficiently shown).  
 1904, *Brown v. Harkins*, 131 Fed. 63, 65 C. C. A. 301 (distiller's books and transcript in collector's office; loss not sufficiently shown on the facts).

§ 1196. **Same: Kinds of Evidence Admissible, etc.**

[*Note 5; add:*]

- 1912, *Kenworthy v. Slooman*, 62 Or. 604, 125 Pac. 273.

[*Note 7, par. 2; at the end, add:*]

and the cases cited *ante*, §§ 158, 664.

[*Note 8; add:*]

- 1906, *Interstate Inv. Co. v. Bailey*, — Ky. —, 93 S. W. 578 (deed).

**§ 1198. Same: Intentional Destruction by the Proponent.**

[*Note 1; add:*]

1906, *Gibbs v. Potter*, 166 Ind. 471, 77 N. E. 942 (rule applied to an altered document).  
 1911, *Di Palma v. Weinman*, 16 N. M. 302, 121 Pac. 38 (injury to business by destruction of goods and building and consequent removal; the case having been four times tried in eight years, the plaintiff's destruction of his invoices, etc. held to be sufficiently explained; approving the text above).  
 1905, *Nelson v. Nat'l Drill Mfg. Co.*, 20 S. D. 299, 105 N. W. 630 (letters destroyed without improper motives; other evidence of them admitted).

[*Text*, p. 1419, l. 4 from the end of the section; after "grantee," insert:]

"Or whether an *alteration avoids* the instrument,"

[*Note 3; add:*]

1906, *Crossman v. Keister*, 223 Ill. 69, 79 N. E. 58; 1904, *Tabor v. Tabor*, 136 Mich. 255, 99 N. W. 4; and the exhaustive article by Professor S. Williston, *Harvard Law Review*, XVIII, 105 (1904), on "Discharge of Contracts by Alteration."

**§ 1200. Detention by Opponent: (a) Opponent's Possession.**

[*Note 1; add:*]

1906, *Young v. People*, 221 Ill. 51, 77 N. E. 536 (letter last seen in possession of K.; notice to K. required, before evidence of contents was admissible).

[*Note 3; add:*]

1908, *Cutter-Tower Co. v. Clements*, 5 Ga. App. 291, 63 S. E. 58.

[*Note 4; add:*]

The following case belongs here:

1913, *Owner v. Bee Hive Spinning Co.*, [1914] 1 K. B. 105 (violation of factory act, plaintiff being an official inspector; to prove the contents of an abstract of the Factory Act as affixed to the wall in defendant's factory, the plaintiff offered secondary evidence; the law required the affixed abstract to be kept constantly affixed; defendant argued that notice to produce should have been given; held, that the case was one of an irremovable document, and that the principle of § 1219, applied; *Mortimer v. M'Callan* cited).

**§ 1201. Same: Mode of Proving Possession.**

[*Note 1; add:*]

1903, *Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107 (lease).  
 1906, *Elmslie v. Thurman*, 87 Miss. 537, 40 So. 67 (bill to enforce a vendor's lien on land conveyed to defendants; the latter not denying execution, their possession of the deed was presumed).  
 1906, *People v. Dolan*, 186 N. Y. 4, 78 N. E. 569 (forgery of notes; other forged notes being relevant to show knowledge, etc., the prosecution was excused from producing the originals, without proof of loss, due notice to produce having been given to the defendant, since here the course of business raised the inference "that they were all returned to the possession of the defendant").  
 1912, *Landon v. Morehead*, 34 Okl. 701, 126 Pac. 1027.

[*Note 2; add:*]

1906, *People v. Dolan*, 186 N. Y. 4, 78 N. E. 569.

[*Note 3; add, under Accord:*]

1905, *City Bank v. Thorp*, 78 Conn. 211, 61 Atl. 428 (assignments sent to defendant, who denied their receipt and possession; copies admitted).

1904, *Supreme Council v. Champe*, 127 Fed. 541, 63 C. C. A. 282 (press-copy admitted, the letter having been proved written, but its mailing and its receipt being doubtful).

[*Note 3; under Contra:*]

*Dele* the citation of *Ill. L. & L. Co. v. Bonner*, 75 Ill. 315.

**§ 1203. Same: (b) Notice to Produce; Rule not Applicable.**

[*Note 5; add:*]

1909, *Jordan v. Austin*, — Ala. —, 50 So. 70 (approving the above conclusion).

1906, *Stark v. Burke*, 131 Ia. 684, 109 N. W. 206 (plaintiff's document traced to R., a hostile witness, who denied possession of such a document; plaintiff not required to call R. to produce a document which he admitted having but asserted not to be the plaintiff's).

1905, *Neubert v. Armstrong W. Co.*, 211 Pa. 582, 61 Atl. 123 (copy of letter received without notice; but the point is not raised).

Compare the situation noticed *post*, § 1209, n. 1.

**§ 1205. Same: (2) Implied Notice in Pleadings.**

[*Note 1; add:*]

1912, *Ætna Ins. Co. v. Bank*, C. C. A., 194 Fed. 385 (policy-holder's notification to the defendant of a fire loss, held improperly proved orally; the present point was not raised, but should have been, and it is astonishing that a court of appeal will reverse a judgment in such a case without noticing so obvious a point to save the reversal).

[*Note 3; add:*]

The following statutes seem to rest on this principle:

Ala. St. 1909, No. 191, Spec. Sess. p. 63, Aug. 25, § 22½ (parol testimony of any U. S. internal revenue liquor tax stamp or license, admissible on a trial for illegal liquor sales, etc. under the prohibition law).

Fla. St. 1907, c. 5688, p. 201, May 11 (amending Gen. St. § 3558; U. S. revenue license or tax stamp in possession of alleged dealer in liquors may be proved by witnesses).

**§ 1206. Rule of Notice Satisfied; (3) Notice of Notice.**

[*Note 2; add:*]

1909, *Turner's Case*, 3 Cr. App. 103, 118, 157, [1910] 1 K. B. 346 (under St. 1908, 8 Edw. VII, c. 59, § 10, former convictions may be evidenced only if seven days' notice has been given to the accused; no copy of this notice had been preserved, and oral evidence was offered; "it is a general rule that you have not to give notice to produce a notice").

[*Note 3; add:*]

Kan. St. 1909, c. 179, p. 324, Mar. 12, § 2 (notice of demand for release of oil lease, etc.; a letter-press or carbon or written copy thereof may be used as if the original).

1912, *Eastman v. Dunn*, 34 R. I. 416, 83 Atl. 1057 (notice of a claim; copy allowed without notice to produce the original; but the opinion states the rule confusedly).

**§ 1207. Same: Exceptions to Rule of Notice.**

[*Note 3, par. 1; add, under Contra:*]

1908, *Moore v. State*, 130 Ga. 322, 60 S. E. 544 (notice not needed for insurance policies in defendant's possession; reasoning unsound).

[*Note 3 — continued*]

1906, *O'Brien v. U. S.*, 27 D. C. App. 263, 273 (copy of document delivered to the defendant charged with embezzlement; notice not required; the ruling goes upon a misunderstanding of the principle of *McGinnis v. State*, quoted *ante*, § 1205).

[*Note 4; add:*]

1904, *Patton v. Fox*, 179 Mo. 525, 78 S. W. 804 (like *Gilbert v. Boyd*).

But distinguish the rule of some statutes as to another kind of *notice* in such cases (*post*, § 1859, par. 4).

### § 1208. Same: Procedure of Notice.

[*Note 7; add:*]

1903, *Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107 (*semble*).

### § 1209. Same: (c) Failure to Produce, etc.

[*Note 1; add:*]

The following case is peculiar: 1904, *Romero v. N. I. M. & D. Co.*, 113 La. 110, 36 So. 907 (the plaintiff alleging a certain contract, the defendant admitting a contract but denying its terms to be as alleged and alleging its loss, the trial judge's order before trial, taking the contract to be as alleged by the plaintiff, was held erroneous).

Compare the cases cited *ante*, § 1203, n. 5.

[*Note 2, par. 1; add:*]

*Oxford (Bishop of) v. Henly*, [1907] P., 88, 91, 104 (proceeding for ecclesiastical offence and canonical punishment; the respondent having refused to produce letters from the prosecutor to the respondent, copies verified by the prosecutor were admitted).

1910, *People v. Everham*, — Ill. —, 93 N. E. 373 (rape of a daughter under age; the other children wrote a letter to the defendant charging him with rape; a copy was offered and admitted, after notice to the defendant to produce the original; held that the privilege was not violated).

1911, *People v. Aldorfer*, 164 Mich. 676, 130 N. W. 351.

### § 1210. Same: Consequences of Non-Production, etc.

[*Note 1; add:*]

1910, *Cyr v. DeRosier*, 40 N. Br. 373 (lease; *Doe v. Hodgson* followed).

S. C. St. 1910, No. 361, p. 695 (bills of lading; quoted *post*, § 2132, n. 5).

[*Note 2; add:*]

1911, *Walter Cabinet Co. v. Russell*, 250 Ill. 416, 95 N. E. 462 (in the absence of express statutory authority, the trial Court cannot enter judgment against a claim, for non-production of documents).

1906, *Hanson v. Lindstrom*, 15 N. D. 584, 108 N. W. 798 (plaintiff failed to supply on demand before trial a copy of a contract, for the defendant's use in preparing his answer; on the facts the statute, Rev. C. 1899, § 5644, quoted *post*, § 1858, was held not applicable).

1904, *Roberts v. Francis*, 123 Wis. 78, 100 N. W. 1076 (penalty for non-production, not enforced on the facts).

[*Text*, p. 1437; at end of § 0, *add* a new par. (4):]

(4) Where the opponent fails to produce on notice, and has the documents in court, the Court may order him to produce, without subpoena, the demand-

[Text, p. 1437 — continued]

ing party not being confined to this right to use secondary evidence: *post*, § 2219, n. 8; § 2200, n. 4.

**§ 1212. Detention by Third Person; (a) Person within the Jurisdiction.**

[Note 1; add:]

1905, *De Leon v. Terr.*, — Ariz. —, 80 Pac. 348 (jailer allowed to testify to the contents of a letter by the accused to his wife).

1913, *Schall v. Northland M. C. Co.*, 123 Minn. 214, 143 N. W. 357 (original in possession of Federal bankruptcy trustee, production not excused, because no privilege applies).

[Note 3; add:]

1905, *Security Trust Co. v. Robb*, 142 Fed. 78, C. C. A. (letter in a third person's hands; subpoena necessary).

1906, *Menasha W. W. Co. v. Harmon*, 128 Wis. 177, 107 N. W. 299 (letters sent to the county clerk, who had not been subpoenaed; copies excluded).

**§ 1213. Same: (b) Person without the Jurisdiction.**

[Note 1; add:]

1904, *New England M. S. Co. v. Anderson*, 120 Ga. 1010, 48 S. E. 396 (witness annexing a copy to his deposition; original required to be accounted for).

1895, *Bishop v. American Preservers' Co.*, 157 Ill. 284, 307, 41 N. E. 765 ("due effort" must be made for "papers out of the jurisdiction"). 1907, *McDonald v. Erbes*, 231 Ill. 295, 83 N. E. 162 (contract between plaintiff and defendant, left in the hands of a third person, who testified that it was at his home in Wisconsin, if anywhere; copy excluded, since "no effort was made by the appellant to obtain the original agreement prior to the trial"; such being "the rule in this State").

1883, *Kearney v. Mayor*, 92 N. Y. 617, 621 ("the last person known to have been in possession of the paper must be examined as a witness," and "even if he is out of the State, his deposition must be procured if practicable, or some good excuse given for not doing so").

1906, *Pringey v. Guss*, 16 Okl. 82, 86 Pac. 292 (action on a contract, the original being in the possession of R., living in Nebraska; copy excluded, no diligence being shown to procure the original).

1846, *McGregor v. Montgomery*, 4 Pa. St. 237 (lease in the hands of a third person, out of the State, who had been notified to produce; other evidence excluded).

1907, *McCollum v. Southern P. R. Co.*, 31 Utah 494, 88 Pac. 663 (special ruling upon a railroad ticket).

1906, *Bruger v. Princeton & S. M. M. F. Ins. Co.*, 129 Wis. 281, 109 N. W. 95 (application for an insurance policy out of the jurisdiction; "some fair showing should be made of efforts to obtain the original, unless it is clear that they would have been fruitless").

[Note 2; add:]

1906, *Hoyle v. Mann*, 144 Ala. 516, 41 So. 835 (ejectment; a writing "out of the State," held provable orally).

1907, *Sellers v. Farmer*, 151 Ala. 487, 43 So. 967 (unrecorded deed presumed to be in possession of grantee out of the State, proved orally).

1912, *McCord-Collins M. Co. v. Dodson*, — Kan. —, 121 Pac. 1085 (draft in a Missouri bank, retained by the deposing cashier; copy held sufficient).

1904, *Cooley v. Collins*, 186 Mass. 507, 71 N. E. 979 (a lease presumed to be in D.'s possession out of the jurisdiction, and therefore provable orally).

[*Note 3; add.:*]

1908, *State Bank & T. Co. v. Evans*, 198 Mass. 11, 84 N. E. 329.

1906, *Hanson v. Lindstrom*, 15 N. D. 584, 108 N. W. 798 (document sent to a third person out of the State; diligence to procure it not being shown, secondary evidence was rejected).

1903, *Speiser v. Phoenix M. L. Ins. Co.*, 119 Wis. 530, 97 N. W. 207 (insurance-application in N. Y., the holder refusing to give it up; proved by copy attached to deposition).

§ 1215. **Irremovable Judicial Records.**

[*Note 10; add.:*]

N. C. Rev. 1905, § 1616 (like Code § 1342).

§ 1219. **Irremovable Official Documents; Specific Instances, etc.**

[*Note 3; add.:*]

1913, *Owner v. Bee Hive Spinning Co.*, [1914] 1 K. B. 105 (document kept by law affixed publicly in a factory; cited more fully *ante*, § 1200, n. 4).

1909, *Chicago v. Mandel*, 239 Ill. 559, 88 N. E. 226 (reports of the South Park Commissioners held not provable by printed copy without accounting for the originals; unsound; no authority cited).

1906, *State v. Nippert*, 74 Kan. 371, 86 Pac. 478 (Federal revenue collector's records, proved by examined copy).

1906, *State v. Schaeffer*, 74 Kan. 390, 86 Pac. 477 (similar).

1906, *Clement v. Graham*, 78 Vt. 290, 63 Atl. 146 (State auditor's vouchers, filed in his office, held to be of a public nature).

§ 1223. **Private Books of Public Importance.**

[*Note 10, par. 1; add.:*]

Ont. St. 1909, c. 43, § 26 (like R. S. 1897, c. 73, § 26).

Yukon St. 1904, c. 5, § 11 (like Dom. St. 1893, c. 31, § 12; quoted *post*, § 1680).

1895, *Mandel v. Swan L. C. Co.*, 154 Ill. 177, 189, 40 N. E. 462 (certain corporate records, etc., held not properly proved under this statute by copies in a deposition).

1904, *Chicago, W. & V. C. Co. v. Moran*, 210 Ill. 9, 71 N. E. 38 (contract between a miners' union and a coal company, held not properly proved under § 18 of the above statute by a sworn copy without seal).

1906, *Chicago, B. & Q. R. Co. v. Weber*, 219 Ill. 372, 71 N. E. 489 (a lease of the defendant railroad's entire property, evidenced by a copy certified by its secretary under corporate seal, held to be a "paper," under § 15 of the above statute).

[*Note 11; add.:*]

Alta. St. 1910, 2d Sess., Evidence Act, c. 3, § 50 (like Ont. R. St. 1897, c. 73, § 51).

Ont. St. 1909, c. 43, § 49 (like R. S. 1897, c. 73, § 51).

Sask. St. 1907, c. 12, Evidence Act, § 21 (like Ont. R. St. 1897, c. 73, § 51).

§ 1225. **Recorded Conveyances; Statutes and Decisions.**

[*Note 1; add.:*]

CANADA: *Alberta*: St. 1906, c. 24, § 17 (land-titles; quoted *post*, § 1651).

*British Columbia*: St. 1906, 6 Edw. VII, c. 23, § 118 (like Rev. St. 1897, c. 111, § 48); *ib.* § 120 (the land registrar's certified copies of "any instruments affecting land which may be deposited, kept, filed, or registered in his office," and affecting land in his district, are admissible "as *prima facie* evidence of the document of which it purports to be a copy, without proof of the signature or seal of such registrar").

[*Note 1 — continued*]

*Nova Scotia*: 1904, *Nova Scotia Steel Co. v. Bartlett*, 35 Can. Sup. 527 (under N. Sc. Rev. St. 1900, c. 163, § 20, *supra*, a plan on file, referred to in a duplicate original grant, is not provable by certified copy; the ruling is a perverse one, for if the theory of substantive law sufficed to make the plan a part of the grant by reference, why could not the same theory make the statute admitting certified copies of the grant suffice also for the plan forming part of the grant?). St. 1910, 10 Edw. VII, c. 28 (amending Rev. St. 1900 c. 163, § 27; cited more fully *post*, § 1651).

*Ontario*: St. 1909, c. 43, §§ 33, 34 (like R. S. 1897, c. 73, § 32); *ib.* § 46 (like *ib.* § 46); *ib.* § 47 (like *ib.* § 47).

*Saskatchewan*: St. 1906, c. 24, § 38 (land-titles; like Alb. St. 1906, c. 24, § 38). St. 1907, c. 12, Evidence Act, § 16 (any instrument filed or registered in a land registration office is provable by the land-registrar's certified copy).

*Yukon* Consol. Ord. 1902, c. 39, § 28 (registered bills of sale and mortgages of personalty; the registration clerk's certified copy "shall be received as *prima facie* evidence for all purposes as if the original instrument was produced").

St. 1904, c. 5, § 21 (copies of recorded deeds; quoted *post*, § 1651); *ib.* §§ 24, 26 (like N. Sc. Rev. St. 1900, c. 163, §§ 24, 26, for the Gold Commissioner's office).

UNITED STATES: *Ala.* St. 1911, No. 52, p. 31, Feb. 20, § 2 (certified transcript of recorded corporate conveyance, admissible if "the original conveyance has been lost or destroyed, or the party offering a transcript has not the custody or control thereof," unless the corporation is in possession and forgery is pleaded).

*Fla.*: Const. 1885, Art. 16, § 21 (recorded deeds and mortgages are provable by certified copy, provided "the original is not within the custody or control of the party offering the copy").

*Ga.*: 1906, *Bower v. Cohen*, 126 Ga. 35, 54 S. E. 918 (deed; search held not sufficient on the facts, under Code § 3630).

1906, *Patterson v. Drake*, 126 Ga. 478, 55 S. E. 175 (*Cox v. McDonald, supra*, followed, as to the trial Court's discretion).

*Ill.*: 1905, *Baltimore & O. S. W. R. Co. v. Brubaker*, 217 Ill. 462, 75 N. E. 523 (evidence held insufficient). 1906, *Tucker v. Duncan*, 224 Ill. 453, 79 N. E. 613 (proof held insufficient). 1906, *People v. Wiemers*, 225 Ill. 17, 80 N. E. 45 (plat of an addition, from the recorder's office; under Rev. St. c. 30, § 35, and c. 109, § 2, *supra*, the original must be shown not to be within the offeror's control). 1910, *Burke v. Glos*, 244 Ill. 627, 91 N. E. 701 (affidavit omitting the proviso "not intentionally destroyed" etc., held insufficient). 1911, *Ellison v. Glos*, 248 Ill. 275, 93 N. E. 763 (collective affidavit applying to each deed held sufficient).

*Kan.* St. 1905, c. 323 (amending Gen. St. 1897, c. 97, § 3, being § 372, c. 80, Gen. St. 1868; certified copies or the record of such documents may be admitted "without proof that the original is not in the possession or under the control of the party desiring to use the same"); c. 324 (similar, for instruments defectively recorded with the register of deeds for ten years past).

*Minn.* St. 1905, c. 305, §§ 35, 42 (registration of title; similar to the Illinois act *supra*; provision made for using certified copies of the certificate of title and also of deeds, etc., filed with the registrar, etc.).

*Mo.*: 1904, *Patton v. Fox*, 179 Mo. 525, 78 S. W. 704 (original shown to be in defendant's possession; no notice required; see the citations *ante*, § 1207, n. 4).

*Mont.* St. 1913, c. 86, p. 378, Mar. 14, § 10 (chattel mortgages recorded on acknowledgment; certified copy admissible "if said original be lost or out of the power of the person wishing to use it").

*N. Mex.* St. 1905, c. 38, § 3 (recorded contract of sale, etc., of animals, provable by certified copy).

*N. Y.* St. 1905, c. 450 (validates acknowledgments recorded for thirty years).

*N. C.* Rev. 1905, §§ 1023, 1598, 1599 (like Code, §§ 1251, 1253, 1263); Rev. 1905, § 1619 (like Code, § 1344).

[*Note 1 — continued*]

*Okl.*: 1904, *Enid & A. R. Co. v. Wiley*, 14 *Okl.* 310, 78 *Pac.* 96 (record of a U. S. land-patent in a county registry of deeds; original required to be accounted for, under *Rev. & Ann. St.* 1903, § 4575).

*S. C.*: 1905, *Uzzell v. Horn*, 71 *S. C.* 426, 51 *S. E.* 253 (loss of original sufficiently proved by the admission of the opponents, residing in the house of the last custodian, that they did not have it).

*S. D.*: 1904, *Reeder v. Wilber*, 18 *S. D.* 426, 100 *N. W.* 1099 (statute applied).

*Tex. St.* 1907, c. 165, p. 308 (*Rev. Civ. St.* § 2312, amended, for defectively acknowledged deeds).

*U. S.*: 1908, *Eastern Dynamite Co. v. Keystone P. M. Co.*, C. C. N. D. Pa., 164 *Fed.* 47 (certified copy of record of an assignment of patent, the assignment having been acknowledged before a notary; original required).

*Wyo. St.* 1913, c. 126, p. 174 (livestock brands; amending *Comp. St.* 1910, § 2604; recorded assignments of brands or marks to be proved by certified copy "as is now provided for certified copies of instruments affecting real estate").

§ 1226. **Same: Sundry Consequences, etc.**

[*Note 7; add:*]

1905, *Senterfeit v. Shealy*, 71 *S. C.* 259, 51 *S. E.* 142 (the original deed appearing to be mutilated, the record of it was shown in court).

Such a statute as *Kan. St.* 1905, c. 323, providing that "the original when produced shall prevail over the record or copy" would probably not forbid the above use of a copy.

§ 1230. **Voluminous Documents, etc.**

[*Note 1; add:*]

1911, *Brown v. First Nat'l Bank*, 49 *Colo.* 393, 113 *Pac.* 483 (bank's books).

1910, *Cabaniss v. State*, — *Ga.* —, 68 *S. E.* 849 (unlawful bank-dividend; principle applied to expert testimony to net earnings).

1913, *State v. O'Neil*, 24 *Ida.* 582, 135 *Pac.* 60 (false report by a bank officer; expert accountants' summaries, admitted; the above-cited statute ignored).

1913, *Reinke v. Sanitary District*, 260 *Ill.* 380, 103 *N. E.* 236 (graphic summaries of statistics, admitted).

1909, *Shea v. Sewerage & Water Board*, 124 *La.* 299, 50 *So.* 166 (compilations from records of contractor's work, admitted).

1904, *Mendel v. Boyd*, 71 *Nebr.* 657, 99 *N. W.* 493 (summary statement of six simple transactions, excluded).

1906, *Kannow & Sons v. Farmers' C. S. Ass'n*, 76 *Nebr.* 330, 107 *N. W.* 563 (expert's computation of the result of weigh-checks in evidence, admitted).

1871, *State v. Rhoades*, 6 *Nev.* 352, 376 (expert accountant allowed to state the net balance of receipts and disbursements in the State Treasurer's books as examined by him, so as to show the cash that ought to be on hand).

1905, *State v. Nevada C. R. Co.*, 28 *Nev.* 186, 81 *Pac.* 99 (expert accountant's statements of the "net earnings" of a railroad company as shown by the books, excluded, partly on the principle of § 1960, *post*, and partly because the questions were not framed in proper application of the present principle).

1909, *Ruth v. State*, 140 *Wis.* 373, 122 *N. W.* 733 (bank accounts).

[*Note 4; add:*]

Whether an official custodian of records is a *preferred witness* is noticed *post*, § 1272.

**§ 1232. What is the Original Writing ; Duplicates and Counterparts, etc.**

[*Note 1 ; add :*]

1907, *International Harvester Co. v. Elfstrom*, 101 Minn. 263, 112 N. W. 252 (contract executed in duplicate in one writing-act as to contents and signature, by placing a carbon between sheets, held a counterpart ; and either usable without accounting for the other).

1908, *Reeves v. Martin*, 20 Okl. 558, 94 Pac. 1058 (triplicate notice of breach of warranty).

1907, *Walker v. Southern R. Co.*, — S. C. —, 56 S. E. 952 (bills of lading being made in triplicate, one signed by the shipper and filed with the carrier's auditor, another sent to the shipper with copied signature, and another filed by the carrier with copied signature, the first two were held to be duplicate originals, the third to be secondary).

**§ 1233. Same : All Duplicates must be Accounted for, etc.**

[*Note 1 ; add, under Accord :*]

1904, *Norris v. Billingsley*, — Ala. —, 37 So. 564 (oral testimony of defendant's counterpart, excluded, where plaintiff's was not accounted for).

1906, *Hayes v. Wagner*, 220 Ill. 256, 77 N. E. 211.

1912, *Pittsburgh C. C. & St. L. R. Co. v. Brown*, 178 Ind. 11, 98 N. E. 625 (action on a bill of lading delivered to plaintiff by defendant ; the plaintiff's original being lost, and the pleadings containing a copy conceded to be correct, held that notice to produce the defendant's duplicate original was not necessary).

1906, *Peaks v. Cobb*, 192 Mass. 196, 77 N. E. 881 (duplicate of a lease required).

**§ 1234. Same : Duplicate Notices, etc.**

[*Note 3, par. 1 ; add :*]

1905, *Chesapeake & O. R. Co. v. Stock*, 104 Va. 97, 51 S. E. 161.

1906, *Menasha W. W. Co. v. Harmon*, 128 Wis. 177, 107 N. W. 299 (letters).

[*Note 4 ; add :*]

1911, *Federal U. Surety Co. v. Indiana L. & M. Co.*, 176 Ind. 328, 95 N. E. 1104 (a machine carbon-copy in triplicate ; each one held an original).

1911, *Goodman v. Saperstein*, 115 Md. 678, 81 Atl. 695 (carbon-copy of a letter, held a duplicate original).

1907, *International Harvester Co. v. Elfstrom*, 101 Minn. 263, 112 N. W. 252 (carbon-copy produced by simultaneous impression on both sheets, held duplicate original ; cited more fully *ante*, § 1232, n. 1).

1906, *State v. Teasdale*, 120 Mo. App. 692, 97 S. W. 995 (a carbon-copy is not a duplicate original).

1907, *Cole v. Ellwood Power Co.*, 216 Pa. 283, 65 Atl. 678 (duplicate notices, one being carbon-copy, executed in the same manner as the other, held counterparts).

1905, *Chesapeake & O. R. Co. v. Stock*, 104 Va. 97, 51 S. E. 161 (a carbon-copy made by the same impression of type is a duplicate original).

**§ 1235. Copy Acted on or Dealt with, etc.**

[*Note 5, par. 1 ; add :*]

1904, *Simonds v. Cash*, 137 Mich. 558, 99 N. W. 754 (copy referred to in conversations).

1904, *Wright v. Michigan C. R. Co.*, 130 Fed. 843, 65 C. C. A. 327 (what is a "duplicate" bill of lading, under St. 1898, June 13, c. 448, 30 Stat. 459).

**§ 1236. Copy made an Original, etc.; Telegraphic Dispatches.**

[*Note 1; add:*]

1906, *Flynn v. Kelly*, 12 Ont. L. R. 440 (contract by telegram, the dispute being as to its terms; the defendants' message handed to the telegrapher, held the original, and the plaintiff bound to prove its loss or destruction; destruction not presumed after six months). *Yukon St.* 1904, c. 5, § 30 (like N. Sc. Rev. St. 1900, c. 163, § 30).

1906, *Young v. People*, 221 Ill. 51, 77 N. E. 536 (swindling by bets; sender's telegram filed in Wisconsin, held to be the original on the facts, and the copy filed in the Chicago receiving office, excluded).

1904, *Bond v. Hurd*, 31 Mont. 314, 78 Pac. 579 (contract for medical services; message handed to telegrapher, held the original, on the facts).

1903, *Yeiser v. Cathers*, — Nebr. —, 97 N. W. 840 (telegram excluded on the facts).

1905, *Cobb v. Glenn B. & L. Co.*, 57 W. Va. 49, 49 S. E. 1005 (principle considered).

**§ 1237. Same: Printed Matter.**

[*Note 1; add:*]

1904, *Prussing v. Jackson*, 207 Ill. 85, 69 N. E. 771 (action for libel against the author of a letter published in a newspaper; the letter held to be the original; unsound, for the declaration alleged publication in the newspaper, and the plaintiff offered to connect the defendant with it).

**§ 1239. Same: Government Land Grants, etc.**

[*Note 4; add:*]

1905, *Butt v. Mastin*, 143 Ala. 321, 39 So. 217 (not a certified copy from a tract book, but the patent or a certified copy, held the original).

1905, *Carpenter v. Smith*, 76 Ark. 447, 88 S. W. 976 (State land commissioner's exemplification of a swamp-land patent, without accounting for the original patent, not admitted). 1905, *Covington v. Berry*, 76 Ark. 460, 88 S. W. 1005 (similar). 1905, *Carpenter v. Dressler*, 76 Ark. 400, 89 S. W. 89 (State land commissioner's certified transcript of his records, not admissible "without first accounting for the deed or certificate"; careful opinion by Hill, C. J., confirming *Covington v. Berry*, *Carpenter v. Smith*, *supra*, and explaining and modifying the opinion in *Boynton v. Ashabrunner*, 75 Ark. 415, 88 S. W. 566, 1011). 1909, *Thornton v. Smith*, 88 Ark. 543, 115 S. W. 677 (duplicate deed of State land commissioner, issued under § 4730, Kirby's Digest, held not a new deed, but a duplicate only).

1870, *Seely v. Wells*, 53 Ill. 120 (records of U. S. land-office, admitted). 1909, *Black v. Chicago B. & O. R. Co.*, 237 Ill. 500, 86 N. E. 1065 (record of general land office reciting a selection of a tract approved by the Secretary of the Treasury, admitted).

Ia. St. 1906, c. 159 (U. S. and State land patents may be recorded with the county recorder without acknowledgment, and the record or recorder's certified copies "read in evidence in all Courts with like effect" as for other instruments).

N. C. Rev. 1905, § 1597, St. 1901, c. 613 (Secretary of State's certified copy, under seal of State, of land grants, admissible when duly registered, etc.).

1904, *Enid & A. R. Co. v. Wiley*, 14 Okl. 310, 78 Pac. 96 (record of a U. S. land-patent in a county registry of deeds; original required to be accounted for, under Rev. & Ann. St. 1903, § 4575).

Or. St. 1907, c. 117, p. 206, § 17 (State lands; land board to preserve "a true copy of all such deeds," and "such copies shall be primary evidence of such conveyance"). St. 1909, c. 226, p. 377 (irrigated desert land; similar to preceding statute). St. 1911, c. 67, p. 106 (amending St. 1907, c. 117). St. 1911, c. 128, p. 175 (amending Lord's Or. Laws, § 597, for the use of certified copies of lost deeds of State land).

[*Note 4 — continued*]

S. D. St. 1905, c. 149 (amending Rev. Civ. Code, 1903, § 961, so that the record, or a certified copy, of the recorded copy of U. S. land patents, etc., or of a recorded certified copy thereof, are "admissible in evidence without further proof").

U. S. St. 1904, April 19, c. 1396, Stat. L. vol. 33, p. 185 ("copies of any patents, records, books, or papers in the general land office, authenticated by the seal and certified by the recorder" shall be admissible equally with the originals "as when certified by the commissioners of said office"). St. 1904, April 19, c. 1398, Stat. L. vol. 33, p. 186 (original applications, etc., in the land office may be produced; cited more fully *post*, § 1676, n. 11).

§ 1240. **Same: Tax-Lists, Ballots, etc.**

[*Note 2; add:*]

1912, *Deeder v. State*, 92 Nebr. 662, 138 N. W. 228 (fraudulent counting of ballots; production of the specific ballots, required).

[*Note 4, par. 1; add:*]

S. C. St. 1910, No. 361, p. 695 (bills of lading; quoted *post*, § 2132, n. 5).

1904, *Brown v. Harkins*, 131 Fed. 63, 65 C. C. A. 301 (distiller's books, and the transcript in the collector's office, required to be kept by U. S. Rev. St. 1878, §§ 3318 and 3330; status as originals, considered).

§ 1243. **Application of the Principle; Oral Utterances, etc.**

[*Note 1; add:*]

1902, *Brown v. Equitable L. Assur. Soc'y*, 14 Haw. 80, 82 (reading from a letter).

1906, *Purinton v. Purinton*, 101 Me. 250, 63 Atl. 925 (letters read aloud by the plaintiff; the defendant not required to account for the letters).

*Contra*: 1904, *State v. Leasia*, 45 Or. 410, 78 Pac. 328 (rule applied to the defendant's reading aloud of a letter; unsound; no authority cited).

1909, *Eads v. State*, 17 Wyo. 490, 101 Pac. 946 (larceny of a horse; time of knowing about or authorizing a telegram whose contents were undisputed; production not required).

§ 1244. **Same: Identity of Documents.**

[*Note 2; add:*]

1910, *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849 (bank-officer's payment of unjustifiable dividend; principle applied to lists of notes, etc. charged off as insolvent, etc.).

1904, *Smythe's Estate v. Evans*, 209 Ill. 376, 70 N. E. 906 (a bookkeeper's statement of the footings of figures, etc. is admissible, but not of the amount of profits shown).

[*Note 2, last line:*]

For "§ 1429," read "§ 1339."

[*Note 4; add:*]

1905, *McPhelemy v. McPhelemy*, 78 Conn. 180, 61 Atl. 477 (that no entry of a certain marriage occurred in a parish-book, allowed).

1907, *Wilson v. Wood*, 127 Ga. 316, 56 S. E. 457 (that no administration has been granted, admissible from one who has made a thorough examination of the records).

1906, *Colton's Estate*, 129 Ia. 542, 105 N. W. 1008 (attorney's testimony to the absence of a decree of a certain tenor, admitted; the official custodian not preferred; *Sykes v. Beckwith*, N. D., disapproved; good opinion by Ladd, J.).

[*Note 4 — continued*]

1907, *Stamper v. Com.*, — Ky. —, 100 S. W. 286 (by the county clerk, that no deed of a certain sort was recorded, allowed).

1905, *State v. Rosenthal*, 123 Wis. 442, 102 N. W. 49 (that no record of naturalization existed, allowed, for one who had made a search).

**§ 1245. Same: Fact of Payment of a Written Claim.**

[*Note 1; add.*]

1912, *Brannan v. Henry*, 175 Ala. 454, 57 So. 967 (payment of taxes).

**§ 1246. Same: Fact of Ownership.**

[*Note 1; add.*]

1904, *Leon v. Kerrison*, 47 Fla. 178, 36 So. 173 (conversion of a yacht; production of the bill of sale to the plaintiff, not required).

[*Note 2; add.*]

1906, *Minnesota Deb. Co. v. Johnson*, 96 Minn. 91, 107 N. W. 740 (whether defendant claimed land under D.; "Did you hold it under D.?" "Yes, I rented it from him," held proper without producing the lease; "the terms of the tenancy were not in issue"; lucid opinion by Elliott, J.).

**§ 1247. Same: Fact of Transfer of Realty, etc.**

[*Note 1; add.*]

1913, *Johnson v. Carlin*, 121 Minn. 176, 141 N. W. 4 (lease of a farm; the lease provided that "if the lessor sells said premises during the life of this lease etc."; held, that the fact of sale to H. could be evidenced without producing the deed to H.).

**§ 1249. Same: Sundry Dealings with Documents.**

[*Note 6; add.*]

1913, *Matthews & Son v. Richards*, 13 Ga. App. 412, 79 S. E. 227 (that a later note was given in renewal of a prior one; production of the later note required).

1905, *Elgin, J. & E. R. Co. v. Thomas*, 215 Ill. 158, 74 N. E. 109 (death of a person riding on cars; the fact that he had in his satchel a ticket between two named points, admitted, without producing the ticket).

[*Note 7; add.*]

1905, *Goslin v. Com.*, 121 Ky. 698, 90 S. W. 223 (perjury; that a prosecution was pending; production required).

1905, *State v. Costa*, 78 Vt. 198, 62 Atl. 38 (illegal sale of liquors; a witness to search and finding under a warrant, not required to produce the warrant).

**§ 1250. Miscellaneous Instances.**

[*Note 1; add.*]

1904, *Taft v. Little*, 178 N. Y. 127, 70 N. E. 211 (testimony that certain building work was extra; production of plans and contracts required).

§ 1254. "Collateral" Facts; Specific Instances.

[Note 1; add:]

1904, *Garrison v. Glass*, 139 Ala. 512, 36 So. 725 (contract for land; his ownership of adjoining land, "being a collateral or incidental matter," allowed to be shown by parol). 1905, *Woodall v. State*, 145 Ala. 662, 39 So. 718 (charge of desertion of family; questions as to the affidavit of complaint and the voter's registration, held collateral). 1905, *Franklin v. State*, 145 Ala. 669, 39 So. 979 (same, for notice of apprehension and arrest, in a charge of homicide). 1909, *Mobile J. & K. C. R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37 (letter). 1905, *Wooldridge v. State*, 49 Fla. 137, 38 So. 3 (signing of certain warrants). 1904, *State v. Mackinnon*, 99 Me. 166, 58 Atl. 1028 (keeping a liquor nuisance; the telephone contract for the building, held a collateral document). 1908, *State v. Clark*, 64 W. Va. 625, 63 S. E. 402 (murder of an officer; oral testimony to his being constable, allowed).

§ 1256. Party's Admission of Contents; Forms of Rule, etc.

[Note 3; add:]

1906, *Purinton v. Purinton*, 101 Me. 250, 63 Atl. 925 (rule of *Slatterie v. Pooley*, allowed to admit proof of letters by the opponent's oral reading aloud of their contents). 1904, *Cooley v. Collins*, 186 Mass. 507, 71 N. E. 979, *semble* (*Loomis v. Wadhams* approved). 1906, *Norcum v. Savage*, 140 N. C. 472, 53 S. E. 289 (heirs of P.'s first wife claiming against heirs of his second wife, the land being on record as granted by deed to P., but plaintiffs claiming that this deed had been obtained by P. in place of a lost deed to his first wife; P.'s admissions that there was such a lost deed to his first wife, received). *Undecided*: 1906, *Minnesota Deb. Co. v. Johnson*, 96 Minn. 91, 107 N. W. 740.

[Note 4; add:]

1904, *Prussing v. Jackson*, 208 Ill. 85, 69 N. E. 771 (libel in a letter printed in a newspaper; held, that until the loss of the original was sufficiently shown, the printed copy could not be used as equivalent, merely upon oral admissions of its identity by the defendant or his testimony on the stand to that effect; upon the latter point the ruling is unsound). 1913, *Swing v. Cloquet Lumber Co.*, 121 Minn. 221, 141 N. W. 117 (written admissions of contents, receivable; here, of a policy and premium note).

[Note 5; add:]

1905, *Security Trust Co. v. Robb*, 142 Fed. 78, C. C. A. (letter in the hands of a third person; the defendant's agent's admission on the stand that "the paper offered was a copy of it," not sufficient; "the most conclusive proof of its correctness will not render a copy available, without ground laid for dispensing with the production of the original"; this is in itself a perversely rigid rule; but furthermore the opinion shows no appreciation of the rule at issue and cites irrelevant precedents).

§ 1257. Same: Related Rules, etc.

[Note 4; add:]

1903, *Davis v. Moyles*, 76 Vt. 25, 56 Atl. 174 (*Carver v. Jackson* approved).

[Note 6; add:]

1908, *Hudkins v. Crim*, 64 W. Va. 225, 61 S. E. 166 (forceful opinion by *Bramon, J.*).

[Note 7, par. 2; add:]

1904, *Phillips v. Laughlin*, 99 Me. 26, 58 Atl. 64 (issue whether J.'s recorded deed to C., under whom defendant claimed, was forged by C.; C.'s letters to J., during C.'s possession,

[*Note 7 — continued*]

admitting the forgery, excluded, as against the defendant claiming by recorded mortgage from C.; following the opinion of Cooley, J., in *Cook v. Knowles*, Mich., *infra*. 1905, *Fall v. Fall*, 100 Me. 98, 60 Atl. 718 (deed to M. by T., and will by M. to O.; C. claims apparently by adverse possession against M., T., and O.; M.'s declarations, that she was not the owner and C. was, excluded, following *Phillips v. Laughlin*; the opinion is obscure in naming the parties).

1906, *Rix v. Smith*, 145 Mich. 203, 108 N. W. 691 (grantor's statements, contemporaneous with making the deed, as to the location of boundaries, admitted; opinion obscure, ignoring the principles involved).

1897, *High's Ex'rs v. Pancake*, 42 W. Va. 607, 26 S. E. 537 ("Mere oral declarations to destroy title are inadmissible," because of the statute of frauds). 1906, *Wade v. McDougle*, 59 W. Va. 113, 52 S. E. 1026 (foregoing case approved).

### § 1259. Witness' Admission of Contents; Rule in The Queen's Case.

[*Text*, p. 1514, l. 19 of the first quotation:]

For "second," read "third."

### § 1260. Same: Arguments against the Rule.

[*Note 9; add:*]

One of the neatest illustrations is found in the examination of Mr. McClelland by Mr. Hughes, before the New York Legislative (Armstrong) Committee on Insurance, on Nov. 29, 1905.

### § 1261. Details of the Rule.

[*Note 1; add:*]

1883, *Horton v. Chadbourn*, 31 Minn. 322, 17 N. W. 865 (but here the rule was too strictly applied).

[*Note 3; add:*]

For the question whether the *whole of the writing*, or only the parts strictly contradictory, may be introduced, see *post*, § 2113.

The following is of course sound:

1912, *Larkin v. Nassau Electric R. Co.*, 205 N. Y. 267, 98 N. E. 465 (a statement typewritten by another person and signed by defendant is not inadmissible merely because he did not read it over).

[*Note 4; add:*]

1904, *Terr. v. Boyd*, 16 Haw. 660, 665 (the witness may be cross-examined to a document shown him, without necessarily filing it and making it evidence).

1904, *Hanlon v. Ehrich*, 178 N. Y. 474, 71 N. E. 12 (like *Romertze v. Bank*). 1912, *Larkin v. Nassau Electric R. Co.*, 205 N. Y. 267, 98 N. E. 465 (may be introduced "in the regular course of the trial").

Distinguish also the question whether the whole *may* be put in evidence by the opponent (*post*, § 2113).

[*Note 4, at end; add a new par.:*]

Of course the document must be *otherwise proved*, if the witness does not admit its execution: 1910, *Belskis v. Dering Coal Co.*, 246 Ill. 62, 92 N. E. 575 (here the document contained additions which the witness denied he had signed).

§ 1262. *Same*: Rule as applied to Depositions, etc.

[Text, p. 1526, last line; add a new note 9:]

\* Distinguish also the question whether the whole of a document *may* be put in evidence by the opponent (*post*, § 2113).

[Note 8; add:]

Presumably the foregoing application of the rule in *The Queen's Case* would no longer be law in England, since St. 28 & 29 Vict. c. 18, § 5 (quoted *post*, § 1263, n. 1) abolished the rule for criminal cases.

§ 1263. *Same*: Jurisdictions recognizing the Rule, etc.

[Note 3; add:]

Alta. St. 1910, 2d sess., Evidence Act, c. 3, § 20 (like Eng. St. 1854, c. 125, § 24).

Ont. St. 1909, c. 43, § 17 (like R. S. 1897, c. 73, § 17).

Sask. St. 1907, c. 12, Evidence Act, § 29 (like Eng. St. 1854, c. 125, § 24).

Yukon St. 1904, c. 5, § 42 (like Eng. St. 1854, c. 125, § 24).

[Note 5; add:]

1911, *Birmingham R. L. & P. Co. v. Bush*, 175 Ala. 49, 56 So. 731 (*Gunter v. State* followed).  
1910, *People v. Bond*, 13 Cal. App. 175, 109 Pac. 150 (former testimony before the coroner; showing the transcript not required).

1909, *Stewart v. State*, 58 Fla. 97, 50 So. 642 (affidavit required to be shown).

1905, *Washington v. State*, 124 Ga. 423, 52 S. E. 910 (rule applied to a letter).

1905, *Warth v. Loewenstein*, 219 Ill. 222, 76 N. E. 378 (questions as to statements made by the witness in a deposition not introduced, allowed). 1910, *Belskis v. Dering Coal Co.*, 246 Ill. 62, 92 N. E. 575 (question held proper, though the witness had signed a statement which was to be offered as the self-contradiction).

1908, *Martin v. Hoffman*, 77 Kan. 185, 93 Pac. 625 (questions on a letter identified by the witness, excluded, unless perhaps for testing credibility).

1914, *Whisner v. Whisner*, — Md. —, 89 Atl. 393 (rule applied).

1904, *McDonald v. Bayha*, 93 Minn. 139, 100 N. W. 679 (cross-examination of the plaintiff to letters, without showing them, held improper; the Court is so far ignorant of the impolicy of its own rule that it stigmatizes the trial Court's procedure as "inquisitorial").

1913, *Ebert v. Metropolitan St. R. Co.*, 174 Mo. App. 45, 160 S. W. 34 (deposition; a prior written statement not having been shown to the deponent, the statement was excluded).

1905, *Villeneuve v. Manchester St. R. Co.*, 73 N. H. 250, 60 Atl. 748 (*Haines v. Ins. Co.* followed; here a signed unsworn statement; the practice here sanctioned seems a poor one).

1905, *State v. Hayes*, 138 N. C. 660, 50 S. E. 623 (rape; defendant allowed to cross-examine prosecutrix as to the contents of her letter in defendant's possession; decided on the theory of § 1252, *ante*).

1910, *State v. Goodager*, 56 Or. 198, 106 Pac. 638 (written statements must be shown; but a report of former testimony, not signed by the witness cannot be used for the purpose; this kind of ruling makes it very difficult for the party desiring to probe a liar).

1909, *Kann v. Bennett*, 223 Pa. 36, 72 Atl. 342 (rule in *The Queen's Case* applied; no precedents cited, no consideration of the controversy).

1908, *Jones v. U. S.*, 9th C. C. A., 162 Fed. 417, 430 (the defendant having cross-examined the prosecution's witness by reading parts of a former sworn statement, the prosecution was allowed to put in the whole, apparently on the theory that this was merely permitting what the defendant should originally have been required to do by the present rule; but of course it was also justifiable, irrespective of the present rule, on the principle of § 2115). 1909, *Richards v. U. S.*, 8th C. C. A., 175 Fed. 911, 925, 942 (rule assumed to apply, in both majority and dissenting opinions).

[*Note 5 — continued*]

1909, *Eads v. State*, 17 Wyo. 490, 101 Pac. 946 (in asking about an impeaching document, "the cross-examiner may accept an affirmative answer as proof of the contents," without production).

§ 1267. **Kinds of Copies ; Is a Written Copy the Exclusive Form, etc.**

[*Note 1 ; add :*]

1908, *Rogers v. Clark Iron Co.*, 104 Minn. 198, 116 N. W. 739 (Federal land-patent).

Compare here the cases cited *post*, § 1273, n., that a proceeding for judicial restoration of a lost record is not the exclusive means of proof, the principle is related to those of §§ 1347 and 1660 *post*, and is there again referred to.

[*Note 6 ; add :*]

*Can.* : 1903, *Stewart v. Walker*, 6 Ont. L. R., 495, 501 (*Sugden v. St. Leonards* followed ; but some corroboration is required).

§ 1268. **Is a Written Copy conditionally Preferred, etc.**

[*Note 4 ; add :*]

1909, *Robinson v. Singlerly P. & P. Co.*, 110 Md. 382, 72 Atl. 828 (American rule as stated by *Greenleaf*, adopted).

[*Note 5 ; add :*]

1906, *State v. Barrington*, 198 Mo. 23, 95 S. W. 235, *semble* (letter).

§ 1269. **Same : Copy preferred for proving Public Records.**

[*Note 1, par. 1 ; add :*]

1904, *R. v. Drummond*, 10 Ont. L. R. 546 (perjury ; the indictment and judgment of the other trial must be evidenced by an exemplified or sworn copy, or certificate of substance under Dom. Cr. C. § 691, and not by the clerk's minute book).

1908, *Felix v. Caldwell*, 235 Ill. 159, 85 N. E. 228 (destroyed probate decree evidenced by recollection and the recitals of the administrator's deed, since "there was in existence no other writing or memorandum").

[*Note 1, par. 2 ; at the end, add :*]

The extreme phrasing in *Glos v. Holmes*, 228 Ill. 436, 81 N. E. 1064 (1907), that the correctness of a sworn copy of records of a tax-sale in the county-clerk's office "could not be disputed by oral evidence" must be understood in the light of the special case ; the ruling was, in effect, merely that where the original record was in court, the sworn copy's correctness was disputable only by the original, not by recollection-testimony.

[*Note 2 ; add :*]

1910, *Russell v. State*, 97 Ark. 92, 133 S. W. 188 (certified copy of public land plats and maps, etc., preferred to oral testimony).

1912, *State v. Oden*, 130 La. 598, 58 So. 351 (illegal liquor-selling ; by statute the collector's certificate of issuance of a Federal revenue license was admissible to prove such a license ; the certificate held to be the "best evidence," so that the defendant's own admissions on cross-examination could not be asked for ; this is a most unpractical ruling ; it is of the kind that puts the law far away in the jungle of logical unrealities, where it has nothing to do with actual needs).

[*Note 3; add:*]

1906, *People v. Christian*, 144 Mich. 247, 107 N. W. 919 (oral testimony to a land-officer's letter, admitted, though a copy of the press-copy in the land office could have been had; "there are no degrees in secondary evidence"; no authority cited).

S. C. St. 1911, No. 53, p. 91 (amending § 32 of St. 1907, Feb. 16; "records of the original books of the collector of internal revenue," showing payment of a U. S. liquor tax, may be evidenced "by the oath of any one who may have inspected the same").

[*Note 4; add:*]

1907, *Kennedy v. Borah*, 226 Ill. 243, 80 N. E. 767 (whether preliminary proof of lack of a certified copy of burnt records of a court should be required; not decided). 1911, *People v. Cotton*, 250 Ill. 338, 95 N. E. 283 (forged entry in a chattel mortgage acknowledged before a justice; to prove that the justice's lost docket did not contain a note of a certain chattel in the mortgaged lot, the contents were allowed to be evidenced by oral recollection of the justice, without preferring a copy made as a part of testimony before the master).

§ 1270. *Same: Copy of Record of Conviction, etc.*

[*Text*, p. 1542, at the end of the quotation from *Clemens v. Conrad*, *add* a new note 2a:]

\* The best opinion, discussing the principle and policy, is now that of Powers, J., in *State v. Knowles*, 98 Me. 429, 57 Atl. 588 (1904).

[*Note 5; add:*]

*Eng.*: 1913, *Mash v. Darley*, [1914] 1 K. B. 1 (bastardy; prior conviction for carnal intercourse, evidenced by a police officer who had been present at the trial).

*Canada*: Dom. St. 1909, 9 Edw. VII, c. 82, § 101 (liquor license act; previous convictions provable "by the production of a certificate under the hand of the convicting justices or police magistrate or of the clerk of the peace, without proof of his signature or official character, or by other satisfactory evidence").

*Alta.* St. 1910, 2d sess., Evidence Act, c. 3, § 22 (like Eng. St. 1854, c. 125, § 25).

*Ont.* St. 1909, c. 43, § 19 (like R. S. 1897, c. 73, § 19). 1910, *R. v. Graves*, 21 Ont. 329, 346 (under St. 1909, 9 Edw. VII, c. 82, § 101, held that "the oral evidence of bystanders" was not sufficient).

P. E. I. St. 1907, 7 Edw. VII, c. 3, § 25 (liquor offences; prior conviction provable by magistrate's certificate, "or other satisfactory evidence").

*Sask.* St. 1907, c. 12, Evidence Act, § 30 (like Eng. St. 1854, c. 125, § 25).

*Yukon* St. 1904, c. 5, § 43 (like Eng. St. 1854, c. 125, § 25, substituting "any crime").

*United States*: 1906, *Thrash v. State*, 79 Ark. 347, 96 S. W. 360 (*Vance v. State* followed).

1911, *Turner v. State*, 100 Ark. 199, 139 S. W. 1124 (rule of *Vance v. State* affirmed).

1904, *McKevitt v. People*, 209 Ill. 180, 70 N. E. 693 (copy of record required in criminal cases). 1906, *O'Donnell v. People*, 224 Ill. 218, 79 N. E. 639 (*Bartholomew v. People* followed). 1908, *Clifford v. Pioneer Fireproofing Co.*, 232 Ill. 150, 83 N. E. 448 (in a civil case, a copy is not required, but "unless admitted by the witness or the party," enough must be proved "to show the jurisdiction of the court and a conviction," even where a copy is used).

1909, *Dotterer v. State*, 172 Ind. 357, 88 N. E. 689 ("If answered affirmatively, what good ground can there be for demanding the record?" repudiating the doubt in *Farley v. State*, *supra*).

1904, *Bise v. U. S.*, 5 Ind. T. 602, 82 S. W. 921 (record required, to disqualify the witness; otherwise for mere impeachment).

1904, *State v. Knowles*, 98 Me. 429, 57 Atl. 588 (cross-examination to conviction, allowed, as an application of common-law principles).

1905, *Deck v. Baltimore & O. R. Co.*, 100 Md. 168, 59 Atl. 650 (what there was in the wit-

[*Note 5 — continued*]

ness' record that led an officer to arrest him, not allowed on cross-examination; "the proper evidence of such convictions should have been produced"; no authority cited).

1907, *Com. v. Walsh*, 196 Mass. 369, 82 N. E. 19 (the common law rule of this State, not permitting the conviction to be proved orally by a witness, applies equally to a defendant testifying on cross-examination; prior practice and rulings followed).

1908, *State v. Gordon*, 105 Minn. 217, 117 N. W. 483.

1905, *State v. Heusack*, 189 Mo. 295, 88 S. W. 21 (statute applied). 1905, *State v. Forsha*, 190 Mo. 296, 88 S. W. 754 (after the witness' admission of conviction for common assault, the State was allowed to show a conviction for assault with intent to kill). 1905, *State v. Spivey*, 191 Mo. 87, 90 S. W. 81 (rule applied to a defendant cross-examined). 1905, *State v. Woodward*, 191 Mo. 617, 90 S. W. 90 (if the witness denies the conviction, the record-copy must be produced, if further proof is desired).

1904, *State v. Fox*, 70 N. J. L. 353, 57 Atl. 270 (the witness may be asked as to conviction of any other crime "without specifying time or place"). 1905, *State v. Mount*, 62 N. J. L. 365, 65 Atl. 259 (statute applied). 1909, *Hill v. Maxwell*, 77 N. J. L. 766, 73 Atl. 501 (statute applied to allow the question to the witness himself).

N. Y. St. 1909, c. 240, § 61, p. 408 (re-enacting P. C. § 714, now Consol. L. c. 88, § 2444).

1912, *People v. Cardillo*, 207 N. Y. 70, 100 N. E. 715 (the accused's confessions out of court are not admissible to show prior convictions of crime; the Code prescribing the only permissible modes).

1909, *Com. v. Racco*, 225 Pa. 113, 73 Atl. 1067 (defendant allowed to be questioned as to former convictions; and a police officer allowed to testify to the defendant's admission thereof, to impeach his denial).

1904, *Gulf C. & S. F. R. Co. v. Johnson*, 98 Tex. 76, 81 S. W. 4 (record required; and this must include the sentence, not merely the judgment on the verdict). 1906, *Grabill v. State*, — Tex. Cr. —, 97 S. W. 1046 (for disqualifying a witness, a copy of the record is required; but for impeachment, his answer on cross-examination suffices). 1907, *Fannin v. State*, 51 Tex. Cr. 41, 100 S. W. 916 (defendant's oral extra-judicial admission of conviction, excluded).

1906, *Bise v. U. S.*, 144 Fed. 374, C. C. A. (for disqualification of a witness, a copy of the record is necessary; here applied for Indian Territory).

Wash. St. 1909, c. 249, p. 900, § 38 (may be shown "either by the record thereof, or a copy of such record duly authenticated by the legal custodian thereof, or by other competent evidence, or by his cross-examination").

1912, *State v. Stone*, 66 Wash. 625, 120 Pac. 76 (under Crim. Code 1909, § 37, Rem. & Ball. Code, § 2290, the witness may be cross-examined without producing the record-copy; "the rule stated in *State v. Payne* is no longer applicable"). 1912, *State v. Overland*, 68 Wash. 566, 123 Pac. 1011 (same).

For the question whether *identity of name* suffices, without other evidence of identity of persons, see *post*, § 2529.

# § 1271. Same: Copy of Foreign Statutory Law, etc.

[*Note 3; add:*]

N. Sc.: *Merritt v. Copper Crown Co.*, 36 N. Sc. 383, 393 (West Virginia statute proved by an admission).

[*Note 4; add:*]

1907, *Cook v. Chicago R. I. & P. R. Co.*, 78 Nebr. 64, 110 N. W. 718 (witness to contents of statutes of Idaho, no copy being offered, excluded).

N. C. Rev. 1905, § 1594 (like Code 1883, § 1338).

1912, *Paterson's Estate*, 22 N. D. 480, 134 N. W. 751 *semble* (an over-technical decision).

1907, *Free v. Southern R. Co.*, 78 S. C. 57, 58 S. E. 952 (whether a North Carolina statute can be evidenced by a North Carolina Supreme Court decision; not decided).

**§ 1272. Preferences as between Recollection-Witnesses.**

[*Note 1; add, under Accord:*]

1906, *Colton's Estate*, 129 Ia. 542, 105 N. W. 1008 (see the citation *ante*, § 1244, n. 4).  
1905, *State v. Rosenthal*, 123 Wis. 442, 102 N. W. 49 (clerk of court is not a preferred witness to a search of records).

**§ 1273. Preference as between Different Kinds of Written Copies, etc.**

[*Note 1, par. 1; add:*]

1906, *State v. Nippert*, 74 Kan. 371, 86 Pac. 478 (Federal revenue records; an examined copy admitted, the officer having refused to certify a copy). *State v. Schaeffer*, 74 Kan. 390, 86 Pac. 477 (similar; general rule as to preference, not decided).  
1904, *Terry v. State*, 46 Tex. Cr. 75, 79 S. W. 320 (U. S. collector's records).  
1906, *Smithers v. Lawrence*, 100 Tex. 77, 93 S. W. 1064 (certified copy, not preferred to examined copy of land-office records).

[*Note 2; add:*]

1910, *Russell v. State*, 97 Ark. 92, 133 S. W. 188 (under Kirby's Dig., §§ 3589-3594 public land plats and maps etc. can be proved only by the originals or certified copies).

[*Note 4; add:*]

1910, *Hughes v. Pritchard*, 153 N. C. 23, 135, 68 S. E. 906, 69 S. E. 3 (homestead appraisal).

**§ 1275. Copy of a Copy; Specific Rules of Preference.**

[*Note 5; add:*]

N. C. Rev. 1905, § 569 (like Code 1883, § 428).

[*Note 6; add:*]

Okl. St. 1908, c. 75, p. 655, Art. II, § 5 (re-records from territorial to state records).

[*Note 8; add:*]

N. C. Rev. 1905, § 2661 (like Code 1883, § 3662).  
1904, *New York, N. H. & H. R. Co. v. Horgan*, 26 R. I. 448, 59 Atl. 310 (certified copy of an authorized record-copy of a dilapidated record of a town-meeting vote, admitted).

[*Note 11, par. 1; add:*]

1906, *Mansfield v. Johnson*, 51 Fla. 239, 40 So. 196 (certified copy from the record of H. county court, of a judgment there recorded on certified copy from D. county court, admitted).  
Fla. St. 1913, c. 6482, p. 296, June 7 (certified copies of deeds re-recorded in other counties to be admissible).  
N. H. St. 1913, c. 137, § 3 (central office of copies of ancient records; certified copy under seal of State by the Secretary of State to be evidence).

[*Note 12; add:*]

Ark. St. 1907, No. 77, p. 171, Mar. 12, § 5 (certified copy of restored burnt records of Garland Co., admissible).  
Cal. St. 1906, Spec. Sess., c. 55, p. 73, June 61, § 1.  
Nev. St. 1909, c. 77, p. 142, § 1 (county records lost or destroyed; provision for use of certified copies of recorded copies).

[*Note 14; add:*]

*S. C.*: 1909, *Pineland Club v. Robert*, 4th C. C. A., 170 Fed. 341 (a record of a certified copy of a will, not admitted, under *S. C. St.* 1866, Dec. 20, the probate of the will being defective and the existence of the will not being otherwise established; the principle of §§ 1658 and 2110 being thus not satisfied; *Howard v. Quattlebaum* distinguished.)

**§ 1278. Witness to Copy must have Personal Knowledge of Original.**

[*Note 1; correct:*]

*Lester v. Blackwell* should be: *Lester v. Blackwell*, 128 Ala. 143, 30 So. 663, 133 Ala. 337, 32 So. 166.

[*Note 1; add:*]

1910, *Lacy v. Meador*, 170 Ala. 482, 54 So. 161 (one L., an illiterate, had dictated a letter to one E., who wrote it; a witness who had heard some one read aloud the letter was excluded; citing the text above).

1910, *Guinasso's Estate, Guinasso v. Arata*, 13 Cal. App. 518, 110 Pac. 335 (one who heard B. read a will aloud, not competent).

**§ 1280. Sundry Distinctions (Press-Copies, etc.).**

[*Note 2; add a new par.:*]

The *length of time* elapsing between seeing the original and making the copy is immaterial; it is then at least as good as recollection-testimony:

1913, *Walter v. Calhoun*, 88 Kan. 801, 129 Pac. 1176.

**§ 1281. Witness must be called, etc.**

[*Note 1; add:*]

1906, *Hall v. Callingham*, 74 N. J. L. 211, 65 Atl. 123 (purporting copy of a letter, not verified by any witness, excluded).

**§ 1290. Attesting-Witness Rule; Kind of Document covered, etc.**

[*Note 1, l. 2; correct:*]

For "the next note," read "note 3, *infra*."

[*Note 3; add:*]

*Alta. St.* 1910, 2d sess., Evidence Act, c. 3, § 52 (like Eng. St. 1854, c. 125, § 26, up to the semicolon). 1913, *Nichols & S. Co. v. Skedanuk*, *Alta. S. C.*, 11 D. L. R. 199 (mortgage of land under Land Titles Act; whether it is a document required to be attested and thus the attesting witness must be called, not decided).

*Ont. St.* 1909, c. 43, § 51 (like *R. S.* 1897, c. 73, § 54).

*Yukon St.* 1904, c. 5, § 32.

[*Note 4; add:*]

1904, *Ballow v. Collins*, 139 Ala. 543, 36 So. 712 (under Code, § 1797, the maker's testimony suffices ordinarily; but where attestation is required for the validity of execution under Code, § 2151, — here, an illiterate's mortgage, signed by mark, — the attestation also must be proved by the maker; as to whether an illiterate's mark is identifiable, see *ante*, § 693); Code 1897, § 1797 (quoted *post*, § 1299, n. 3).

1906, *Castor v. Bernstein*, 21 Cal. App. 703, 84 Pac. 244 ("The Code makes no distinction in rank between the various modes in which a writing may be proved"; here said of an attested release).

## [Note 4 — continued]

1913, *Kaeo v. Ozaki*, 21 Haw. 633 (assignment of a claim; witness need not be called).  
 N. Y. St. 1909, c. 65, p. 22, Feb. 17 (places St. 1883, c. 195, § 1, in C. C. P. as § 961b).  
 N. C. Rev. 1905, § 329, Code 1883, § 57 (special rule provided for proving a copy of a lost probated will).  
 S. D.: Stats. 1899, § 533 ("The execution of witnessed instruments, except wills, may be proven in the same manner as the execution of unwitnessed instruments").  
 1905, *Mississippi L. & C. Co. v. Kelly*, 19 S. D. 577, 104 N. W. 265 (statute applied to a witnessed note; the statutes for proof to a recording officer held not applicable).  
 1907, *Boswell v. First National Bank*, 16 Wyo. 161, 92 Pac. 624 (power of attorney; not decided).

## [Note 6; add:]

Compare the following: 1909, *Eadie v. Chambers*, 9th C. C. A., 172 Fed. 73 (whether attestation is requisite to validity between the parties).

## § 1292. Who is an Attesting Witness.

## [Note 2; add:]

Whether the witness is *competent* or *credible* by the substantive law, so as to affect the validity of the attestation, is also a different question (*post*, § 1510, n. 4).

## [Note 6; add:]

*Accord*: on the latter point decided in *Lavretta v. Holcombe*, Ala., there is a series of prior cases in that State.

*Undecided*: 1907, *Gump v. Gowans*, 226 Ill. 635, 80 N. E. 1086 (notary).

*Contra*: 1903, *Kelly v. Moore*, 22 D. C. App. 9 (collecting cases).

For the rule of substantive law as to the *sufficiency*, for purposes of attestation, of a defective or unauthorized certificate of acknowledgment, see *Keely v. Moore*, 196 U. S. 38, 25 Sup. 169 (1904), collecting the cases.

## [Text, p. 1576; add a new par. (6):]

(6) An *illiterate* person may be an attesting witness, subscribing by mark; but the proof of the mark may raise a difficulty (*ante*, § 693, n. 2).

## § 1297. Execution not disputable because of Opponent's Claim, etc.

## [Note 1; add:]

1810, *Pearce v. Hooper*, 3 Taunt. 60 (cited *post*, § 1298, n. 2).

1905, *McBrayer v. Walker*, 122 Ga. 245, 50 S. E. 95 (administrator of grantee, claiming under the deed; the grantor allowed to use without authentication an admission of usury indorsed by the grantee on the deed).

## § 1299. Attester preferred to any Third Person, etc.

## [Note 2; add:]

1913, *Swindell v. Ford*, — Ala. —, 63 So. 651.

## [Note 3; add:]

1904, *Ballow v. Collins*, 139 Ala. 543, 36 So. 712 (statute applied; see the citation *ante*, § 1290, n. 4).

1904, *Vizard v. Moody*, 119 Ga. 918, 47 S. E. 348 (statute applied).

§ 1300. **Attester preferred to Opponent's Extra-judicial Admissions.**

[Note 2; add:]

1903, *Sledge v. Singley*, 139 Ala. 346, 37 So. 98 (Code, § 1797, quoted *ante*, § 1299, n. 3, applies only to testimony on the stand or by deposition; hence the alleged maker's extra-judicial admissions do not dispense with calling the attester of a deed).  
 1905, *Lewis v. Glass*, — Ala. —, 39 So. 77 (admissions excluded).

§ 1302. **Attester need not Testify Favorably.**

[Note 1; add:]

1910, *Mordecai v. Canty*, 86 S. C. 470, 68 S. E. 1049 (failure to testify to sanity).  
 1904, *Schouweiler v. McCaull*, 18 S. D. 70, 99 N. W. 95 (mortgage).

In *Illinois*, by a queer forgetfulness of the present principle, the words of the local statute were for a time made to reach a contrary result: 1906, *Greene v. Hitchcock*, 222 Ill. 216, 78 N. E. 614 (by Rev. St. c. 148, § 2, quoted *post*, § 1304, n. 6, the oath of two attesting witnesses "that they were present and saw the testator sign, etc.," "shall be sufficient proof of the execution"; in this case, the will bore a full attestation clause, but one of the attestors could testify only that he did not remember whether he saw the testatrix sign, but that he would not have signed it except in her presence nor have let her sign it except in his presence, etc.; this was held insufficient, ignoring the present principle and citing no authority whatever, and then invoking the peculiar local rule of § 1303, n. 3, *post*, to exclude all other testimony; the result is to establish an unjust rule of hardship, contrary to two centuries of settled law).

But the ruling in *Greene v. Hitchcock* was within a year practically repudiated. 1907, *Mead v. Presbyterian Church*, 229 Ill. 526, 82 N. E. 371 (the opinion does not mention *Greene v. Hitchcock*, though the briefs cited it). 1908, *Schofield v. Thomas*, 236 Ill. 122, 86 N. E. 122 (issue whether the testatrix was present at the attestors' signing; the attestors testified not, but another person testified that she was; due attestation was not found; but the opinion points out that the attestors' negative testimony was not of itself fatal, if other testimony to due attestation had been believed; approving *Gould v. Seminary*, 189 Ill. 282, 59 N. E. 536; not mentioning *Greene v. Hitchcock*, *supra*, but effectually repudiating it).

[Note 2; add:]

1906, *Shapter's Estate*, 35 Colo. 578, 85 Pac. 688.  
 1913, *Brock v. Brock*, 140 Ga. 590, 79 S. E. 473 (*Gillis v. Gillis* followed).  
 1907, *Carmical v. Carmical*, 32 Ky. L. 171, 104 S. W. 1037.  
 1909, *Newell v. White*, 29 R. I. 343, 73 Atl. 798.  
 1911, *Merck v. Merck*, 89 S. C. 347, 71 S. E. 969.  
 1878, *Meurer's Will*, 44 Wis. 392, 401.  
 N. Y. St. 1914, c. 443 (amending C. C. P. § 2612, surrogates' courts; "if all the subscribing witnesses to the will be dead or incompetent by reason of lunacy or otherwise to testify, or unable to testify, or are absent from the State and their testimony has been dispensed with, . . . or if a subscribing witness has forgotten the occurrence or testifies against the execution of the will, or was not present with the other witness at the execution of the will, the will may nevertheless be established"; remainder quoted *post*, § 1320).

§ 1303. **Same: Discriminations, etc.**

[Note 3; add:]

1904, *O'Brien v. Bonfield*, 213 Ill. 428, 72 N. E. 1090 (rule held constitutional). 1905, *Senn v. Greundling*, 218 Ill. 458, 75 N. E. 1020. 1905, *Barry's Will*, 219 Ill. 391, 76 N. E. 577. 1906, *Greene v. Hitchcock*, 222 Ill. 216, 78 N. E. 614. 1906, *Stuke v. Glaser*, 223 Ill.

[*Note 3 — continued*]

316, 79 N. E. 105 (meaning of the proviso as to "fraud," determined). 1909, *Dean v. Dean*, 239 Ill. 424, 88 N. E. 149.

**§ 1304. Number of Attesters required to be Called.**

[*Note 6; add:*]

1906, *Greene v. Hitchcock*, 222 Ill. 216, 78 N. E. 614 (on a grant of probate, the two attest-ers must testify).

Kan. St. 1905, c. 526, § 1 (the Court shall cause "the witnesses to such will" to attend and be examined).

N. Y. St. 1914, c. 443 (replacing C. C. P. § 2618 by § 2611; "two at least" must be produced, "if so many are within the State and competent and able to testify"; where one has been for cause dispensed with, "and one subscribing witness has been examined," the will may be probated on the latter's testimony alone).

N. C. Rev. 1905, § 3127 (like Code 1883, § 2148). 1906, *Steadman v. Steadman*, 143 N. C. 345, 55 S. E. 784 (rule applied to a will dating 1857).

Okl. St. 1909, c. 41, p. 641, § 4 (amending Stats. 1893, § 1189, by adding proviso that the witness prove all particulars of due execution and the testator's sanity).

**§ 1310. Statutory Enumerations of Causes of Unavailability.**

[*Note 1; add:*]

N. Y. St. 1911, c. 105, p. 163 (amending C. C. P. § 2540, in other respects). St. 1913, c. 412, p. 871 (amending C. C. P. § 2618). St. 1914, c. 443 (surrogates' courts; replacing C. C. P. §§ 2618-2670, 2539, 2540 by a new C. C. P. § 2612; testimony of a subscribing witness may be dispensed with in case of "death, absence from the State, incompetency by reason of lunacy or otherwise," or when he "cannot with due diligence be found within the State, or cannot be examined by reason of his physical or mental condition"; surrogate may order testimony taken by commission if the witness "is absent from the State and his testimony can be obtained with reasonable diligence").

N. C. Rev. 1905, § 3127 (like Code 1883, § 2148, adding "or cannot after due diligence be found within the State").

**§ 1311. Causes of Unavailability; (2) Ancient Document.**

[*Note 2; add:*]

1904, *O'Neal v. Tennessee C. I. & R. Co.*, 140 Ala. 378, 37 So. 275.

**§ 1312. Same: (3) Absence from Jurisdiction.**

[*Note 2; add:*]

1906, *Terry v. Broadhurst*, 127 Ga. 212, 56 S. E. 282 (attendance at school in another State, sufficient).

1909, *Worman v. Seybert*, 78 N. J. L. 176, 73 Atl. 529 (residence in Philadelphia, held to suffice).

[*Note 6; add:*]

1904, *Schouweiler v. McCaull*, 18 S. D. 70, 99 N. W. 95 (one witness called, the other out of the county; other testimony then allowed).

[*Note 8, par. 2, l. 2; add:*]

1907, *Cuff v. Frazee S. & C. Co.*, 14 Ont. L. R. 263 (former witness now absent; inquiries and replies, excluded as evidence of absence, but considered as evidence of inability to find) and the cases cited *ante*, §§ 664, 1196.

[*Note 10; add:*]

1907, *Boswell v. First National Bank*, 16 Wyo. 161, 92 Pac. 624 (residence and attestation in other States, with other evidence, held to raise the presumption of absence, so as to exempt from proof of the witnesses' signature).

§ 1313. **Same: (4) Absence in Unknown Parts.**

[*Note 2; add:*]

1910, *Thompson v. King*, 95 Ark. 549, 129 S. W. 798.

[*Note 5, par. 2; add:*]

and the cases cited *ante*, §§ 664, 1196, *post*, § 1725.

§ 1316. **Same: (9) Incompetency, etc.**

[*Note 4, last line; add:*]

For an illiterate attester, see *ante*, § 693, n. 2.

§ 1320. **If the Witness is Unavailable, must his Signature be proved, etc.?**

[*Note 2; add:*]

N. Y. St. 1914, c. 443 (replacing C. C. P. § 2620 by a new C. C. P. § 2612; surrogates' courts; on failure of testimony, etc., as quoted *ante*, § 1302, the will may nevertheless be established, etc., as in the original C. C. P. § 2620, *supra*).

1913, *Swindell v. Ford*, — Ala. —, 63 So. 651 (deed; proof of attestation required).

N. C. Rev. 1905, § 3127 (like Code 1883, § 2148; adding, "In all cases where the testator executed the will by making his mark, and where any one or more of the subscribing witnesses are dead or reside out of the State or are insane or otherwise incompetent to testify, it shall not be necessary to prove the handwriting of the testator, but proof of the handwriting of the subscribing witness or witnesses so dead," etc., shall suffice).

1907, *Boswell v. First National Bank*, 16 Wyo. 161, 92 Pac. 624 (not decided; cited more fully, *ante*, § 1312, n. 10).

§ 1326. **Magistrate's Report of Accused's Statement.**

[*Note 1; add:*]

Ill. St. 1907, May 17, p. 213 (re-enacting this part of c. 32, § 18, *supra*).

N. H. St. 1905, c. 60, amending St. 1903, c. 134 (the testimony before a medical referee as coroner "shall be reduced to writing").

N. C. Rev. 1905, § 3196 (like Code 1883, § 1147).

Rev. 1905, § 3193 (like Code 1883, § 1150).

[*Note 3; add:*]

Compare the comments of Mr. Gulson, in his treatise cited *post*, § 1349, n. 1.

[*Note 4; add:*]

1910, *Davis v. State*, 168 Ala. 53, 52 So. 939 (oral testimony not admissible, unless magistrate's report is accounted for).

1909, *State v. Winter*, 83 S. C. 153, 65 S. E. 209.

§ 1327. **Same: Magistrate's Report not required, if lost or not taken.**

[*Note 3; add:*]

1910, *People v. Luis*, 158 Cal. 285, 110 Pac. 580 (here a confession in answer to the district attorney).

**§ 1328. Written Examination usable as Memorandum, etc.***[Note 2; add:]*1913, *State v. Harris*, 74 Wash. 60, 132 Pac. 735, *semble*.*[Note 3; add:]**Accord*: 1906, *Lowe v. State*, 125 Ga. 55, 53 S. E. 1038, *semble*.**§ 1329. Magistrate's or Coroner's Report of Witness' Testimony.***[Note 2; add:]**Can.*: 1905, *Farlinger v. Thompson*, 37 Sup. 513, 534 (examination of a debtor).*[Note 3; add:]*1905, *Sanford v. State*, 143 Ala. 78, 39 So. 370.1904, *McKinney v. Carmack*, 119 Ga. 467, 46 S. E. 719 (neither committing magistrate's nor coroner's report is preferred, where the testimony is used in impeachment; prior cases not cited).1905, *Green v. State*, 124 Ga. 343, 52 S. E. 431 (coroner's report of testimony, not preferred).1905, *Briggs v. People*, 219 Ill. 330, 76 N. E. 499 (coroner's minutes of testimony need not be used; no authority cited).*[Note 5; add:]*1906, *State v. Thompson*, 116 La. 829, 41 So. 107 (the magistrate's report of the testimony being excluded for irregularity, the testimony of one who heard the former testimony was received).*[Note 6; add:]*1914, *Bennett v. State*, — Fla. —, 63 So. 842.**§ 1330. Report of Testimony at a Former Trial.***[Note 1, par. 1; add:]*1911, *McRorie v. Monroe*, 203 N. Y. 426, 96 N. E. 724.The same point is implied in many of the rulings cited *post*, § 2098 (whether the *precise words* must be proved).*[Note 2; add:]*1905, *Petty v. State*, 76 Ark. 515, 89 S. W. 465 (the witness may read his memorandum to the jury; of course; it is curious that a Court should dignify such an objection by noticing it).1904, *State v. Harmon*, 70 Kan. 476, 78 Pac. 805.1904, *State v. Woolridge*, 45 Or. 389, 78 Pac. 333.1906, *State v. Martin*, 47 Or. 282, 83 Pac. 849 (here because the stenographer could not verify the completeness and accuracy of the report).*[Note 3; add, under Not Required:]*1905, *Meyer v. Foster*, 147 Cal. 166, 81 Pac. 402 (not preferred to oral testimony from memory).1905, *Miller v. People*, 216 Ill. 309, 74 N. E. 743 (official stenographer's report; "we have no statute giving any special weight to stenographic notes").1908, *Studabaker v. Faylor*, 170 Ind. 498, 83 N. E. 747.1911, *State v. Kines*, 152 Ia. 240, 132 N. W. 180.1906, *Austin v. Com.*, 124 Ky. 55, 98 S. W. 295 (cited *post*, § 1669).

[*Note 3 — continued*]

1911, *McRorie v. Monroe*, 203 N. Y. 426, 96 N. E. 724.

1905, *Harmon v. Terr.*, 15 Okl. 147, 79 Pac. 765 (official report, not preferred to the stenographer's testimony on the stand from his carbon copy).

1905, *Wells v. Chase*, 126 Wis. 202, 105 N. W. 799 (a perverse ruling, excluding the official stenographer's sworn verification of his notes on the stand, because they were not "certified" by him under Rev. Sts. 1898, § 4141, cited *post*, § 1669, which declares his certified minutes admissible without calling him in person; the object of the statute was merely to make the minutes admissible without calling him, and his sworn testimony was of course at least as good as his certificate; here the Court, citing no authority, turned the abundant caution of the trial counsel into an error).

[*Note 3; add, under Required:*]

1904, *People v. Buckley*, 143 Cal. 375, 77 Pac. 169 (under P. C. § 869; cited *post*, § 1669, n. 2).

1905, *Estes v. Missouri P. R. Co.*, 111 Mo. App. 1, 85 S. W. 909 (citing none of these cases).

[*Note 3; add, at the end:*]

The proper method is exemplified in *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810 (1903).

The following doubt is unnecessary: 1904, *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467 (the witness having identified a person in his former testimony by saying, "There is one; that fellow," and pointing, the stenographer was offered to identify the now defendant as the person pointed out; the Court remarks, "There is certainly much force in the contention that the statutory deposition cannot be thus added to"; on the contrary, there is no reason for doubting that it can be thus supplemented).

#### § 1331. Deposition taken *de bene esse*.

[*Note 1; add:*]

*Contra*, and on this point preferable. 1904, *State v. Woolridge*, 45 Or. 389, 78 Pac. 333 (cited *post*, § 1349, n. 12; collecting authorities).

#### § 1332. Dying Declarations, and other Extra-judicial Statements.

[*Note 4; add:*]

1910, *People v. Luis*, 158 Cal. 285, 110 Pac. 580 (confession).

#### § 1335. Official Certificates.

[*Note 1, par. 2, under Contra, add:*]

The above Louisiana doctrine has now been abandoned: 1903, *State v. Menard*, 110 La. 1098, 35 So. 360.

1906, *State v. Romero*, 117 La. 1003, 42 So. 482.

[*Note 2, first part; add:*]

1913, *Com. v. Borasky*, 214 Mass. 313, 101 N. E. 377 (record of autopsy, not preferred to testimony of operating physician).

#### § 1339. Sundry Preferences for Eye-Witnesses, etc.

[*Note 4; add:*]

1905, *Washington v. State*, 143 Ala. 62, 39 So. 388 (forgery).

1910, *McCray v. State*, 134 Ga. 416, 68 S. E. 62 (magistrate's signature on a warrant, the magistrate, though present, held not a preferred witness to the signature).

[Note 7; add:]

Ind. St. 1905, p. 584, § 238 (foregoing statute re-enacted).

[Note 8; add:]

1907, *Forrester v. Hurtt*, 18 Haw. 256 (land location; surveyor not preferred).

[Note 10; add:]

1910, *Stewart v. Sloss-Sheffield S. & I. Co.*, 170 Ala. 544, 54 So. 48 (account-books do not exclude testimony of one having independent knowledge).

Compare the useful remarks of Mr. Gulson, in his treatise cited *post*, § 1349, n. 1.

### § 1347. Cases involving the Effect of Judgments, etc.

[Note 1; add:]

1910, *Chantangco v. Abaroa*, 218 U. S. 476, 31 Sup. 34 (where it is discouraging to find this Court discussing a judgment-bar in terms of its being "admissible in evidence").

The use of other judgments for strictly testimonial purposes needs much liberalizing. The principal instances are:

(1) Using a judgment of conviction of a *principal in larceny*, on the trial of the accessory; some cases are collected *post*, § 1388, n. 6, par. 3.

(2) Using a judgment of conviction to *impeach a witness*; this is unquestioned: *ante*, §§ 980, 987.

(3) Sundry uses:

*Excluded*: 1911, *Lillie v. Modern Woodman*, 89 Nebr. 1, 130 N. W. 1004 (beneficiary who had murdered her husband; the judgment in the criminal case held not admissible; the opinion declares this to be "fundamental and elementary," and it doubtless is, as matter of law; nevertheless, it reveals an instance where some of our fundamental law is fundamental nonsense).

*Admitted*: 1910, *In re Crippen*, [1911] 1 P. 108 (application of a convicted felon, or his representative, to establish claim resulting from his own crime; conviction admissible).

1913, *Mash v. Darley*, [1914] 1 K. B. 1 (In *re Crippen* approved; here, on a bastardy complaint, the defendant's conviction for carnal intercourse with the complainant was received).

1908, *Sheibley v. Fales*, — Nebr. —, 116 N. W. 1035 (libel on S., charging a defalcation as county officer; judgment against S. in a suit by the county, admitted, on the theory that defendant, as a resident taxpayer, was privy to the other suit).

[Note 3, par. 2; add:]

1905, *Chattanooga N. B. & L. Ass'n v. Vaught*, 143 Ala. 389, 39 So. 215.

1911, *Huston v. Smith*, 248 Ill. 396, 94 N. E. 63.

1904, *Hall v. Hall*, 118 Ky. 656, 82 S. W. 269.

1901, *Johnson Lumber Co. v. Leonard*, 145 N. C. 339, 59 S. E. 134.

1910, *Veeder v. Gilmer*, 103 Tex. 458, 129 S. W. 595.

The rule for proving the incorrectness of the certificate of examination by "clear and convincing evidence," instead of by a "mere preponderance" is a rule for *measure of proof* (*post*, § 2498).

[Note 4; add:]

1908, *Hilt v. Heimberger*, 235 Ill. 235, 85 N. E. 304.

[Note 6; add:]

1309, *Bayeux v. Beryhale*, Maitland's Yearbooks, II, 110, 3 Edw. II, No. 15 (Selden Soc. vol. XIX) (the bishop's certificate "suffices for ever" to prove a man legitimate).

[*Note 7; add.:*]

1908, *Rogers v. Clark Iron Co.*, 104 Minn. 198, 116 N. W. 739.

1906, *Kennedy v. Dickie*, 34 Mont. 205, 85 Pac. 982 (citing cases).

§ 1349. **Magistrate's Report of Testimony.**

[*Note 1; add.:*]

Mr. J. R. Gulson, in his treatise on Philosophy of Evidence (1905), at §§ 392-426, analyzes these problems in a careful and enlightening manner.

[*Note 2; add.:*]

1905, *Bell v. State*, — Miss. —, 38 So. 795 (*Wright v. State* approved).

[*Note 3; add.:*]

1906, *Willis v. U. S.*, 6 Ind. Terr. 424, 98 S. W. 147 (under a statute requiring the magistrate to make only a "general" statement in writing, the testimony of witnesses who heard is admissible).

1910, *People v. Giro*, 197 N. Y. 152, 90 N. E. 432.

[*Note 5, par. 1; add.:*]

1904, *State v. Busse*, 127 Ia. 318, 100 N. W. 536, *semble* (a confession before a sheriff, written down by a bystander, read to the defendant, sworn and signed by him); 1905, *State v. Usher*, 126 Ia. 287, 102 N. W. 101 ("Such we conceive to be the rule," citing *State v. Busse*).

[*Note 8; add.:*]

1910, *R. v. Prasiloski*, 15 Br. C. 29 (perjury; statements made by the witness, allowed to be orally proved, the magistrate not having purported to take down his entire testimony).

[*Note 9; add, under Accord.:*]

1904, *Godfrey v. Phillips*, 209 Ill. 584, 71 N. E. 19 (clerk's certificate of testimony of witnesses at probate of a will, under Rev. St. c. 148, § 7, cannot be contradicted as to the date by the clerk).

1906, *State v. Jennings*, 48 Or. 483, 87 Pac. 524 (but the coroner was here allowed to prove the witness' oral statement, to impeach him, because the witness denied the correctness of the signed written report).

[*Note 9; add, under Contra.:*]

1909, *State v. Hooper*, 151 N. C. 646, 65 S. E. 613 (here the justice had only made notes).

[*Note 12; add.:*]

Whether *perjury* may be committed in testifying by deposition where the deposition is not perfected so as to be admissible, is in theory a different question; and if the oral utterances constitute perjury, they should be provable: 1904, *State v. Woolridge*, 45 Or. 389, 78 Pac. 333 (citing authorities).

§ 1350. **Enrolled Copy of Legislative Act, etc.**

[*Note 2; add.:*]

1904, *People v. McCullough*, 210 Ill. 488, 71 N. E. 602 ("the departure . . . has never been extended beyond an inspection of the journals").

[*Note 3; add.:*]

1906, *State v. Brodie*, 148 Ala. 381, 41 So. 180.

1905, *Andrews v. People*, 33 Colo. 193, 79 Pac. 1031 (Speaker's testimony excluded). 1906,

[*Note 3 — continued*]

Rio Grande S. Co. v. Catlin, 40 Colo. 450, 94 Pac. 323 (printed journals held conclusive as against a report of a committee; but the point is not clearly stated in the opinion). 1912, People v. Leddy, 53 Colo. 109, 123 Pac. 824 (entry of names of members voting).

1910, Rash v. Allen, Ross v. Allmond, 1 Boyce Del. 444, 76 Atl. 370.

1909, State v. Wheeler, 172 Ind. 578, 89 N. E. 1 (oral testimony not admissible against the journals).

1904, State v. Armour Packing Co., — N. C. —, 47 S. E. 411.

[*Note 4, par. (1); add:*]

1904, Gibson v. Anderson, 131 Fed. 39, 42, 65 C. C. A. 277 (the "published statutes of the U. S." showed that a joint resolution was approved May 27, 1902; plaintiff not allowed to show that the true date was after June 1; unsound; erroneously taking as authority Field v. Clark, U. S., *infra*, note 5).

1909, State v. Groves, 80 Oh. 351, 88 N. E. 1096 (enrolled statute prevails).

1906, Clagett v. Duluth, 143 Fed. 824, 827, C. C. A. (a printed official compilation of statutes, held not to prevail over "the original legislation").

[*Note 4; add, at the end:*]

(9) Whether the rule applies to the *veto of a governor also*: 1912, State ex rel. Crenshaw v. Joseph, 175 Ala. 579, 57 So. 942 (failure to veto). 1907, Powell v. Hayes, 83 Ark. 448, 104 S. W. 177. 1904, People v. McCullough, 210 Ill. 488, 71 N. E. 602 ("Only record evidence can be introduced to show that the Governor filed the bill in the office of the Secretary of State with his objections, in case the bill was vetoed by him").

1905, Commissioners v. Warfield, 100 Md. 516, 60 Atl. 599 (here the Governor had signed by mistake and afterwards erased his signature).

As to the fact or time of *presentation of an enacted bill to the Governor for approval*:

1913, Tuttle v. Boston, 215 Mass. 57, 102 N. E. 350. 1907, Wrede v. Richardson, 77 Oh. 182, 82 N. E. 1072 (the record of the Governor, kept pursuant to law, stating the presentation of an act to him for approval on a specified date, is conclusive as to the fact of presentation).

[*Note 5; add:*]

1904, Yancy v. Waddell, 139 Ala. 524, 36 So. 733 (similar).

1913, Allen v. State, 14 Ariz. 458, 130 Pac. 1114 (referendum note; legislative record and governor's proclamation, held conclusive).

1904, Rogers v. State, 72 Ark. 565, 82 S. W. 160 (tenor of the act; journals consulted, citing Chicot Co. v. Davies but no other of the thirteen foregoing cases). 1909, State v. Bowman, 90 Ark. 174, 118 S. W. 711 (Smithee v. Garth followed).

1905, Andrews v. People, 33 Colo. 193, 79 Pac. 1031 (whether a bill was read, printed, etc.; journals consulted).

1906, Adams v. Clark, 36 Colo. 65, 85 Pac. 642 (Lieutenant-governor's signature; *Re* Roberts followed). 1912, People v. Leddy, 53 Colo. 109, 123 Pac. 824 (approving the Robertson and Andrews cases).

1906, State v. Savings Bank, 79 Conn. 141, 64 Atl. 5 (whether a bill was duly passed; journals, etc., consulted; here the Secretary of State had not recorded it; no precedents cited).

1910, Rash v. Allen, Ross v. Allmond, 1 Boyce Del. 444, 76 Atl. 370 (number of votes; journals consulted and held conclusive under a constitutional requirement for entry of vote therein; two judges diss.).

1906, Wade v. Atlantic L. Co., 51 Fla. 628, 41 So. 72 ("This Court is firmly committed to the holding").

1910, De Loach v. Newton, 134 Ga. 739, 68 S. E. 708 (whether a majority vote was given; enrolled act conclusive; careful opinion by Fish, C. J.).

[*Note 5 — continued*]

- 1912, *Neiberger v. McCullough*, 253 Ill. 312, 97 N. E. 660 (whether a bill was printed in final form before passage).  
 1894, *State v. Boice*, 140 Ind. 506, 513, 39 N. E. 64, 40 N. E. 113 (*Evans v. Browne* affirmed).  
 1894, *Western Union Tel. Co. v. Taggart*, 141 Ind. 281, 40 N. E. 1051 (*Evans v. Browne* affirmed).  
 1897, *Lewis v. State*, 148 Ind. 346, 350, 47 N. E. 675 (*Evans v. Browne* affirmed).  
 1909, *State v. Wheeler*, 172 Ind. 578, 89 N. E. 1 (whether a bill was vetoed; *Evans v. Browne* followed; but, for some reason not very clear, the Court proceed nevertheless to examine the journals).  
 1906, *Belleville v. Wells*, 74 Kan. 823, 88 Pac. 47 (title of bills; journals consulted).  
 1907, *Missouri K. & T. R. Co. v. Simons*, 75 Kan. 130, 88 Pac. 551 (constitutional majority; rule re-affirmed).  
 1913, *Hamlett v. McCreary*, 153 Ky. 755, 156 S. W. 410 (journal cannot be used even to uphold validity of an act; here, the enrolled bill was not signed by the Senate President).  
 1907, *Cox v. Mignery*, 126 Mo. App. 669, 105 S. W. 675 (rule applied to a municipal ordinance).  
 1906, *Palatine Ins. Co. v. Northern P. R. Co.*, 34 Mont. 268, 85 Pac. 1032 (due passage by entering the vote, etc.; journals consulted; repudiating anything to the contrary in *State v. Long*, cited *supra*, n. 4, par. 5). 1909, *State v. Erickson*, 39 Mont. 280, 102 Pac. 336 (whether amendments were adopted; journals not consulted to determine contents of bill).  
 1904, *Colburn v. McDonald*, 72 Nebr. 431, 100 N. W. 961 (like *State v. Frank*, *supra*).  
 1884, *Passaic Co. v. Stevenson*, 46 N. J. L. 173 (rule of *Pangborn v. Young* approved).  
 1890, *Standard Underground C. Co. v. Att'y-Gen'l*, 46 N. J. Eq. 270, 19 Atl. 733 (similar).  
 1907, *Bloomfield v. Board*, 74 N. J. L. 261, 65 Atl. 890 (that a bill was not approved within sixty days after adjournment; enrolled attested statute not allowed to be overthrown collaterally).  
 1896, *New York & L. I. B. Co. v. Smith*, 148 N. Y. 540, 42 N. E. 1088 (journals consulted, to learn whether a two-thirds vote was received). 1906, *Stickney's Estate*, 185 N. Y. 107, 77 N. E. 993 (journals consulted to determine the constitutional quorum).  
 1904, *State v. Armour Packing Co.*, — N. C. —, 47 S. E. 411 (triple reading after amendment, etc.; authentication is conclusive, except so far as the Constitution requires that certain matters must appear in the journal). 1905, *Bray v. Williams*, 137 N. C. 387, 49 S. E. 887 (private act; like *Wilson v. Markley*). 1904, *Board v. Traveler's Ins. Co.*, 128 Fed. 817, 825, 63 C. C. A. 467 (first reading; following *Carr v. Coke*, N. C., *supra*, the journals were consulted). 1906, *Board v. Tollman*, 145 Fed. 753, 764, C. C. A. (roll-call; N. C. rule applied).  
 1911, *Woolfolk v. Albrecht*, 22 N. D. 36, 133 N. W. 310 (whether the enrolled is conclusive as to an amendment's passage, not decided).  
 1904, *Portland v. Yick*, 44 Or. 439, 75 Pac. 706 (journals will be consulted only to determine whether mandatory provisions there appear to have been observed).  
 1911, *Jackson v. Weis & L. M. Co.*, 124 Tenn. 421, 137 S. W. 757 (*State v. Algood* affirmed).  
 1897, *Missouri, K. & T. R. Co. v. McGlamory*, 92 Tex. 150, 41 S. W. 466 (journals examined to see whether an act took effect from date of passage). 1907, *El Paso & S. W. R. Co. v. Foth*, 45 Tex. Civ. App. 275, 100 S. W. 171 (*Williams v. Taylor* followed).  
 1904, *State v. Cahill*, 12 Wyo. 225, 75 Pac. 433 (signing, etc., of a bill; journals may be consulted for facts constitutionally required to be recorded). 1904, *Younger v. Hehn*, 12 Wyo. 289, 75 Pac. 443 (preceding case approved).

[*Note 11; add:*]

- 1910, *Murphy v. Chicago, Rock Island & P. R. Co.*, 247 Ill. 614, 93 N. E. 381 (rule applied to a city ordinance, said to have been passed for corrupt motives).  
 1906, *State v. Terre Haute & I. R. Co.*, 166 Ind. 580, 77 N. E. 1077 (corruption).

§ 1351. **Certificate of Election.**

[Note 4; add:]

- 1905, *People v. Davidson*, 2 Cal. App. 100, 83 Pac. 161.  
 1913, *Rottner v. Buchner*, 260 Ill. 475, 103 N. E. 454.  
 1904, *Strebin v. Lavengood*, 163 Ind. 478, 71 N. E. 494 (construing the law as to gravel-road elections).  
 1906, *Moorhead v. Arnold*, 73 Kan. 132, 84 Pac. 742 (good opinion by Burch, J.).  
 1909, *Com. v. Edgerton*, 200 Mass. 318, 86 N. E. 768.  
 1908, *Sheehan v. Manchester*, 74 N. H. 445, 68 Atl. 872.  
 1909, *People v. Wintermute*, 194 N. Y. 99, 86 N. E. 818 (voting-machine).  
 1913, *Moss v. Hunt*, — Okl. —, 135 Pac. 282 (election officers' testimony not receivable, until the ballots are shown to be not identifiable or to have been probably tampered with).  
 1913, *Quigley v. Phelps*, 74 Wash. 73, 132 Pac. 738.  
 1905, *Stafford v. Sheppard*, 57 W. Va. 84, 50 S. E. 1016. 1906, *Williamson v. Musick*, 60 W. Va. 59, 53 S. E. 706.

§ 1352. **Sundry Official Certificates, etc.**

[Note 3; add:]

- 1904, *Markey v. State*, 47 Fla. 38, 37 So. 53 (on a charge of perjury). Compare the similar question for *perjury in a deposition* (*ante*, § 1331, n. 1).

[Note 4; add:]

- 1911, *St. Louis I. M. & S. R. Co. v. Webster*, 99 Ark. 265, 137 S. W. 1103, 1199 (St. 1905, § 4, p. 779, May 11, providing that if signature of a deposition is waived, "the officer . . . must so certify," held not to forbid oral testimony to the waiver; *Wood, J., diss.*)  
 1906, *Sebesta v. Supreme Court*, 77 Nebr. 249, 109 N. W. 166 (foreign notary's certificate of taking of an affidavit, the certificate itself reciting only the fact of signature, not of oath-taking, excluded, under statutory wordings; here the ruling however is perversely technical, because the affidavit itself recited that the signers were "each duly sworn upon their oaths").

For the conclusiveness of the *purging oath* of one charged with contempt, see *post*, § 1815, n. 2.

[Note 5, l. 7; add:]

- 1906, *Ford v. Ford*, 27 D. C. App. 401, 408 (collecting the authorities).  
 1910, *Orendorff v. Suit*, 167 Ala. 563, 52 So. 744.  
 1904, *Walker v. Shepard*, 210 Ill. 100, 71 N. E. 422 (notary's certificate of acknowledgment is not conclusive as to the grantor's mental capacity). 1909, *Kosturska v. Bartkiewicz*, 241 Ill. 604, 89 N. E. 657.  
 1909, *People's Gas Co. v. Fletcher*, 81 Kan. 76, 105 Pac. 34.  
 1907, *Skajewski v. Zantarski*, 103 Minn. 27, 114 N. W. 247.  
 1911, *Bonvier v. Jaeger Coal Land Co. v. Sypher*, C. C., 186 Fed. 644, 660.  
 1905, *Swiger v. Swiger*, 58 W. Va. 119, 52 S. E. 23.

[Note 5, at the end; add:]

For the *measure of proof* required in overturning such a certificate, see *post*, § 2498.

[Note 9, par. 2; add:]

Otherwise to some extent, as to *offences of seamen*: Rev. St. 1878, § 4597, amended by St. 1898, Dec. 21, c. 28, § § 19, 20, 30 Stat. 760 (the court in admiralty may refuse to receive evidence of offences by seamen when not entered in the official log).  
 1906, *The Amazon*, 144 Fed. 153, D. C. (statute applied).

[Note 11, par. 1; *add.*:]

Ky. Gen. Stats. 1899, c. 81, § 17, Stats. 1903, § 3760 ("Unless in a direct proceeding against himself or his sureties, no fact officially stated by an officer in respect of a matter about which by law he is required to make a statement in writing, either in the form of a certificate, return, or otherwise, shall be called in question, except upon the allegation of fraud in the party benefited thereby, or mistake on the part of the officer").

1906, *Husbands v. Polivick*, — Ky. —, 96 S. W. 826 (statute applied as a rule of presumption to a tax-collector's return on a tax sale).

1914, *Malone v. Alderdice*, 8th C. C. A., 212 Fed. 668 (commission to the Five Civilized Tribes of Oklahoma, to enrol their citizens, held a quasi-judicial body having power to determine, and its determinations of material facts held conclusive, including the fact of minority of age before 1900; but not conclusive as to facts not material, *i.e.* as to precise age).

[Text, p. 1663, l. 8, *insert* a new par. (6) :]

(6) In *Louisiana* the French principle of proof prevails, *viz.* that certain official *notarial certificates*, particularly for the execution of contracts, wills, deeds, etc., are conclusive, except for specified purposes. Transactions and documents ("acts") so drawn up are termed "authentic," which signifies "executed before a public officer and certified by him." The Code Civil of France provides (§ 1319): "An authentic act makes full proof of the agreement contained in it, against the contracting parties and their assigns."<sup>10a</sup>

<sup>10a</sup> The application of this principle may be seen in the following cases :

1912, *Block's Succession*, 131 La. 101, 59 So. 29 (notary's certificate of execution of a nuncupative will).

#### § 1354. Constitutionality of Statutes, etc.; Applications of Principles.

[Note 4; *add.*:]

1906, *Husbands v. Polivick*, — Ky. —, 96 S. W. 826 (tax-deed is presumptive only).

[Note 6; *add.*:]

1905, *Calkins v. Howard*, 2 Cal. App. 233, 83 Pac. 280 (statute declaring that a sale in bulk without notice is "conclusively presumed to be fraudulent and void" as against creditors, enforced as valid).

1907, *Re Applicants for License*, 143 N. C. 1, 55 S. E. 635 (a statute providing that applicants for the bar who file a certificate of good character signed by two attorneys, and satisfy the Court as to their legal knowledge shall be admitted, makes the certificate conclusive as to character, and is valid; the above distinction is recognized; "if a legislature, having prescribed certain qualifications, should undertake to direct whether an applicant did or did not possess them, this might be an unconstitutional exercise of judicial power; but not so here," for the legislature prescribed in effect the possession of such a certificate as a qualification; compare on this case Mr. Lee's article, cited *infra*, n. 10).

[Note 7; *add.*:]

1907, *Powell, J., in Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022 (cited more fully *infra*, n. 22a).

[Note 9, at l. 1; *add.*:]

1913, *Ex parte Woodward*, — Ala. —, 61 So. 295.

1908, *Hammond v. State*, 78 Oh. 15, 84 N. E. 416 (Rev. St. § 4427-6, providing that, on a

[Note 9 — *continued*]

charge of being engaged in a trust-combination to control trade, "the character of the trust or combination alleged may be established by proof of its general reputation as such" is unconstitutional, as being in effect a "rule of conclusive evidence . . . that shall be binding").

Compare the cases and statutes merely *admitting reputation* as evidence (*post*, §§ 1620-1626).

[Note 10, par. 1; *add*.:]

1909, *Ex parte Allen*, 82 Vt. 365, 73 Atl. 1078 (physician's sworn certificate of insanity, which was required by statute before committal, held not conclusive under the statute; and a statute which made it conclusive would be void).

[Note 14, l. 6 from the end; *omit* the remaining six lines, and *insert* the following :]

1902, *Japanese Immigrant Case*, 189 U. S. 86, 99, 23 Sup. 611 (the arbitrariness of an executive officer's action under such a statute will be reviewed); 1903, *Gonzales v. Williams*, 192 U. S. 1, 15, 24 Sup. 177 (passing on St. 1903, Mar. 3, c. 1012, 32, State. 1213); 1904, *Hopkins v. Fachant*, 130 Fed. 839, 65 C. C. A. 1 (same statute); 1904, *Tom Hong v. U. S.*, 193 U. S. 517, 24 Sup. 517.

A similar statute, making conclusive, for certain purposes, a *Chinese immigrant's certificate of occupation*, has been enforced: U. S. 1884, July 5, c. 220, 23 Stat. L. 115, 1 Rev. St. Suppl. 458; 1891, *Wan Shing v. U. S.*, 140 U. S. 424, 11 Sup. 729; 1904, *U. S. v. Gin Hing*, 8 Ariz. 416, 76 Pac. 639.

But a partial halt seems now to have been taken in the license to Executive usurpation granted by this particular line of statutes. The extreme result of the logic of the foregoing rulings would have been to sanction the exclusion or deportation, by administrative fiat, of an *American-born person*, a citizen by express constitutional provision, without affording a judicial review of the administrative officer's erroneous assertion that the citizen was a Chinese alien. This step was taken, with one foot, for the case of an American citizen *excluded* on his return from abroad: 1904, *U. S. v. Sing Tuck*, 194 U. S. 161, 24 Sup. 621, overruling *Sing Tuck v. U. S.*, 128 Fed. 592, C. C. A. (U. S. St. 1894, Aug. 18, c. 301, § 1, makes the decision of the Secretary of Commerce and Labor conclusive, after a due hearing, upon the fact of non-citizenship of a person of Chinese parentage claiming entrance as a native-born citizen; constitutionality of the statute, not decided); 1905, *U. S. v. Ju Toy*, 198 id. 253, 25 Sup. 645 (constitutionality of the preceding statute affirmed; "with regard to him [a returning citizen], due process of law does not require a judicial trial; . . . the decision may be entrusted to an executive officer"; three judges dissenting; Brewer, J.: "Such a decision is to my mind appalling; . . . an obnoxious class may be put beyond the protection of the Constitution by ministerial officers of the State proceeding in strict accord with exactly similar rules").

But the final step, namely, the same ruling for the case of an American citizen ordered to be *deported*, though now here and having never left the country, has not yet been taken by the Supreme Court; and the tendency shown by the lower and intermediate Courts has thus far been to refuse to take this step; for the extraordinary and broad consequences of it (as suggested in the dissenting opinion of Brewer, J., in *U. S. v. Ju Toy*, *supra*) are presumably becoming apparent:

1903, *Re Lea*, 126 Fed. 234, D. C. (under the immigration laws, a claim of citizenship is a judicable question).

1903, *U. S. v. Hung Chang*, 126 Fed. 400, 405, D. C., *semble* (the deportation of a native-born citizen is unconstitutional; hence the issue whether a particular person to be deported is native-born is a judicable one).

1906, *Moy Suey v. U. S.*, 147 Fed. 697, C. C. A. ("Nativity gives citizenship, and is a right under the Constitution. It is a right that Congress would be without constitutional power

[Note 14 — continued]

to curtail or give away. It is a right to be adjudicated in the Courts, in the usual and ordinary way of adjudicating constitutional rights"; distinguishing *U. S. v. Sing Tuck* on the ground that here the alleged citizen is within the country, and not seeking to re-enter it after departure).

1907, *Chin Yow v. U. S.*, 208 U. S. 8 (habeas corpus by a Chinese claiming citizenship by birth, and alleging that he was not permitted to adduce available testimony; Holmes, J.: "As between the substantive right of citizens to enter, and of persons alleging themselves to be citizens to have a chance to prove their allegation, on the one side, and the conclusiveness of the commissioner's fiat on the other, when one or the other must give way, the latter must yield"; this is some palliation).

1908, *In re Tang Tun*, *In re Gang Gong*, *In re Can Pon*, D. C. W. D. Wash., 161 Fed. 618, 625 (here Hanford, J., emphasizes the gravity of danger in a law submitting to executive officials the determination of the constitutional right of citizenship by birth).

1909, *Re Can Pon*, 9th C. C. A., 168 Fed. 479 (procedure of immigration officers, prescribed).

1909, *Re Tang Tun*, 9th C. C. C., 168 Fed. 488 (similar).

1909, *Liu Hop Fong v. U. S.*, 209 U. S. 453, 28 Sup. 576 (an order of deportation made by the district judge on the commissioner's findings, without other evidence, held improper under the circumstances).

1910, *U. S. v. Chu Hang*, D. C. S. C., 179 Fed. 564 (similar to *Tang Tun's Case*, per Brawley, J.).

1914, *Hanges v. Whitfield*, D. C. N. D. Ia., 209 Fed. 675 (deportation of an immigrant under St. 1907, Feb. 20, as amended by St. 1910, Mar. 26, c. 128, 36 Stats. L. 263).

In any event there may at least be recognized a difference of *burden of proof* between cases where the applicant is already on American soil claiming American citizenship and where he is entering from abroad; the burden is on the Government in the former case: 1906, *Moy Suey v. U. S.*, 7th C. C. A., 147 Fed. 697; 1911, *Gee Cue Beng v. U. S.*, 5th C. C. A., 184 Fed. 383.

That the likelihood of abuse of this executive authority is not merely imaginative or fastidious may be seen from *Ex parte Ung King Seng*, D. C. N. D. Cal. (1914), 213 Fed. 119; here the inspector had refused to allow any cross-examination at all of the witnesses produced for the government; and to such a pitch of callous indifference had local deportation practice come that the government counsel on argument had the hardihood to suggest that "*it would be a nuisance to permit cross-examination.*" Cross-examination a nuisance! This amply illustrates the ease with which the best traditions of our justice can degenerate when the control of our Courts is withdrawn.

The tendency of the times towards the expansion of administrative finality is lucidly discussed and favored, and the decisions collated, by Professor F. J. Goodnow, in an article entitled "The Growth of Executive Discretion," in the Proceedings of the American Political Science Association, II, 29 (1905); this author, however, does not clearly face the distinction vital to the objectors against the new tendency, namely, the distinction between administrative finality within the sphere of administrative services (*e. g.* the postal service), and administrative finality as extended to fundamental private rights (*e. g.* property and citizenship) which the Judiciary exist inherently to protect. The new tendency is criticised by Mr. E. M. Parker, in 20 *Harvard Law Review*, 116 (1906; "Executive Judgments and Executive Legislation"), and is advocated by Mr. T. R. Powell, in 1 *American Political Science Review*, 583 (1907; "Conclusiveness of Administrative Determinations in the Federal Government"), in 22 *Harvard Law Review*, 360 (1909; "Judicial Review of Administrative Action in Immigration Proceedings"), and 24 *Harv. L. Rev.* (1911; "Administrative Exercise of the Police Power"). The most philosophical treatment anywhere to be found is that of Professor Roscoe Pound, in his article "Executive Justice" (*American Law Register*, n. s., March, 1907), in which he analyzes the fundamental reasons for the appearance of the new tendency of decision.

[Note 15; add:]

So also *postal officials*:

1904, *Public Clearing House v. Coyne*, 194 U. S. 497, 24 Sup. 789 (order excluding fraudulent communications from the mails).

For the Federal *land-office* decisions, see *ante*, § 1347, n. 7.

[Note 16; add:]

1912, *Reitler v. Harris*, 223 U. S. 437, 32 Sup. 248 (Kan. St. 1907, c. 373, making an entry of forfeiture of school land for default in payment *prima facie* evidence of proper preliminary steps).

[Note 18; add:]

1904, *Adams v. New York*, 192 U. S. 585, 24 Sup. 372 (policy slips; possession as raising a presumption of knowledge).

[Note 19; add:]

1910, *Toole v. State*, 170 Ala. 41, 54 So. 195 (statute making the keeping of liquor etc., *prima facie* evidence of intent to sell, held constitutional).

1908, *People v. McBride*, 234 Ill. 146, 84 N. E. 865 (statute making the issuance of an internal revenue stamp *prima facie* evidence, held constitutional, following *Meadowcroft v. People*, *supra*, n. 17).

1910, *Diamond v. State*, 123 Tenn., 348, 131 S. W. 666 (illegal liquor sale; a statute making the procuring of a Federal revenue license *prima facie* evidence of being in the liquor business, held valid).

[Text, p. 1671, last line; add:]

and in sundry other respects.<sup>22a</sup>

<sup>22a</sup> 1907, *Mulkey v. State*, 1 Ga. App. 521, 57 S. E. 1022 (St. 1903, Aug. 15, p. 90, punishing fraudulent contracts to render service, and making non-performance presumptive evidence of fraudulent intent, held constitutional, but not applicable to remote acts; weighty opinion by Powell, J., the best on the subject). 1912, *Wilson v. State*, 138 Ga. 489, 75 S. E. 619 (P. C. 1910, § 715, making non-performance of a contract of service presumptive evidence of fraudulent intent, held valid).

1904, *People ex rel. Hillel Lodge v. Rose*, 207 Ill. 352, 69 N. E. 762 (St. 1901, May 10, declaring the failure of a corporation to file an annual report *prima facie* evidence of non-user, is constitutional; otherwise if a rule of conclusiveness had been declared; *Magruder, J.*, diss. on other grounds).

1905, *Williams v. Fourth Nat'l Bank*, 15 Okl. 477, 82 Pac. 496 (sales in bulk).

1905, *State v. Lawson*, 40 Wash. 455, 82 Pac. 750 (official records of physicians' licenses).

1905, *Andricus' Adm'r v. Pineville Coal Co.*, 121 Ky. 724, 90 S. W. 233 (statute making a mine inspector's report *prima facie* evidence, held constitutional).

1904, *Com. v. Anselvich*, 186 Mass. 376, 71 N. E. 790 (a statute making the possession of registered bottles, etc., *prima facie* evidence of crime).

1910, *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. 337 (a statute making the pumping of certain waters *prima facie* evidence of an offence under the statute, and putting on such party the burden of showing that he comes within an exception, held valid).

1909, *Ex parte Allen*, 82 Vt. 365, 73 Atl. 1078 (statute making a physician's sworn certificate *prima facie* evidence of insanity in committal proceedings, held valid).

## § 1362. Theory of the Hearsay Rule.

[Note 1; add:]

1909, *State v. Heffernan*, 24 S. D. 1, 123 N. W. 87 (careful opinion by McCoy, J.).

§ 1364. **History of the Hearsay Rule.**[Note 24, at the end; *add.*:]

The earlier loose practice in this respect is seen in a London case of 33 Edw. I, cited in Bateson's *Borough Customs*, II, Introd. p. 32 (Selden Society Pub., XXI, 1906).

[Note 28; *add.*:]

For the history and theory of the Hearsay rule on the Continent, see a learned and exhaustive essay by Eugen Kulischer, "Das Zeugnis von Hörensagen," in *Zeitschrift für privat- und öffentliches Recht*, 1907, XXXIV, 169.

[Note 47, l. 14; *add.*:]

About this time the great dramatist reveals a popular notion of the justice of the rule:

*Richard II*, IV, 1:

*Bishop*. "Thieves are not judged but [= unless] they are by to hear,  
Although apparent guilt be seen in them."

1613 (circa) *King Henry VIII*, II, 1:

1 *Gent.* . . . "The great duke

Came to the bar. . . .

The king's attorney, on the contrary,

Urged on the examinations, proofs, confessions,

Of divers witnesses, which the duke desired

To have brought *viva voce* to his face;

At which appeared against him his surveyor," etc.

§ 1367. **Cross-Examination as a Distinctive Feature, etc.**[Note 5; *add.*:]

Mr. (Assistant District Attorney) Arthur Train points out the analogous failures of cross-examination through an interpreter ("The Prisoner at the Bar," 1906, p. 239): "It is practically impossible to cross-examine through an interpreter, for the whole psychological significance of the answer is destroyed; ample opportunity being given for the witness to collect his wits and carefully to frame his reply."

§ 1368. **Theory and Art of Cross-Examination.**[Note 10; *add.*:]

1906, Train, "The Prisoner at the Bar," 290 (cross-examination of the old lady).

[Note 14; *add.*:]

Mr. Train has collected ("The Prisoner at the Bar," 1906, pp. 286-290) some useful examples on this point.

§ 1371. **Opportunity of Cross-Examination, etc.**[Note 1, par. 1; *add.*:]

1907, *Munster v. Ashworth*, 29 D. C. App. 84 (counsel left the place, stating that he did not care to cross-examine; admitted).

1904, *Union I. & F. Co. v. Soonenfield*, 113 La. 436, 37 So. 20.

The ruling in *Hosch Lumber Co. v. Weeks*, 123 Ga. 336, 51 S. E. 439 (1905), that where the taking party fails to attend but the opponent attends and cross-examines, the latter cannot use his cross-examination but must give notice again and take the deposition again as his own, is both unsound and unjust.

Distinguish the principles of § 912, *ante*, § 1983, n. 7, *post*.

### § 1373. Sundry Tribunals.

[Note 1; *add.*:]

So also *court commissioners* of various sorts:

1906, *U. S. v. Greene*, 146 Fed. 796, — D. C. — (deceased witness' testimony before a U. S. commissioner on a proceeding for extradition, admitted).

### § 1374. Testimony at a Coroner's Inquest.

[Note 5; *add.*:]

*Accord.*: 1904, *Knights Templar & M. L. I. Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066 (excluded).

*Not decided.*: 1905, *Puls v. Grand Lodge*, 13 N. D. 559, 102 N. W. 165.

### § 1375. Testimony before Committing Magistrate, etc.

[Note 4, col. 2, l. 1; *add.*:]

N. C. Rev. 1905, § 3205 (like Code 1883, § 1157).

1909, *State v. Heffernan*, 24 S. D. 1, 123 N. W. 87.

[Note 4, at the end; *add.*:]

Compare Ill. St. 1907, Feb. 11, p. 56 (bastardy complaint; the woman shall be examined by the magistrate upon oath, etc., "in the presence of the man alleged to be the father of the child").

### § 1378. Depositions; Notice and Sufficient Time, etc.

[Note 1; *add.*:]

Whether the notice must be served on *party* or *attorney* depends chiefly on statutory wordings: 1906, *Webb v. Ritter*, 60 W. Va. 193, 54 S. E. 484.

Defects in the designation of *residence* etc. are immaterial if they did not in fact mislead: 1908, *Rock Island Plow Co. v. Schoening*, 104 Minn. 163, 116 N. W. 356.

But the requirement of notice does not apply to *ex parte* testimony, miscalled depositions, used as a *sworn complaint* to authorize a magistrate's issuance of a warrant: 1909, *State v. Stevens*, 19 N. D. 249, 123 N. W. 888.

[Note 4, par. 1; *add.*, under *Accord.*:]

1908, *Bollinger v. Bollinger*, 153 Cal. 190, 94 Pac. 770 (attendance waives all irregularity in the form of notice; but the correct theory is not that there is a waiver, but that *de facto* opportunity to examine is all that is needed).

1907, *Munster v. Ashworth*, 29 D. C. App. 84 (notice for deposition of witness M., three others were produced).

1905, *Real Estate T. Co. v. Union T. Co.*, 102 Md. 41, 61 Atl. 228.

### § 1379. Same: Plural Depositions, etc.

[Note 2; *add.*:]

1906, *Ivey v. Bessemer C. C. Mills*, 143 N. C. 189, 55 S. E. 613 (notice to attend in F. and in P.; the opponent attended at P., and the deposition at F. was not taken).

### § 1380. Depositions; English and Canadian Statutes.

[Note 3; *add.*:]

*Eng.*: 1904, St. 4 Edw. VII, c. 15, § 14 (Prevention of Cruelty to Children Act; for depositions of children, notice and opportunity of cross-examination are required).

[*Note 3 — continued*]

St. 1908, 8 Edw. VII, c. 67, §§ 28, 29 (Children Act; notice for deposition of child or young person).

*Br. C. St.* 1903-4, 3 & 4 Edw. VII, c. 15, § 69 (all witnesses before any judge, etc., "shall give their testimony *visa voce* on oath, and be subject to examination by counsel in the presence of the Court," etc., "unless it is otherwise ordered by the Court or a judge on special grounds, or with the consent of the parties," etc.); *ib.* § 70 (nothing herein shall "affect the mode of giving evidence by the oral examination of witnesses in trials by jury or before a judge without a jury," "save as far as relates to the power of the Court for special reasons to allow depositions or affidavits to be read").

St. 1905, 5 Edw. VII, c. 14, § 95 (county courts; like *Rev. St.* 1897, c. 52, § 134).

*Newf. St.* 1904, c. 3, Rules of Court 33 (provisions for notice; further provisions as quoted *post*, § 1411, n. 1).

*Ont. St.* 1910, 10 Edw. VII, c. 32, § 118 (division courts).

*P. E. I. St.* 1910, c. 8, § 48 (chancery proceedings); *St.* 1910, c. 3, § 45 (election trials).

*Yukon Consol. Ord.* 1902, c. 17, Ord. XXVI, R. 262 (like *Ont. Rules of Court*, § 483); R. 292 (like *Eng. Ord.* 38).

§ 1381. **Same: U. S. Federal Statutes.**

[*Note 1; add:*]

St. 1909, Feb. 16, c. 130, No. 230 (35 Stat. L. p. 620), § 16 (rules for depositions in naval courts).

St. 1911, Mar. 3, c. 231, Judicial Code, § 169 (testimony for Court of Claims; superseding *Rev. St.* § 1083).

Equity Rules 1912, Rules 53, 54.

[*Note 3; add:*]

The latest pronouncements on this question are as follows:

1903, *Hanks Dental Ass'n v. Tooth Crown Co.*, 194 U. S. 303, 24 Sup. 700 (U. S. St. 1892, c. 14, Mar. 9, "does not purport to repeal in any part, or to modify, § 861, or to create additional exceptions to those specified in the subsequent sections by enlarging the causes or grounds for taking depositions"; here applied to forbid following New York law as to depositions of a party for discovery before trial; collecting the intervening rulings of the Federal intermediate courts on St. 1892).

1904, *Zych v. American Car & F. Co.*, 127 Fed. 723, 728, C. C. (Thayer, J.: "It will not be out of place to observe, because the question has been to some extent discussed, that the law as declared in *Ex parte Fisk* has not been altered by the act of Congress of Mar. 9, 1892, *supra*; . . . there seems to be a general consensus of judicial opinion that the act relates merely to the mode of taking testimony, adopting in that respect the provisions of the laws of the various States relative to the method of taking depositions, without altering the conditions prescribed by §§ 863 and 866 of the Revised Statutes of the U. S. under which depositions for use in the Federal courts may be taken").

1905, *Carrara P. A. Co. v. Carrara P. Co.*, 137 Fed. 319, C. C. (the statute of 1892 does not "add to the classes of witnesses" but "provides an additional mode" for taking depositions).

Compare the new statute quoted *ante*, § 6.

§ 1382. **Same: U. S. State Statutes.**

[*Note 1; add:*]

*Ala.*: 1905, *Edwards v. Edwards*, 142 Ala. 267, 39 So. 82 (Chancery statute applied).

*Cal. St.* 1903, c. 255 (adding to C. C. P. 1872 a new § 2025½, providing for depositions of non-resident witnesses on oral interrogatories, with rules for notice). *St.* 1905, c. 540

[*Note 1 — continued*]

(amends P. C. 1872, §§ 1335-1341, as to the mode of taking the depositions). St. 1905, c. 570 (amends P. C. 1872, §§ 872, 882). St. 1905, c. 540 (amending P. C. § 882; prosecution's depositions in criminal cases; quoted *post*, § 1411, n. 1).

St. 1907, c. 392, p. 731, Mar. 20, § 5 (repealing C. C. P. § 2033).

*D. C.*: 1913, *Hutchins v. Hutchins*, 41 D. C. App. 367 (this Court cannot order a deposition by commission on oral examination of a witness in a foreign country; only letters rogatory can be used, with the questions prepared beforehand).

*Ga.* St. 1908, No. 568, p. 84, Aug. 17 (rules for deposition without a commission; whenever notice is "impracticable" and "urgent necessity" exists, the notice may be such as judge thinks "reasonable and direct").

*Ill.*: 1903, *Arrowsmith's Estate*, 206 Ill. 352, 69 N. E. 77 (*semble*, under R. S. c. 148, § 4, providing for depositions in probate cases by commission, the failure of the opponent to receive notice of the taking does not prevent the use of the deposition).

*Ind.* St. 1905, p. 584, § 242 (phraseology of the foregoing statute changed).

*Ia.*: 1905, *State v. Mosher*, 128 Ia. 82, 103 N. W. 105 (Code, § 4688, as to deposition by Court order, construed).

*La.*: 1905, *Honor Co. v. Stevedores' & L. B. Ass'n*, 114 La. 361, 38 So. 271 (notice required). 1905, *De Renzes v. His Wife*, 115 La. 675, 39 So. 865 (under Rev. St. § 611, for a foreign commission, no notice of time and place is required when interrogatories are annexed and notice thereof given). St. 1910, No. 176, p. 261, July 6 (witnesses residing out of the parish; reasonable notice required).

*Md.* St. 1906, c. 239 (repealing Pub. Gen. L. 1904, art. 35, § 36; provision made for taking testimony on a commission from without the State).

*Mo.*: 1903, *Re Wogan*, 103 Mo. App. 146, 77 S. W. 490 (time of notice).

*Mont.* St. 1907, c. 109, p. 262, Mar. 6 (amending Cr. C. §§ 2480-2491).

*N. J.*: 1904, *Stokes v. Hardy*, 71 N. J. L. 116, 58 Atl. 650 (proof of notice).

*N. Y.* St. 1914, c. 443, §§ 2543, 2544 (amending C. C. P. c. XVIII, surrogate proceedings).

*N. C.* Rev. 1905, § 1652 (like Code 1883, § 1357, as amended by later statutes).

*Oh.* St. 1913, p. 443, May 8 (amending Gen. Code §§ 13668, 13669; depositions may be taken by the State).

*Ok.* St. 1913, c. 68, p. 106 (amending Comp. L. 1909, § 6623, in unspecified details).

*Or.* St. 1911, c. 148, p. 200 (amending § 835 of Bell. & C. Arnot. Codes & Stats.).

*Pa.* St. 1909, No. 167, p. 258 (witnesses out of the State but in the U. S., in criminal cases).

*S. C.* St. 1909, No. 128, p. 206 (deposition of the female in rape cases).

*Tenn.* St. 1907, c. 87, p. 252 (witnesses to will of foreign testator).

*Tex.* St. 1905, c. 76 (Rev. Civ. St. 1895, §§ 2282, 2284, as to notice, etc., amended, and § 2274 *a* added). St. 1907, c. 91, p. 186 (amending Rev. Civ. Stats. §§ 2282, 2284, 2291, as to depositions by commission and by oral examination).

*Utah* St. 1905, c. 41, Mar. 7 (providing a mode of depositions taking without the State on oral interrogatories).

*Wis.* St. 1905, c. 237 (rules for notice, in Stats. 1898, § 4102, amended). St. 1913, c. 336, p. 367 (Stats. § 4086, amended so as to permit the State to take depositions in criminal cases).

### § 1383. Same : Depositions in Perpetuam Memoriam.

[*Note 1; add:*]

1909, *Ohio Copper M. Co. v. Hutchings*, 8th C. C. A., 172 Fed. 201 (under Utah Rev. St. 1898, § 3467, the deposition of a person corporally injured may be taken at the instance of his wife and may be used on his death, clause (1) of the statute permitting this).

§ 1384. *Affidavits, etc.*

[*Note 1, par. 1; add.:*]

1909, *McCabe v. State*, 85 Nebr. 278, 122 N. W. 893 (illegal sale of liquor; the search-warrant and return, including the sworn complaint before the county court by L. who did not testify on the trial, was admitted; held erroneous).

1906, *People v. Wolf*, 183 N. Y. 464, 76 N. E. 592 (affidavits forming a criminal information against the defendant).

1909, *State v. Weil*, 83 S. C. 478, 65 S. E. 634 (illegal liquor-selling; record of an injunction-case against the defendant, containing affidavits, held improperly admitted).

§ 1385. *Ex parte Expert Investigations, etc.*

[*Note 1; add.:*]

*Accord:* 1906, *Lenoir v. People's Bank*, 87 Miss. 559, 40 So. 5 (maps and surveys testified to by the surveyor, taken in a survey made with the notice provided in Code 1892, § 1653, admitted).

*Contra:* 1903, *Wood v. LeBlanc*, 35 N. Br. 47, 56, by two judges among seven (a witness using a plan to illustrate his testimony should prepare it in court, not before trial; this is unsound).

§ 1387. *Issue the Same.*

[*Note 1; add.:*]

1909, *Edmunds' Case*, 2 Cr. App. 257 (like *R. v. Beeston, supra*).

1905, *Nordan v. State*, 143 Ala. 13, 39 So. 406 (murder by abortion; testimony of the deceased, in a prior criminal prosecution against the defendant for the seduction, as to the handwriting of certain letters there and here offered, admitted, the particular issue being identical).

1912, *Fox v. State*, 102 Ark. 393, 144 S. W. 516 (robbery of C. W., defendant being charged as accessory; on a former indictment of defendant as accessory to the murder of C. W., the robbery and the murder being parts of the same transaction by the same persons, the testimony of a now deceased witness was taken; admitted; sensible opinion by Hart, J.).

1913, *Atwood v. Atwood*, 86 Conn. 579, 86 Atl. 29 (issues held substantially the same, on the facts).

1910, *McInturff v. Insurance Co.*, 248 Ill. 92, 93 N. E. 369 (plaintiff's house was burned in March, 1908; later in 1908 the plaintiff and his wife were indicted for fraudulent arson, and B. at that trial testified for the prosecution; the accused were acquitted; the now plaintiff then shot and killed B.; afterwards the present suit was brought, and the testimony of B. formerly given on the criminal trial was offered for the defendant, on its plea of fraudulent arson; excluded; the decision is erroneous on principle, because the issue in the two trials was precisely the same, and the parties were substantially the same; perhaps no precedent has gone as far as to admit in such a case; but the artificial application of the principle as in the present case would reduce the principle to dead wood; the ruling falls under the censure of the text above, p. 1729; see an able critique of the case by Professor Henry C. Hall in the *Illinois Law Review*, VI, 136).

1908, *McGivern v. Steele*, 197 Mass. 164, 83 N. E. 405.

1904, *Taft v. Little*, 178 N. Y. 127, 70 N. E. 211 (a former trial, in which the case had been rested but no formal termination reached, owing to the referee's death, held sufficient under C. C. P. § 830).

1907, *Shaw v. N. Y. Elev. R. Co.*, 187 N. Y. 186, 79 N. E. 984 (action to enjoin the operation of an elevated railroad; a deceased witness' testimony for the plaintiff at the first trial, admitted at the second trial against a party becoming a lessee after the first trial and brought in by stipulation as a defendant on the second trial; St. 1899, c. 352, p. 762, and St. 1893,

## [Note 1 — continued]

c. 595, p. 1375, amending C. C. P. 1877, § 830, held not to affect this result, the testimony being admissible on common-law principles).

1912, *Lynch's Adm'r v. Murray*, 86 Vt. 1, 83 Atl. 746 (fraudulent conveyance; issues held substantially the same, approving the text above).

## [Note 2; add:]

*Newf. St.* 1904, c. 3, Rules of Court, 33, par. 25.

*N. W. Terr. Consol. Ord.* 1898, c. 21, R. 287 (like N. Sc. Ord. 35, R. 24).

*Yukon Consol. Ord.* 1902, c. 17, Ord. XXVI, R. 286 (like N. Sc. Ord. 35, R. 24).

*Cal. St.* 1905, c. 540 (amends P. C. 1872, § 882, so as to admit depositions for the prosecution taken before a committing magistrate; quoted *post*, § 1411, n. 1).

*Ia. St.* 1898, p. 16, c. 9, § 1, Code Suppl. 1902, § 245a (quoted more fully *post*, § 1669, n. 2; notes of testimony are admissible "on any retrial of the case or proceeding in which the same were taken," and "shall have the same force and effect as a deposition").

*Ky. St.* 1904, c. 79 (real estate controversies; elaborate provisions for notice; the deposition to be evidence in any court having jurisdiction).

*Wash. St.* 1905, c. 26 (testimony "given in a former action or proceeding, or in a former trial of the same cause or proceeding," if a civil one, "where it is between the same parties and relates to the same matter," is admissible).

*Wis. St.* 1909, c. 107, Stats. § 4141a (deceased witness' testimony admissible "in any other action where the party against whom it is offered shall have had the opportunity to cross-examine the deceased witness and where the issue upon which it is offered is substantially the same").

## [Note 3; add:]

*Cal. St.* 1907, c. 392, p. 731, Mar. 20, § 2 (adding a new C. C. P. § 2022: "A deposition taken and returned as provided in this chapter may, except as provided in § 2032, be read in evidence by either party at any stage of the action or proceeding in which it was taken, or in any other action or proceeding between the same parties or their privies or successors in interest upon the same subject, and is then deemed the evidence of the party reading it; but the Court may exclude the same if it appear that the taking thereof was in any material respect unfair"; repealing C. C. P. § 2034).

*N. Y. St.* 1909, c. 65, § 3, p. 34 (C. C. P. § 885, amended; rules for use of deposition on contested motion).

*St.* 1911, c. 764, p. 2029 (amending C. C. P. § 830).

*St.* 1911, c. 859, p. 2401 (amending C. C. P. § 881, to apply to special proceedings).

*St.* 1913, c. 140, p. 232 (amending C. C. P. §§ 1688f to i, as to depositions before a referee).

## [Note 6; add:]

A similar question arises where a surety or joint-tortfeasor sues principal or co-tortfeasor for contribution to a claim sued for and paid; here the testimony at the first trial may be received as a part of the record (even without showing the witnesses unavailable) to define the scope of the issue adjudged, but not as testimony to the facts: 1896, *Washington G. Co. v. District*, 161 U. S. 316, 16 Sup. 564. 1906, *Spokane v. Costello*, 42 Wash. 182, 84 Pac. 652.

## [Note 7; add:]

1909, *State v. Longstreth*, 19 N. D. 268, 121 N. W. 1114 (procuring an abortion; defendant's testimony in a suit by the woman for bastardy, admitted).

## § 1388. Parties or Privies the Same.

## [Note 6, par. 1; add:]

1907, *In re Durant*, 80 Conn. 140, 67 Atl. 497 (disbarment; a deceased witness' testimony before a bar association grievance committee on charges against the now respondent, ad-

## [Note 6 — continued]

mitted; "the requirement of identity of parties is only a means to an end; . . . the issues were substantially the same, and nothing more is necessary in that regard," per Prentice, J.; approving the above text).

1911, *London Guarantee & A. Co. v. American Cereal Co.*, 251 Ill. 123, 95 N. E. 1064 ("both actions must involve the same issue between the same parties or their privies," and the fact that the now opponent "was a party to the former action and had full opportunity to cross-examine the witness does not necessarily render the testimony admissible"; thus adhering to the reactionary ruling in *McInturff v. Ins. Co.*, *supra*, § 1387; here applied to a suit involving the liability of an independent contractor on the facts, the testimony was emphatically such as would have been admitted by any procedure founded on good sense). 1914, *Stephens v. Hoffman*, 263 Ill. 197, 104 N. E. 1090 (ejectment; former testimony in an ejectment suit between present opponents and offeror's predecessor in title, admitted).

1905, *Hunter v. District Court*, 126 Ia. 357, 102 N. W. 156 (contempt; testimony in a similar charge against an accomplice, excluded). 1906, *Wiltsey's Will*, 135 Ia. 430, 109 N. W. 776 (testimony at a former probate proceeding for the same will, with parties slightly different in form, admitted under Code Suppl. 1902, § 245a, cited *ante*, § 1387, n. 2).

1905, *Andricus' Adm'r v. Pineville Coal Co.*, — Ky. —, 90 S. W. 233 (two fellow-workmen killed at the same time and place by the same cause, and two actions by the same person their administrator against the same defendant; a deposition taken in one, admitted in the other).

1912, *Eesley Light & P. Co. v. Commonwealth P. Co.*, 172 Mich. 78, 137 N. W. 663 (water-power dam; testimony about the same river's history, in a suit between different parties, on a different issue, excluded).

1904, *Edgerly's Estate*, — Minn. —, 99 N. W. 896 (deposition not admitted against one not a party).

1909, *O'Meara v. McDermott*, 40 Mont. 38, 104 Pac. 1049 (testimony in another suit, involving the same parties, admitted; "precise nominal identity of all the parties is not necessary").

1903, *Persons v. Smith*, 12 N. D. 403, 97 N. W. 551 (testimony between the same parties on the same issues in the Federal Circuit Court, admitted).

Oh. St. 1913, p. 190, Apr. 23 (adding § 11540-1 to Gen. Code; "depositions taken by the plaintiff in an action for damages for personal injuries may be read by the administrator" etc. "in any action for damages or wrongfully caused death resulting from the same personal injuries").

1905, *Martin v. Ragsdale*, 71 S. C. 67, 50 S. E. 671 (former testimony in 1882 in a suit between the present plaintiffs and a remote assignor of defendants on the same subject, admitted).

1902, *Miller v. Gillispie*, 54 W. Va. 450, 46 S. E. 451 (deposition taken by defendant in a creditor's suit to avoid a conveyance, not usable against another creditor in a suit to avoid the same conveyance).

## [Note 6, par. 3; add:]

1911, *State v. Stewart*, 85 Kan. 404, 116 Pac. 489.

1855, *Com. v. Elisha*, 3 Gray 460.

1913, *State v. Fiore*, — N. J. L. —, 88 Atl. 1039 (judgment of conviction of principal, admissible to show principal's guilt in trial of accessory); and cases cited *ante*, § 1347, n. 1.

## § 1389. Deposition used by Either Party, etc.

## [Note 1; add:]

1908, *Western Union T. Co. v. Hanley*, 85 Ark. 263, 107 S. W. 1168 (rule of *Sexton v. Brock* not applicable to deposition taken by agreement of parties).

[*Note 1 — continued*]

1908, *Ong Chair Co. v. Cook*, 85 Ark. 390, 108 S. W. 203 (following *Sexton v. Brock*).

1912, *McDonald v. Brown*, 90 Nebr. 676, 134 N. W. 263 (examination of bastardy complainant).

[*Note 2; add:*]

1908, *Richardson v. McMillan*, 18 Man. 359 (and the taker need not put it in).

1910, *Johnson v. Birket*, 21 Ont. L. R. 319 (the plaintiff in an action for money paid was examined on discovery by defendant before trial; she died ten months later; her executor on the trial offered her examination; held inadmissible; thoroughly unsound; the opinion does not appreciate that the plaintiff's answers were testimony, and therefore inevitably fall within the present principle).

1913, *Cartwright v. Toronto*, 29 Ont. L. R. 73, 13 D. L. R. 604 (like *Johnson v. Birket*, 21 Ont. L. R. 319; plaintiff's predecessor in title died, having been examined on discovery by defendant; held, that plaintiff could not offer his answers as a deposition, unless defendant had used some portion; opinion shows the same unsound theory as to discovery-answers).  
Cal. St. 1907, c. 392, p. 731, Mar. 20, § 2 (adding a new C. C. P. § 2022).

1907, *Chesapeake Stone Co. v. Fossett*, — Ky. —, 100 S. W. 825.

1905, *McDonald v. Smith*, 139 Mich. 211, 102 N. W. 668 (by Circuit Court Rule 41a).

N. Y. St. 1911, c. 764, p. 2029 (amending C. C. P. § 830).

[*Note 6; add:*]

1912, *Lake Erie & W. R. Co. v. Huffman*, 177 Ind. 126, 97 N. E. 434 (H. sued in a State court for personal injury caused by the defendant; the cause was removed to the Federal court; H. died, and his administratrix was substituted; the cause was dismissed, and a suit for H.'s death was begun in a State court; the deposition of H. at the former trial was admitted as against the defendant; but not as against the defendant's agent, who had not been a party to the former suit).

### § 1390. Failure of Cross-Examination through Witness' Death, etc.

[*Note 4; add:*]

1804, *O'Callaghan v. Murphy*, 2 Sch. & Lefr. 158, Ire. (where a witness in chancery died after direct examination but before any cross-examination, the testimony was read, on the facts of the case).

1908, *Wray v. State*, 154 Ala. 36, 45 So. 697 (the witness was brought into court but his physician stated that an examination might be fatal; the Court declined to allow an examination; but finally consented to allow the State to ask one vital question, which was asked, and then the Court gave liberty to cross-examine, which was not availed of; held, that the right of cross-examination was not adequately had).

1910, *Gale v. State*, 135 Ga. 351, 69 S. E. 537 (the witness collapsed physically and mentally pending cross-examination; after adjournment and at a later session, the witness' inability continuing, opponent's counsel declined to accept the judge's offer of a mistrial; held that the trial judge's admission of the testimony was not improper; careful opinion by Lumpkin, J., quoting the text above).

### § 1391. Failure of Cross-Examination through Witness' Refusal, etc.

[*Note 1; add:*]

*Contra*: 1826, *Courtenay v. Hoskins*, 2 Russ. 253 (the refusal of the witness to be cross-examined is no reason for later suppressing the direct examination; because the cross-examiner should insist at the time on the enforcement of his right).

§ 1392. **Non-Responsive Answers, etc.**

[*Note 4; add:*]

1906, *Taylor v. Globe Ref. Co.*, 127 Ga. 138, 56 S. E. 292.

1906, *Sparks v. Taylor*, 99 Tex. 411, 90 S. W. 485 (further pertinent answers by an opponent in discovery, made by advice of his attorney, admitted).

[*Note 5, par. 1; add:*]

1904, *Young v. Valentine*, 177 N. Y. 347, 69 N. E. 643 (an oral answer stricken out before signing, and therefore not subject to cross-examination, cannot be used).

§ 1393. **Sundry Insufficiencies of Cross-Examination (Interpreters, etc.).**

[*Text, p. 1747, par. (c), l. 2, after "witness"; add a new note 2a:*]

This may well be deemed a *fundamental right*; N. Mex. Const. 1910, Art. II, § 14 (in all criminal prosecutions the accused is entitled "to have the charge and testimony interpreted to him in a language that he understands").

[*Note 3; add:*]

1912, *The King v. Sylvester*, 45 N. Sc. 525, 1 D. L. R. 186 (the accused were Italians from Calabria; the interpreter for one important witness gave only the purport of the witness' direct testimony delivered in English, and none of his cross-examination, but the counsel cross-examined in English; held no substantial error; Graham, E. J., dissenting, in a sound opinion; prior English and Canadian cases collected; the dissent deserves support, for the most common official abuse in this country is to supply inadequate interpretation; if the judges could be sent to a foreign country and there haled into court for crime, and made to feel the plight of an alien accused, some improvement might take place).

[*Text, par. (c), at the end; add:*]

The same principle applies to an accused who is *deaf or dumb or blind*.<sup>2a</sup>

<sup>2a</sup> 1905, *Ralph v. State*, 124 Ga. 81, 52 S. E. 299 (the accused being deaf, the Court refused to let the testimony be taken by a stenographer and then typewritten and read by the accused as the trial progressed, but allowed the counsel to write down the testimony and show it to the accused; held sufficient, in the trial Court's discretion).

Minn. St. 1905, c. 47 (a person deaf or dumb, charged with insanity, is entitled "as a matter of absolute right" to an interpreter).

1906, *Felts v. Murphy*, 201 U. S. 123, 26 Sup. 366 (an accused, in a State court, unable by deafness to hear the testimony, which was not repeated to him by his ear-trumpet; this was held not to give ground for complaint as a Federal question under the Fourteenth Amendment).

[*Text, p. 1747, at the end of par. (c), add:*]

Moreover, the opponent is also entitled to *cross-examine the interpreter* so as to test the correctness of the translation,<sup>3a</sup> and to call *other witnesses* to verify the interpretation.<sup>3a</sup>

<sup>3a</sup> 1911, *Terr. v. Kawano*, 20 Haw. 469 (interpreter may be required to repeat in the foreign language the words used by him).

1859, *Schnier v. People*, 23 Ill. 1, 22 (interpreter may be required to give the primary meaning, etc., of words used).

<sup>3a</sup> 1859, *Schnier v. People*, 23 Ill. 1, 22.

1878, *Ulrich v. People*, 39 Mich. 245, 251 (to correct a witness' account of a conversation heard in a foreign language, other interpreting witnesses may be called to render the conversation as reported).

[Text, p. 1748, l. 4; add a new par. (e):]

(e) Whether the trial judge's *limitation of the time* for cross-examination (*ante* § 783) has in effect deprived the opponent of its benefits may involve the present principle.

### § 1395. Purpose and Theory of Confrontation.

[Note 2, at the end, add:]

The great dramatist alludes to this earlier conception, still current in his day:

*King Richard*: "Then call them to our presence; face to face,

And frowning brow to brow, ourselves will hear

The accuser and the accused freely speak."

(*Richard II*, I, 1).

The French practice still shows this notion of confrontation, in liveliest manner; illustrations will be found in the French trials quoted in the Appendix to Sir J. F. Stephen's *History of the Criminal Law*, and in those reported in Albert Batailles' "*Causes Criminelles et Mondaines*," 1895 and earlier years.

It would be interesting to trace this earlier notion carefully in Howell's *State Trials*, until its merger in the 1700s with the principle of cross-examination.

### § 1397. Effect of Constitutional Sanction of Confrontation.

[Note 1; add:]

N. Mex. Const. 1910, Art. II, § 14 ("to be confronted with the witnesses against him").

[Text, p. 1755, end of par. (3); add a new note 2a:]

<sup>2a</sup> The above text was approved in the opinion of McCoy, J., for the Court, in *State v. Heffernan*, 24 S. D. 1, 123 N. W. 87 (1909).

### § 1398. Effect of Constitutional Sanction, etc.; Law in Various Jurisdictions.

[Note 4; add:]

1905, *State v. Mosher*, 128 Ia. 82, 103 N. W. 105, *semble* (rule not applicable in disbarment proceedings; but "were this a criminal case, the point might be well taken").

1899, *Re Wellcome*, 23 Mont. 260, 58 Pac. 711, *semble*.

1909, *Parks v. Com.*, 109 Va. 807, 63 S. E. 462 (Finn's Case repudiated, so far as concerns the general principle; testimony of a deceased former witness, admitted; Finn's Case restricted to the case of an absent witness; above text quoted).

[Note 5, par. 1; add:]

*Cal.*: 1907, *People v. Clark*, 151 Cal. 200, 90 Pac. 549 (affirming *People v. Sierp*; "the matter should be considered as finally settled").

*Ida.*: 1890, *Terr. v. Evans*, 2 Ida. Hasb. 651, 23 Pac. 232. 1908, *State v. Zarlenga*, 14 Ida. 305, 94 Pac. 55.

*Ind.*: 1911, *Wilson v. State*, 175 Ind. 458, 93 N. E. 609 (witness out of the State and not found).

*Ia.*: 1911, *State v. Kimes*, 152 Ia. 240, 132 N. W. 180. 1911, *State v. Brown*, 152 Ia. 427, 132 N. W. 862 (applied to former testimony of one now out of the jurisdiction).

*Kan.*: 1904, *State v. Nelson*, 68 Kan. 566, 75 Pac. 505 (thus presumably disposing of the doubt in *State v. Tomblin*, *supra*, n. 4). 1904, *State v. Harmon*, 70 Kan. 476, 78 Pac. 805 (foregoing case approved). 1911, *State v. Stewart*, 85 Kan. 404, 116 Pac. 489 (preliminary examination). 1912, *State v. Gentry*, 86 Kan. 534, 121 Pac. 352 (preliminary examination).

*Ky.*: 1904, *Fuqua v. Com.*, 118 Ky. 578, 81 S. W. 923 (former testimony of a deceased

[Note 5 — *continued*]

witness, admitted; St. 1903, § 4643, quoted *post*, § 1413, and providing that the consent of the defendant in criminal cases shall be necessary, applies in that respect "alone to the testimony of living witnesses so taken"). 1906, *Austin v. Com.*, 124 Ky. 55, 98 S. W. 295 (former testimony).

*Me.*: 1906, *State v. Herlihy*, 102 Me. 310, 66 Atl. 643.

*Mich.*: 1910, *People v. Droste*, 160 Mich. 66, 125 N. W. 87 (illness; deposition).

*N. Y.*: 1891, *People v. Fish*, 125 N. Y. 136, 26 N. E. 319. 1914, *People v. Qualey*, 210 N. Y. 202, 104 N. E. 138 (testimony before a magistrate under C. C. P. § 8; for the further point as to using the official stenographic report, see n. 7, *infra*).

*Okla.*: 1910, *Hawkins v. U. S.*, 3 Okl. Cr. 651, 108 Pac. 561 (approving the above text). 1911, *Warren v. State*, 6 Okl. Cr. 1, 115 Pac. 812 (testimony at preliminary examination).

*Or.*: 1909, *State v. Walton*, 53 Or. 557, 99 Pac. 431, 101 Pac. 389 (following *Mattox v. U. S.*). 1911, *State v. Myers*, 59 Or. 537, 117 Pac. 818 (following *State v. Walton, supra*).

*S. D.*: 1909, *State v. Heffernan*, 24 S. D. 1, 123 N. W. 87 (former testimony; leading opinion by McCoy, J.).

*Tex.*: 1907, *Porch v. State*, 51 Tex. Cr. 7, 99 S. W. 1122 (testimony of a deceased witness before the committing magistrate, received; "we therefore, without a further tedious discussion of the question, overrule the majority opinion in the Cline case [cited *supra*, n. 4], and reaffirm the opinions of this Court rendered prior to the Cline case as the law"; this was a sensible and praiseworthy attitude, meant to set right once for all the law in this State; this decision therefore practically repudiates also on this point *Smith v. State*, 48 Tex. Cr. 65, 85 S. W. 1153, cited more fully *post*, § 1405, n. 1). 1908, *Pratt v. State*, 53 Tex. Cr. 291, 109 S. W. 138 (former testimony of deceased witness, admitted; Davidson, P. J., diss., on the authority of *Cline v. State*, but ignoring *Porch v. State*). 1908, *Nixon v. State*, 53 Tex. Cr. 325, 109 S. W. 931 (*Porch v. State* confirmed). 1908, *Hobbs v. State*, 53 Tex. Cr. 76, 112 S. W. 308 (former testimony of witness now in another jurisdiction, admitted; Davidson, P. J., still dissenting; his history is unsound). 1911, *Kemper v. State*, 63 Tex. Cr. 1, 138 S. W. 1025 (deceased witness at former trial of same case; Scott, Sp. J., for the majority: "We therefore adhere to the majority opinion of the Court as announced in the Cline Case, and expressly overrule the Porch Case and Hobbs Case and the Pratt Case, and in fact every other case in Texas which has announced a contrary rule"; the opinion vainly wrestles with the history and reason of the subject, and is a futile effort to turn this Court backward from the sensible rule, by invoking the supposed laws of Moses and of Rome; Prendergast, diss., files notice that whenever the majority is otherwise constituted "this decision may be overruled"). 1912, *Robertson v. State*, 63 Tex. Cr. 216, 142 S. W. 533 ("Kemper v. State is overruled on this point, and Cline v. State and all cases following it are again overruled," Davidson, P. J., diss.; thus the see-saw goes on).

*U. S.*: 1906, *U. S. v. Greene*, 146 Fed. 796, D. C.

*Utah*: 1902, *State v. King*, 24 Utah 482, 68 Pac. 419. 1910, *State v. Vance*, 38 Utah 1, 110 Pac. 434.

*Wis.*: 1907, *Spencer v. State*, 132 Wis. 509, 112 N. W. 462 (testimony before a committing magistrate; usable where the witness is deceased or permanently incapacitated mentally or physically; rule for a witness out of the jurisdiction, not stated; careful opinion by Winslow, J.).

[Note 6; *add.*]

1908, *Jones v. State*, 130 Ga. 274, 60 S. E. 840.

[Note 7, par. 1; *add.* under *Accord.*]

1904, *Sokel v. People*, 212 Ill. 238, 72 N. E. 382 (following *Tucker v. People*).

1914, *People v. Qualey*, 210 N. Y. 202, 104 N. E. 138 (Laws 1912, c. 390, April 15, adding § 221b, C. C. P., for the admission of the official stenographic report of testimony before a magistrate is constitutional).

## [Note 7 — continued]

1907, *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002 (illegal sale of liquor; U. S. revenue collector's certified copy of a Federal liquor license record, admitted; following *State v. Behrman*).

1911, *Dowdell v. U. S.*, 221 U. S. 325, 31 Sup. 590 ("where a clerk, upon suggestion of the diminution of the record, orders a clerk of the court below to send up a more ample record, or to supply deficiencies in the record filed," the provision of the Constitution is not applicable; here a clerk's certified copy of entries showing for the Supreme Court the defendant's arraignment in the lower court at Samar, P. I.). 1912, *Heike v. U. S.*, C. C. A., 192 Fed. 83 (official records of U. S. weighers in revenue department, admitted).

## [Note 5, par. 2; add:]

*Cal.*: 1904, *People v. Buckley*, 143 Cal. 375, 77 Pac. 169 (testimony before the magistrate, admitted for the State; no cases cited). The statute of 1905, c. 540 (quoted *post*, § 1411, n. 1), may be intended to cure in part the anomaly in this State. Compare here also the peculiar local rulings under the statute for using a *stenographic report* of the testimony (*post*, § 1669).

## [Note 5, at the end; add:]

In *Indiana*, the following statute applies: St. 1905, p. 584, § 242 (a defendant's request or notice, in a criminal case, to take depositions "shall be deemed a waiver of his constitutional right to object to the taking of depositions by the State," etc.).

The Sixth Federal Amendment, quoted *ante*, § 1397, n. 1, does not control State legislation: 1904, *West v. Louisiana*, 194 U. S. 258, 24 Sup. 650 (cross-examined testimony before a committing magistrate, the witness now being permanently a non-resident, offered against a defendant). The only Federal question, therefore, can be whether there was due process of law under the Fourteenth Amendment, and this is not thereby violated; *West v. Louisiana*, *supra*; *Felts v. Murphy*, cited *ante*, § 1393, n. 3a.

Whether *disbarment* proceedings are criminal, in the constitutional sense, has usually been answered in the negative:

1905, *State v. McRae*, 49 Fla. 389, 38 So. 605.

1905, *State v. Mosher*, 128 Ia. 82, 103 N. W. 105.

1899, *Re Wellcome*, 23 Mont. 260, 58 Pac. 711.

## [Note 9, par. 1; add:]

1910, *State v. Vanella*, 40 Mont. 326, 106 Pac. 364.

1912, *Diaz v. U. S.*, 223 U. S. 442, 32 Sup. 250 (testimony at the preliminary investigation, offered by the accused).

## [Note 9, par. 2; add:]

1904, *Schick v. U. S.*, 195 U. S. 65, 24 Sup. 826 (said *obiter* that Art. 6 of the U. S. Constitution can be waived). 1909, *Mullen v. U. S.*, 212 U. S. 516, 29 Sup. 330 (holding the same for U. S. Rev. St. 1878, § 1624, providing for courts martial, in so far as that provision is intended to be analogous to the constitutional right).

1912, *Diaz v. U. S.*, 223 U. S. 442, 32 Sup. 250; and cases cited *post*, § 2595, n. 6.

Whether the 6th Amendment applies to *criminal contempts*: 1912, *Merchants' S. & G. Co. v. Board of Trade*, 8th C. C. A., 201 Fed. 20, 29 (in criminal contempt proceedings, the defendant is not entitled to be confronted with the witnesses against him).

## § 1401. Preliminary Distinctions (Taking Depositions, etc.).

[Text, p. 1761, l. 11 of par. (c); add a new note 2:]

<sup>1</sup> The effect of those statutes which abolish all limitations on *taking* depositions before trial is virtually to make a radical change in another part of the law, viz. the rule against

[Text, p. 1761 — continued]

obtaining *discovery from a witness* before trial. The cases dealing with that aspect of the statutes are placed under that head, *post*, §§ 1850-1856.

### § 1403. Specific Cases of Unavailability; (1) Death.

[Note 1, l. 1; *add.*]

1908, *Carr v. American Locomotive Co.*, 29 R. I. 276, 70 Atl. 196.

### § 1404. Witness Unavailable; Absence from Jurisdiction.

[Note 1; *add.*]

1911, *U. S. v. Cohen*, D. C. So. D. N. Y., Oct. 26, M. S., Hough, J. (witness for the prosecution, released after former testimony, and then disappearing; former testimony admitted).

[Note 3; *add.*]

1914, *Spencer, J.*, in *Levi v. State*, — Ind. —, 104 N. E. 765.

[Note 4; *add.*]

1914, *Spencer, J.*, in *Levi v. State*, — Ind. —, 104 N. E. 765.

*Contra* (i. e. holding that this is unnecessary): 1882, *Stebbins v. Duncan*, 108 U. S. 32, 2 Sup. 313. 1905, *Toledo Traction Co. v. Cameron*, 137 Fed. 48, 61, 69 C. C. A. 28.

[Note 5; *add.*]

*Ala.*: 1904, *Sims v. State*, 139 Ala. 74, 36 So. 138 (a witness to a dying declaration, shown merely to have gone to Texas; former testimony excluded). 1904, *Wilson v. State*, 140 Ala. 43, 37 So. 93 ("residence and indefinite absence from the State" suffices). 1904, *Kirkland v. State*, 141 Ala. 45, 37 So. 352 (removal permanently or for an indefinite time suffices). 1904, *Southern R. Co. v. Bonner*, 141 Ala. 517, 37 So. 702 (similar).

*Ark.*: 1905, *Petty v. State*, 76 Ark. 515, 89 S. W. 465. 1909, *Wimberly v. State*, 90 Ark. 514, 119 S. W. 668. 1910, *Poe v. State*, 94 Ark. 172, 129 S. W. 292 (witness "beyond the jurisdiction").

*Ga.*: 1906, *Taylor v. State*, 126 Ga. 557, 55 S. E. 474 (absence from the county, being last heard from within the State, does not suffice, under P. C. 1895, § 1001). 1912, *Crumm v. Allen*, 11 Ga. App. 203, 75 S. E. 108 (where the witness is the party himself offering his former testimony, of course his voluntary absence from the State does not make him inaccessible). 1912, *Taylor v. Felder*, 11 Ga. App. 742, 76 S. E. 75 (under Civ. C. § 5773, a witness residing in an adjoining county within the State is not "inaccessible").

*Ind.*: 1910, *Reichers v. Dammeier*, 45 Ind. App. 208, 90 N. E. 644 (non-resident). 1914, *Levi v. State*, — Ind. —, 104 N. E. 765 (general principle recognized; but here former testimony was held improperly admitted because no effort was made other than by subpoena to obtain the witness' presence or their depositions; unsound).

*Ia.*: 1911, *State v. Brown*, 152 Ia. 427, 132 N. W. 862 (settling the rule for criminal cases). *Kan.*: 1904, *State v. Nelson*, 68 Kan. 566, 75 Pac. 505. 1904, *State v. Harmon*, 70 Kan. 476, 78 Pac. 805 (absence from the State suffices).

1908, *State v. Simmons*, 78 Kan. 872, 98 Pac. 277. 1912, *State v. Gentry*, 86 Kan. 534, 121 Pac. 352.

*La.*: *State v. Kline*, 109 La. 603, cited *supra* (affirmed on writ of error, under the U. S. 14th Amendment, *s. v. West v. Louisiana*, U. S., cited *infra*). 1904, *State v. Sejours*, 113 La. 676, 37 So. 599 (permanent absence from the State suffices).

*Mich.*: 1907, *Dolph v. Lake Shore & M. S. R. Co.*, 149 Mich. 278, 112 N. W. 981.

*Minn.*: 1911, *Finnes v. Selover B. Co.*, 114 Minn. 339, 131 N. W. 371 (admissible if "not a

## [Note 5 — continued]

resident of the State, and without the jurisdiction of the court"). 1911, *Gutmann v. Klimek*, 116 Minn. 110, 133 N. W. 475 (residence in another State; here the plaintiff's own testimony at a former trial, offered in his own behalf; not decided).

*Mo.*: 1913, *State v. Butler*, 247 Mo. 685, 153 S. W. 1042 (testimony before committing magistrate, admitted for defendant, though Rev. St. 1909, §§ 5056, 5033, do not specify any conditions on which such testimony may be used).

*Mont.*: 1909, *O'Meara v. McDermott*, 40 Mont. 38, 104 Pac. 1049 (witness in California; admitted under Rev. Codes, § 7887). 1909, *Motte & K. D. Co. v. Lowrey*, 39 Mont. 124, 101 Pac. 966 (preliminary examination).

*Okl.*: 1910, *Hawkins v. U. S.*, 3 Okl. Cr. 651, 108 Pac. 561. 1913, *Atchison T. & S. F. R. Co. v. Baker*, 37 Okl. 48, 130 Pac. 577.

*Or.*: 1909, *State v. Walton*, 53 Or. 557, 99 Pac. 431, 101 Pac. 389.

*R. I.*: 1908, *Kolodrianski v. American Locomotive Co.*, 29 R. I. 127, 69 Atl. 505.

*Tex.*: 1914, *Millner v. State*, — Tex. Cr. —, 162 S. W. 348.

*U. S.*: 1904, *West v. Louisiana*, 194 U. S. 258, 24 Sup. 650 (permanent non-residence suffices, at least under the fourteenth Amendment; here applied to testimony before a committing magistrate offered against a defendant). 1905, *Toledo Traction Co. v. Cameron*, 137 Fed. 48, 57, 69 C. C. A. 28 (former testimony of a witness in Indiana, out of the jurisdiction of this court and more than 100 miles away, admitted).

*Utah*: 1910, *State v. Vance*, 38 Utah 1, 110 Pac. 434.

## [Note 7; add:]

In *Virginia*, *Finn's Case*, *supra*, was partly repudiated and its validity for the present purpose left undetermined, in *Parks v. Com.*, 109 Va. 807, 63 S. E. 462 (1909).

[Note 8, par. 1; add, under *Accord*.:]

*Can.*: 1908, *Rogers v. Troop*, 43 N. Sc. 279 (trial Court decides, under Order 35, R. 17).

*U. S.*: 1873, *Burton v. Driggs*, 20 Wall. 125 (lost deposition of a witness living in another State and more than 100 miles away; contents allowed to be proved). 1882, *Stebbins v. Duncan*, 108 U. S. 32, 2 Sup. 313 (deposition burned; *Burton v. Driggs* approved).

For the case of a witness *once present during the time of trial, but subsequently departing*, see *post*, § 1415.

## [Note 8, par. 2; add:]

*Contra*: 1911, *Redhouse v. Graham*, 20 Haw. 717 (plaintiff's own former testimony excluded, where he had left the jurisdiction before trial without any explained reason).

## § 1405. Same: Disappearance, etc.

[Note 1, par. 1; add, under *Accord*.:]

*Ont.*: 1907, *Cuff v. Frazee S. & C. Co.*, 14 Ont. L. R. 263 (witness supposed to have gone to the U. S.).

*Ala.*: 1905, *Bardin v. State*, 143 Ala. 74, 38 So. 833 (mere inability to find, after searching the county of usual residence, insufficient). 1906, *Woodstock Iron Works v. Kline*, 149 Ala. 391, 43 So. 362. 1913, *Pope v. State*, — Ala. —, 63 So. 71 (former testimony; inability to find after diligent search is sufficient to admit; here a defendant's witness).

*Ark.*: 1913, *Paxton v. State*, — Ark. —, 157 S. W. 396.

*Cal.*: 1899, *People v. Plyler*, 126 Cal. 379, 58 Pac. 904 (trial Court's determination controls in applying P. C. § 686, cited *post*, § 1411). 1904, *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467 (same). 1904, *People v. Buckley*, 143 Cal. 375, 77 Pac. 169 (testimony before the magistrate, admitted under P. C. § 686; here the witness was in Mexico). 1904, *People v. Barker*, 144 Cal. 705, 78 Pac. 266 (similar).

[*Note 1 — continued*]

*Fla.*: 1904, *Dorman v. State*, 48 Fla. 18, 37 So. 561 (witness for the defendant; former testimony not admitted on the facts). 1908, *Putnal v. State*, 56 Fla. 86, 47 So. 864.

*Ga.*: 1907, *Robinson v. State*, 128 Ga. 254, 57 S. E. 315 (due diligence not used, on the facts).

*Haw.*: 1907, *Tsuruda v. Farm*, 18 Haw. 434 (witness subpoenaed in two places and not found; showing held insufficient on the facts).

*Ind.*: 1911, *Wilson v. State*, 175 Ind. 458, 93 N. E. 609 (not found in or out of the State).

*Mich.*: 1912, *Krouse v. Detroit U. R. Co.*, 170 Mich. 438, 136 N. W. 434 ("the proofs should be full and convincing").

*Mo.*: 1904, *State v. Riddle*, 179 Mo. 287, 78 S. W. 606 (due diligence not found on the facts).

*Okl.*: 1911, *Warren v. State*, 6 Okl. Cr. 1, 115 Pac. 812 (witnesses not to be found, and last heard from in Arkansas). 1913, *Edwards v. State*, — Okl. Cr. —, 131 Pac. 956 (preliminary examination).

*Tex.*: 1905, *Smith v. State*, 48 Tex. Cr. 65, 85 S. W. 1153 (former testimony of an absent person, excluded; this Court here appears to be unable clearly to tell the profession just what rules it means to lay down on these points; from this opinion it is impossible to say whether the exclusion is (1) because the witness was not sought for with sufficient diligence, or (2) because mere inability to find is never enough, but only absence from the jurisdiction, or (3) because the Texas statutes for depositions, *post*, §§ 1411, 1413, are the only sources of admissibility, and under them no provision at all is made for using testimony at a former trial in a criminal case, or (4) because the use of former testimony in a criminal case is always unconstitutional, under *Cline v. State*, cited *ante*, § 1398, n. 4; the only things fairly apparent from the opinion are that *Sullivan v. State*, *supra*, is regarded as overruled, in *Evans v. State*, 12 Tex. App. 370, on some point or other, and that *Cline v. State*, *supra*, may be still law for some purpose or other, though its status is doubtful on another point, *ante*, § 1398, n. 5).

The following case is peculiar and unsound:

1908, *Driggers v. U. S.*, 21 Okl. 60, 95 Pac. 612 (witness said to be dead; the marshal's return on the subpoena and the testimony of others that they "had been told he was dead," held not enough; this is a sample of the courts twiddling thumbs over a game of checkers while the world clamors for justice to be done on murderers; the question here, Was Jim Saddler dead? could probably have been answered positively in two minutes if the Court had gone about it as directly as they would go about it in their ordinary business affairs. Is it necessary for Judicial Justice to shut itself off from the world in a temple and perform a sort of legal-religious ritual in order to determine the answers sought by its suppliants?)

See the general question of *evidencing death* considered *ante*, §§ 158, 667.

[*Note 1, par. 1; add, under Contra:*]

1826, *Wilbur v. Selden*, 6 Cow. 164 (former testimony of a witness who could not be found and had declared that he was going to Pennsylvania, excluded).

[*Note 1, par. 2, l. 4; add:*]

and for attesting witnesses (*ante*, § 1313), persons not heard from (*ante*, §§ 158, 664), and statements of intent (*post*, § 1725).

## § 1406. Same: Illness, etc., preventing Attendance.

[*Note 1; add:*]

*Contra*, for a party's examination:

1912, *Park v. Schneider*, Alta. S. C., 6 D. L. R. 451 (plaintiff lived in Ohio, and was too ill to travel; his examination on discovery by defendant was taken, with leave to treat it as on a commission; the plaintiff was not allowed to use it on the trial, the credibility of the

[*Note 1 — continued*]

witness being important; this erroneous ruling indicates a failure to perceive that a party's examination taken by an opponent stands exactly on the footing of a deposition for present purposes; compare the similar fallacy in *Johnson v. Birket*, Ont., cited *ante*, § 1389).

[*Note 3; add:*]

1908, *Smith v. Moore*, 149 N. C. 185, 62 S. E. 892 (approving *Berney v. Mitchell*, and taking the singular view that a deposition is better than a stenographic report).

[*Note 5; add:*]

1910, *People v. Droste*, 160 Mich. 66, 125 N. W. 87 (woman about to be confined; testimony before the examining magistrate, admitted; careful opinion by Brooke, J.; virtually overruling *Siefert v. Siefert*, which held that the illness must be permanent).

1908, *Smith v. Moore*, 149 N. C. 185, 62 S. E. 892 (mere doctor's certificate that witness was "too unwell to attend court," held not sufficient on the facts).

1907, *Spencer v. State*, 132 Wis. 509, 112 N. W. 462 (see the citation *ante*, § 1398, n. 5).

[*Note 6; add:*]

1908, *Stewart's Case*, 1 Cr. App. 57 (statute applied, the witness being ill).

#### § 1407. Same: Attendance prevented by (6) Imprisonment, etc.

[*Note 2; add:*]

1910, *Hawkins v. U. S.*, 3 Okl. Cr. 651, 108 Pac. 561 (life prisoner in a Federal penitentiary out of the State, the prison authorities having refused the request of the State Governor to bring the prisoner to testify).

[*Note 6; under Repudiating it; add:*]

1913, *Rio Grande So. R. Co. v. Campbell*, — Colo. —, 136 Pac. 68 (new trial 5 years later, but the witness a young man of unimpaired health and mind).

#### § 1408. Same: (9) Insanity, etc.

[*Note 2; add:*]

1913, *Atwood v. Atwood*, 86 Conn. 579, 86 Atl. 29.

#### § 1409. Same: Disqualification by Infamy.

[*Note 2, par. 1; add:*]

1907, *Greenlee v. Mosnat*, 136 Ia. 639, 111 N. W. 996 (former testimony of a party now disqualified by the opponent's death; St. 1898, c. 9, § 1, quoted *post*, § 1669, n. 2, held not to alter this result).

1909, *Sayre v. Woodyard*, 66 W. Va. 288, 66 S. E. 320.

[*Note 4; add:*]

Colo. St. 1911, c. 229, p. 676, June 2 (amending Rev. St. 1908, § 7267; in any suit in which one party is disqualified by reason of death, etc. of the other, and "the defendant in any such suit has previously been required to testify" under Rev. St. §§ 7080, 7253, the report of testimony may be read for the defendant, "so far as the same relates to the estate" etc.). 1911, *State v. Stewart*, 85 Kan. 404, 116 Pac. 489 (husband privileged not to testify against his wife, and claiming his privilege; his former testimony, admitted; able opinion by Johnston, C. J.).

Conversely, the deposition of one who becomes competent after taking and before offering should be excluded: *contra*:

[*Note 4 — continued*]

1912, *Howard v. Strode*, 242 Mo. 210, 146 S. W. 792 (deposition of T. J. M., alleged to be husband of plaintiff, offered against her, a divorce having been granted to T. J. M. after deposition taken but before offered; admitted).  
For the effect of time on privilege, see *post*, § 2237 (marital privilege).

§ 1410. **Same: (11) Disqualification by Infamy.**

[*Note 1; add:*]

1910, *Hawkins v. U. S.*, 3 Okl. Cr. 651, 108 Pac. 561 (approving the above text).

§ 1411. **Statutes affecting Depositions de bene esse.**

[*Note 1; add:*]

*Eng.*: 1894, St. 57 & 58 Vict. c. 41, § 16 (Prevention of Cruelty to Children; like St. 4 Edw. VII, *infra*, with an additional clause that the Court must be satisfied that the evidence of the child "is not essential to the just hearing of the case"). 1904, R. v. Hale, 20 Cox Cr. 739 (St. 57 & 58 Vict. c. 41, § 16, construed as to the child's evidence being "essential"). 1904, St. 4 Edw. VII, c. 15, § 13 (Prevention of Cruelty to Children Act; in trials for offences under this act, "where a justice is satisfied by the evidence of a registered medical practitioner that the attendance before a court of any child," in respect of whom an offence of cruelty is charged, "would involve serious danger to its life or health," the sworn deposition of the child may be taken); *ib.* § 14 (similar provision for the admission of a child's depositions taken under this or certain other acts). St. 1908, 8 Edw. VII, c. 67, §§ 28, 29 (Children Act; where the attendance at court of a "child or young person," the victim of the alleged offence, "would involve serious danger to the life or health of the child or young person," the deposition may be taken and used).

*Dom.* St. 1913, 3-4 Geo. V, c. 13, § 30 (amending Crim. Code, 1906, § 999; allowing former testimony or deposition to be used also "if such person refuses to be sworn or to give evidence").

*Br. C.* St. 1903-4, 3 & 4 Edw. VII, c. 15, §§ 69, 70 (quoted *ante*, § 1380). St. 1905, 5 Edw. VII, c. 14, § 95 (county courts; like Rev. St. 1897, c. 52, § 134).

*Newf.* St. 1904, c. 3, Rules of Court 33, par. 1 (a judge may order that an affidavit be read "on such conditions" as may be thought reasonable, or that the attendance of a witness may "for some sufficient cause" be dispensed with; but where the other party "*bona fide* desires the production of a witness for cross-examination" and "such witness can be produced," no affidavit is to be ordered); *ib.* par. 18 (unless by special order no deposition is to be used unless "the deponent is dead, or beyond the jurisdiction of the court, or resident in Labrador, or is unable from sickness or other infirmity to attend the trial").

*Yukon* Consol. Ord. 1902, c. 17, Ord. XXVI, R. 262 (like Ont. Rules of Court, § 483); R. 266 (like N. W. Terr. Rule 267).

*P. E. I.* St. 1910, c. 8, § 48 (chancery proceedings; deposition before a master shall not be read without consent "unless the inability of the witness to personally attend exists to the satisfaction of the Court at the time such evidence is offered"). St. 1910, c. 3, § 45 (special provision in election trials for a witness who "intends to leave the Province and cannot attend the trial").

*Cal.* St. 1905, c. 134 (amends C. C. P. 1872, § 2021, by adding, under par. 2, "or resides in the county but more than fifty miles distant from the place of trial or hearing by the nearest usual traveled route"). St. 1905, c. 540 (amends P. C. 1872, § 882, applying to depositions for the prosecution before the committing magistrate, by providing that "such deposition may be used upon the trial of the defendant, except in cases of homicide, under the same conditions as mentioned in § 1345," but this section is not to apply to an accomplice). St. 1907, c. 392, p. 731, Mar. 20, § 2 (adding a new C. C. P. § 2022; quoted *ante*, § 1387). *Ga.* St. 1908, No. 568, p. 84, Aug. 17 (rules for deposition without a commission; "if the

[Note 1 — continued]

reasons for taking the deposition cease to exist before trial, such deposition shall not be used in the case").

*Ida.*: 1908, *State v. Zarlenga*, 14 *Ida.* 305, 94 *Pac.* 55 (a deposition taken for the prosecution, under *Rev. St.* 1887, § 7588; the conditions requisite to be shown, specified in full; i. e. due taking before a magistrate, notice, inability to attend, and due diligence).

*Kan. St.* 1905, c. 526, § 1 (depositions may be used in probate proceedings in the same manner as under the Code of Civil Procedure).

*La.*: 1904, *Thibodeaux v. Thibodeaux*, 112 *La.* 906, 36 *So.* 800 (deposition excluded for lack of proper notice). *St.* 1908, No. 105, p. 162, July 1 (no deposition of "a fugitive from justice from this State" shall be admissible). *St.* 1910, No. 176, p. 261, July 6 (testimony of witnesses residing out of the parish may be taken by deposition in civil cases).

*Me. St.* 1909, c. 159, p. 162, Mar. 29 (adding to *Rev. St.* c. 109, § 4, par. 5 (numbered (6) above) "or that he has become so infirm or sick since the taking of the deposition as to be unable to attend the place of trial").

*Mich.*: 1908, *Nolan v. Garrison*, 151 *Mich.* 138, 115 *N. W.* 58 (*Comp. St.* 1897, § 10136 above, and § 10188 relating to chancery causes, compared, and held not to be inconsistent; both methods are available; under § 10136 the taker need not wait until 10 days after issue joined).

*N. C. Rev.* 1905, § 1645 (like Code, § 1358, adding under par. 96, "or the superintendent or any physician" of a State insane hospital). *Rev.* 1905, § 1654, *St.* 1889, c. 428 (depositions taken in certain *quo warranto* proceedings are admissible "without regard to the place of residence of such witness or distance of residence from said place of trial"). *Rev.* 1905, § 1655 (rules for taking a deposition in the State in aid of a suit without the State).

*Or. St.* 1909, c. 58, p. 105 (amending § 826 of *Bell. & C. Annot. Codes & Stats.*).

*Pa. St.* 1909, No. 167, p. 258 (witnesses out of the State but in the U. S., in criminal cases).

*St.* 1911, June 8, p. 709 (witnesses residing in another State or foreign country).

*S. C. St.* 1909, No. 128, p. 206 (in trials for rape, the deposition of the female may in the judge's discretion be admitted "as though such testimony had been given orally in court").

*S. D. St.* 1913, c. 370, p. 609 (amending *P. C.* 1903, § 802; deposition of a convict in a penitentiary may be taken).

*U. S.*: 1904, *Zych v. American Car & F. Co.*, 127 *Fed.* 723, 728, *C. C. A.* (cited *ante*, § 1381, n. 1). *St.* 1909, Feb. 16, c. 130, No. 230 (35 *Stat. L.* p. 620), § 16 (rules for depositions in naval courts). *St.* 1911, Mar. 3, c. 231, *Judicial Code*, §§ 167, 168 (testimony for Court of Claims; superseding *Rev. St.* §§ 1081, 1082). *Equity Rules* 1912, Rules 46-48.

*Utah St.* 1905, c. 41, Mar. 7 (depositions taken out of the State on oral interrogatories "may be used . . . as now provided by the laws of this State").

*Va. St.* 1904, c. 18, § 3 (deposition of the female in rape or attempted rape may be read without accounting for her absence; an unwise exception).

*Wash. St.* 1909, c. 249, p. 907, § 54 (right of confrontation affirmed; "provided that whenever any witness whose deposition shall have been taken pursuant to law by a magistrate, in the presence of the defendant and his counsel, shall be absent and cannot be found when required to testify upon any trial or hearing, so much of such deposition as the Court shall deem admissible" shall be read).

*Wis. St.* 1913, c. 336, p. 367 (*Stats.* § 4086, amended so as to permit the State to take deposition of a witness "within the State who is in imminent danger of death").

[Text, p. 1777, line 2; add a new note 2, after "statute":]

<sup>2</sup> *Accord*: 1913, *State v. Butler*, 247 *Mo.* 685, 153 *S. W.* 1042 (citing the text above). 1905, *Toledo Traction Co. v. Cameron*, 137 *Fed.* 48, 58, 69 *C. C. A.* 28 (the term "except" in *U. S. Rev. St.* 1878, § 861, "was simply an opening for letting in an addition to the powers of the Court as they had been customarily exercised"; here admitting the former testimony of a witness out of the jurisdiction, though the statute names only depositions; good opinion by Severens, J.).

## § 1412. Statutes affecting Depositions in perpetuam memoriam.

[Note 1; add:]

*Ky.* St. 1904, c. 79 (real estate controversies; no conditions specified).

*U. S.*: Rev. St. 1878, § 866 ("In any case where it is necessary in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatum* to take depositions according to common usage; and any circuit court, upon application to it as a court of equity, may according to the usages of chancery direct depositions to be taken in perpetuam memoriam," etc., and Rev. St. §§ 863-865 for *de bene* depositions shall not apply).

1908, *Westinghouse Machine Co. v. Electric S. B. Co.*, C. C. N. J., 165 Fed. 992 (statute applied, and order refused).

## § 1413. Statutes affecting Testimony at a Former Trial.

[Note 1; add:]

*Ia.* St. 1898, p. 16, c. 9, § 1, Code Suppl. 1902, § 245a (quoted more fully *ante*, § 1387, n. 2, *post*, § 1669, n. 2; admits former testimony with "the same force and effect as a deposition").

*Kan.* St. 1905, c. 494, § 1 (court stenographer's transcript of former testimony, admissible like a deposition; cited more fully *post*, § 1669).

*Ky.*: 1904, *Fuqua v. Com.*, 118 Ky. 578, 81 S. W. 923 (the proviso in the statute for the consent of the defendant in a criminal case applies "alone to the testimony of living witnesses so taken"; a better construction would be that it applies only to the use of the official report, leaving the sworn testimony of the stenographer on the stand unaffected by the statute).

*La.*: A peculiar rule has been introduced in Louisiana: St. 1908, No. 247, p. 368, July 8 (on a new trial in a civil case, all the testimony at the former trial, if written down, may be used, without recalling the witnesses, except so far as the Court may permit on request of a party). *N. Y.* St. 1893, c. 595, and St. 1899, c. 352 (amending C. C. P. § 830, but not on this point; quoted *ante*, § 1387, n. 2). St. 1911, c. 764, p. 2029 (amending C. C. P. § 830). St. 1913, c. 542, p. 1465 (amending Consol. L. c. 27, St. 1909, c. 32, § 93; on second or later application for habeas corpus by insane person, testimony at any former hearing may be used without calling the witnesses).

*N. C.* Rev. 1905, § 3121, St. 1899, c. 680, § 2 (when a subscribing witness "shall die or be absent beyond the State," the affidavits and proofs taken in common form shall be *prima facie* evidence). Rev. 1905, § 3205 (like Code 1883, § 1157).

*Tex.*: 1905, *Smith v. State*, 48 Tex. Cr. 65, 85 S. W. 1153 (cited more fully *ante*, § 1405 n.).

*Wash.* St. 1905, c. 26 ("The testimony of any witness, deceased, or out of the State, or for any other sufficient cause unable to appear and testify," when written and certified as in § 1669, *post*, may be used in any civil case). St. 1913, c. 126, p. 386, § 6 (official reporter's certified transcript, admissible in any civil cause "when satisfactory proof is offered to the judge presiding that the witness originally giving such testimony is then dead or without the jurisdiction of the court," subject to objections as if he were present testifying).

*Wis.* St. 1911, c. 65, p. 71 (amending Stats. § 4141a, by extending it to the testimony of "any witness who is absent from the State," taken in any "action or proceeding except in a default action or proceeding where service of process was obtained by publication," offered in any "retrial, other action, or proceeding," etc.).

## § 1414. Proof of Unavailability of Witness.

[Note 1; add:]

*Contra*, but unsound: 1904, *Fitch v. Traction Co.*, 124 Ia. 665, 100 N. W. 618 (former testimony).

1909, *Van Norman v. Modern Brotherhood*, 143 Ia. 536, 121 N. W. 1080 (former testimony).

[*Note 2; add, under Accord:*]

1906, *Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695 (deposition of a non-resident taken under C. C. P. § 2024; continued non-residence presumed).

1904, *Taylor v. Taylor's Estate*, 138 Mich. 658, 101 N. W. 832 (age, and inability to travel).

1904, *Chicago B. & Q. R. Co. v. Krayenbuhl*, 70 Nebr. 766, 98 N. W. 44 (non-residence in Iowa presumed to continue).

[*Note 2; add, under Contra:*]

1908, *O'Brien v. St. Louis Transit Co.*, 212 Mo. 59, 110 S. W. 705 (non-residence in the county must be shown by the party offering the deposition; one judge diss.).

1904, *Carter v. Wakeman*, 45 Or. 427, 78 Pac. 362 (because the statute, cited *ante*, § 1411, n. 1, expressly requires that proof be made that the witness "still continues" unavailable).

### § 1415. If Witness is Available, etc., Deposition is not Usable.

[*Note 1; add:*]

1904, *Handy v. Smith*, 77 Conn. 165, 58 Atl. 694.

1904, *Lanza v. LeGrand Quarry Co.*, 124 Ia. 659, 100 N. W. 488 (testimony at a former trial, assimilated to a deposition, under St. 1898, 27 Gen. Ass. c. 9, excluded, the witnesses being present).

1906, *State v. Coleman*, 199 Mo. 112, 97 S. W. 574 (testimony at a former trial, excluded, the witness being present in court).

1904, *Hughes v. Chicago, St. P. M. & O. R. Co.*, 122 Wis. 258, 99 N. W. 897.

[*Note 2; add:*]

1907, *Dover v. Greenwood*, C. C. R. I., 154 Fed. 855 (patent application; testimony taken in interference proceedings, refused to be made a part of the record, on the present principle).

[*Note 3, add:*]

1906, *Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695 (trial began Nov. 2, deposition was taken Nov. 11, witness left the State Dec. 5, deposition was offered Dec. 7; admitted).

1904, *Flannery v. Central B. Co.*, 70 N. J. L. 715, 59 Atl. 157 (a deposition of the plaintiff taken by consent was offered and received on the opening of the trial; on the second day the plaintiff appeared in court; after close of the plaintiff's case, a motion to strike out the deposition was made by the defendant; held, that the defendant's unexplained delay was a waiver of objection).

[*Note 5; add:*]

1908, *Georgia F. & A. R. Co. v. Sasser*, 4 Ga. App. 276, 61 S. E. 505 (like *Western & A. R. Co. v. Bussey*).

1904, *Taylor v. Taylor's Estate*, 138 Mich. 658, 101 N. W. 832 (under Comp. L. 1897, §§ 10136-10142, quoted *ante*, § 1411, the judge's discretion controls).

1914, *Holt v. Guergin*, — Tex. —, 163 S. W. 10 (left to the trial Court's discretion; the opinion shows an imperfect apprehension of the subject).

### § 1416. Rule not applicable to Deposition of Party-Opponent.

[*Note 1; add:*]

1874, *Hatch v. Brown*, 63 Me. 410, 419.

1911, *Merrill v. Leisenring*, 166 Mich. 219, 131 N. W. 538 (opponent's former testimony used, although he was at the later trial disqualified).

1907, *Southern Bank v. Nichols*, 202 Mo. 309, 100 S. W. 613.

1887, *Meier v. Paulus*, 70 Wis. 165, 35 N. W. 301. 1904, *Hughes v. Chicago, St. P. M. &*

[Note 1 — *continued*]

O. R. Co., 122 Wis. 258, 99 N. W. 897 (rule for parties not applicable to employees of a corporation). 1905, *Johnson v. St. Paul & W. C. Co.*, 126 Wis. 492, 105 N. W. 1048 (rule applied to an officer of a corporation, distinguishing *Hughes v. R. Co.*, *supra*). 1906, *Clark Co. v. Rice*, 127 Wis. 451, 106 N. W. 231 (similar). 1906, *Anderson v. Chicago Brass Co.*, 127 Wis. 273, 106 N. W. 1077 (like *Hughes v. R. Co.*, *supra*).

Wis. St. 1913, c. 246, p. 259 (amending Stats. § 4096, so as to make it plain that the answers on examination of an adverse party or "any of the persons mentioned" may be received in evidence from the taker "notwithstanding the person who was so examined may be present at the trial or proceeding").

But an oral answer which has been *stricken out* of the written deposition before signing cannot be used at all: 1904, *Young v. Valentine*, 177 N. Y. 347, 69 N. E. 643.

[Note 7; *add*.:]

1911, *Carpenter v. Ashley*, 15 Cal. App. 461, 115 Pac. 268 (malicious prosecution by indictment for perjury in a suit of M. v. R.; E.'s testimony in the suit of M. v. R. admitted as bearing on probable cause for the indictment).

[Note 8; *add* a new paragraph:]

For a similar question arising in suits by a *surety* or *joint-tortfeasor* against *principal* or *co-tortfeasor* for *contribution* to a claim sued for and paid, see *ante*, § 1387, n. 5.

### § 1417. Exceptions to the Rule, for Chancery Proceedings, etc.

[Note 3; *add*.:]

So in *patent* proceedings: 1910, *Dover v. Greenwood*, C. C. R. I., 177 Fed. 946 (bill in equity over a patent; testimony taken in interference proceedings in patent office held inadmissible under Rev. St. § 4915, without accounting for the witness in the usual way).

So, too, in equity, under Equity Rules 46-48 of 1912; here "good and exceptional cause for departing from the general rule" is to be shown.

[Text, par. (2); at the end, *add* a new note 7a:]

<sup>7a</sup> It seems to be, however, in *Colorado*: 1906, *Stone v. Victor E. Co.*, 36 Colo. 370, 85 Pac. 327 (for a deposition taken out of the State).

[Note 11 · *add*.:]

1903, *Arrowsmith's Estate*, 206 Ill. 352, 69 N. E. 77.

1907, *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540.

1905, *Beggans' Will*, 68 N. J. Eq. 572, 59 Atl. 874.

Compare *post*, § 1658, par. 5, and n. 4.

[Note 12; *add*.:]

1905, *McLaughlin v. Joy*, 100 Me. 517, 62 Atl. 348 (here merely to show compliance with the statute as to complaints).

### § 1418. Anomalous Jurisdictions, etc.

[Note 1; *add*.:]

1906, *R. v. Snelgrove*, 39 N. Sc. 400 (prosecutrix, examination before the magistrate; the prosecutrix being now deceased, her examination was held inadmissible under Cr. Code 1892, § 687, the case of death being not therein provided for, and the Code provision being meant as exhaustive; unsound).

Compare here also some of the varying local rules as to proving testimony by a *stenographic report* (*post*, § 1669).

**§ 1430. Dying Declarations; History.**[Note 1, l. 1; *add.*:]

The custom of using dying declarations probably comes down as a tradition long before the evidence-system arises in the 1500s; 12th Cent., London Custumal: "[When the sheriff holds inquest over a man killed], if the neighborhood names any one or suspects any one, or if the dead man himself has accused any one before he died, the sheriff ought to attach him who is accused, if he can find him" (Bateson's Borough Customs, I, 13; Selden Soc. vol. XVIII, 1904).

**§ 1432. Rule applicable in Certain Criminal Cases only.**[Note 1, par. 1, *add.*:]

*Contra*: 1914, *Thurston v. Fritz*, 91 Kan. 468, 138 Pac. 625 (cited *post*, § 1436).

[Note 2; *add.*:]

1905, *People v. Stison*, 140 Mich. 216, 103 N. W. 542 (incest, followed by death at childbirth; deceased's declarations excluded).

1911, *Haley v. State*, — Tex. Cr. —, 138 S. W. 631 (rape).

[Note 3, par. 1; *add.*, under *Accord.*:]

1908, *State v. Fuller*, 52 Or. 42, 96 Pac. 456.

[Note 3, par. 1; *add.*, under *Contra*.:]

1906, *State v. Fleetwood*, 6 Penna. Del. 153, 65 Atl. 772.

In l. 6 from the end, for "id.," read "N. J. L."

[Note 4; *add.*:]

*Mo. St.* 1907, p. 245, Mar. 6 (amending *Rev. St.* 1899, c. 16, Art. 7, by adding § 2635a; in prosecutions for abortion, etc., the woman's dying declarations are admissible, provided she was "of sound mind when such declarations were made"; but "no conviction shall be based alone upon such declarations unless corroborated as to the fact that an abortion or miscarriage has taken place," and the privilege for communications to the attending physician shall not apply to his testimony).

*N. Y. St.* 1909, c. 66, § 1, p. 85 (re-enacting *St.* 1875, c. 352, § 1, as *C. Cr. P.*, § 398a).

*Ok. St.* 1910, p. 210, May 13 (on a trial for violation of *Gen. Code* § 12412, the woman's dying declaration "as to the cause and circumstances of such miscarriage or attempt," to be admissible; enacting a new § 12412-1).

**§ 1433. Death in Question must be Declarant's.**[Note 1; *add.*, under *Excluded*.:]

1904, *Taylor v. State*, 120 Ga. 857, 48 S. E. 361 (like *State v. Bohan*, Kan., quoted *supra*).

1875, *State v. Bohan*, 15 Kan. 418 (quoted *supra*).

**§ 1434. Circumstances of Death Related.**[Note 1; *add.*:]

1913, *Lucas v. Com.*, 153 Ky. 424, 155 S. W. 721 (declaration as to certain prior occurrences, excluded; the precision with which the admissible and inadmissible portions of the declaration are nicely dissected in this opinion shows the utterly unreasonable nature of this limitation).

1912, *State v. Albanes*, 109 Me. 199, 83 Atl. 548 (declarations as to threats of defendant reported to deceased on the day of the killing, admitted).

[*Note 1 — continued*]

1910, *People v. Alexander*, 161 Mich. 645, 126 N. W. 837 (statement as to prior trouble between the parties, excluded).

1909, *State v. Kelleher*, 224 Mo. 145, 123 S. W. 551 (declarations as to prior occurrences, excluded; unsound on the facts).

1911, *State v. Crean*, 43 Mont. 47, 114 Pac. 603.

1908, *State v. Doris*, 51 Or. 136, 94 Pac. 44 ("I never had any trouble with him before," excluded). 1908, *State v. Fuller*, 52 Or. 42, 96 Pac. 456 (abortion; admissible for facts "tending to establish every essential element of the crime"; here, for declarant's condition of health on the day when defendant operated).

1905, *Com. v. Spohr*, 211 Pa. 542, 60 Atl. 1084 (declarations stating the defendant's conversation just before shooting, in which he referred to his prior threats and arrest, admitted).

1911, *Still v. State*, 125 Tenn. 80, 140 S. W. 298 (threat relating to a past occurrence, excluded). 1912, *Patterson v. Com.*, 114 Va. 807, 75 S. E. 737 (declarations as to prior conduct, excluded).

#### § 1435. Further Limitations rejected.

[*Note 1; add:*]

1905, *Lyles v. State*, 48 Tex. Cr. 119, 86 S. W. 763.

#### § 1436. Foregoing Limitations Improper.

[*Note 1; add:*]

In one jurisdiction the irrationality of these limitations has now been frankly recognized: 1914, *Thurston v. Fritz*, 91 Kan. 468, 138 Pac. 625 (action by an executor to recover the residue of a purchase price due to his testator; the sum paid was in dispute; the deceased had made a statement, when on the point of death, purporting to give "the truth about the sale of my farm to Mr. Fritz and Mr. Beal"; held admissible, *Benson, J., diss.*; liberal and rational opinion by *West, J.*; "we are confronted with a restrictive rule of evidence commendable only for its age"; the restrictions positively repudiated seem to be the restriction (1) to criminal cases, (2) to homicide issues, (3) to the details of a specific transaction).

Upon the policy of enlarging or retaining the present arbitrary limitations of the Exception, see the following interesting discussion:

Mr. Wilbur Larremore, in *American Law Review*, XLI, 660 (Sept.-Oct., 1907); Mr. Wm. A. Purrington, in *Bench and Bar*, XI, 91 (Dec., 1907); Mr. Larremore again, in *Bench and Bar*, XII, 39 (Jan., 1908).

#### § 1438. Solemnity of the Situation.

[*Note 2; add:*]

1905, *People v. Thomson*, 145 Cal. 717, 79 Pac. 435.

1905, *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018.

1904, *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042.

1911, *People v. Falletto*, 202 N. Y. 494, 96 N. E. 355.

#### § 1439. Consciousness of the Approach of Death.

[*Note 4; add, under Accord:*]

1904, *Sims v. State*, 139 Ala. 74, 36 So. 138.

1910, *State v. Peacock*, 58 Wash. 41, 107 Pac. 1022 (but requiring great certainty in the declarant's reference to the prior statement).

§ 1440. **Certainty of Death.**

[Note 1; add:]

1909, *Perry's Case*, 2 Cr. App. 267, 2 K. B. 697 ("a settled, hopeless expectation of death").

[Note 2, col. 1; add:]

1904, *Gregory v. State*, 140 Ala. 16, 37 So. 259.1904, *Brown v. Com.*, — Ky. —, 83 S. W. 645.1912, *Biggs v. Com.*, 150 Ky. 675, 150 S. W. 803 ("he had a little hope"; excluded).1904, *State v. Harris*, 112 La. 937, 36 So. 810 ("Bill Harris is my friend, and I don't want nothing done to him"; excluded). 1904, *State v. Gianfala*, 113 La. 463, 37 So. 30.1912, *Fannie v. State*, 101 Miss. 378, 58 So. 2 ("make haste and get the doctor, I am going to die"; excluded).1905, *Craven v. State*, 49 Tex. Cr. 78, 90 S. W. 311.

[Note 2, col. 2, l. 6 from the end; omit the word "no," and add:]

1904, *Pitts v. State*, 140 Ala. 70, 37 So. 101.1904, *State v. Bordelon*, 113 La. 690, 37 So. 603.1904, *Hawkins v. State*, 98 Md. 355, 57 Atl. 27.§ 1441. **Speediness of Death.**

[Note 1; add:]

1905, *Brom v. People*, 216 Ill. 418, 74 N. E. 790 (statement excluded on the facts).1911, *People v. Cassesse*, 251 Ill. 422, 96 N. E. 274 (excluded on the facts).§ 1442. **Consciousness of Approaching Death, how Determined.**[Note 1, par. 1; add, under *Accord*.:]1913, *State v. Van Winkle*, — Del. —, 86 Atl. 310.1905, *Gipe v. State*, 165 Ind. 433, 75 N. E. 881.1907, *Williams v. State*, 168 Ind. 87, 79 N. E. 1079.1907, *Kennedy v. Com.*, 30 Ky. L. 1063, 100 S. W. 242.1911, *State v. Crean*, 43 Mont. 47, 114 Pac. 603.1905, *State v. Roberts*, 28 Nev. 350, 82 Pac. 100.1910, *Terr. v. Eagle*, 15 N. M. 609, 110 Pac. 862.1903, *State v. Gray*, 43 Or. 446, 74 Pac. 927.

[Note 2; add:]

1904, *State v. Knoll*, 69 Kan. 767, 77 Pac. 580 (the deceased was assaulted on Feb. 19, died on Mar. 23, and declared on Mar. 7 "any hour, any day, he might die, and he had to die of the whipping of John K."; a priest administered the last rites; his declaration was excluded; "there is nothing indicating that he considered death imminent"; a brilliant *tour de force* in judicial reasoning).

[Note 3; add:]

1910, *R. v. Walker*, 15 Br. C. 100.1907, *R. v. Sunfield*, 15 Ont. L. R. 252.1907, *McEwen v. State*, 152 Ala. 38, 44 So. 619. 1909, *Parker v. State*, 165 Ala. 1, 51 So. 260.1907, *Fogg v. State*, 81 Ark. 417, 99 S. W. 537.1905, *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018. 1909, *Copeland v. State*, 58 Fla. 26, 50 So. 621. 1913, *Bennett v. State*, 66 Fla. 369, 63 So. 842.1905, *Anderson v. State*, 122 Ga. 161, 50 S. E. 46. 1911, *Glover v. State*, 137 Ga. 82, 72 S. E. 926.

[*Note 3 — continued*]

1908, *Board v. Provident H. & T. S. Ass'n*, 233 Ill. 216, 84 N. E. 218.  
 1905, *State v. Bonar*, 71 Kan. 800, 81 Pac. 450, 484.  
 1904, *Martin v. Com.*, — Ky. —, 78 S. W. 1104. 1907, *Com. v. Hargis*, 124 Ky. 356, 99 S. W. 348. 1910, *Tibbs v. Com.*, 138 Ky. 558, 128 S. W. 871. 1913, *Daniel v. Com.*, 154 Ky. 601, 157 S. W. 1127.  
 1904, *State v. Bordelon*, 113 La. 690, 37 So. 603. 1905, *State v. Daniels*, 115 La. 59, 38 So. 895.  
 1904, *Hawkins v. State*, 98 Md. 355, 57 Atl. 27.  
 1905, *Ashley v. State*, — Miss. —, 37 So. 960. 1905, *Pryor v. State*, — Miss. —, 39 So. 1012.  
 1905, *State v. Brown*, 188 Mo. 451, 87 S. W. 519. 1905, *State v. Craig*, 190 id. 332, 88 S. W. 641. 1907, *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470. 1910, *State v. Colvin*, 226 Mo. 446, 126 S. W. 448.  
 1910, *State v. Byrd*, 41 Mont. 585, 111 Pac. 407.  
 1908, *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690.  
 1905, *State v. Teachey*, 138 N. C. 587, 50 S. E. 232. 1912, *State v. Watkins*, 159 N. C. 480, 75 S. E. 22.  
 1909, *Bilton v. Terr.*, 1 Okl. Cr. 566, 99 Pac. 163. 1910, *Hawkins v. U. S.*, 3 Okl. Cr. 651, 108 Pac. 561.  
 1904, *State v. Gray*, 43 Or. 446, 74 Pac. 927.  
 1908, *State v. McCoomer*, 79 S. C. 63, 60 S. D. 237. 1908, *State v. Gallman*, 79 S. C. 229, 60 S. E. 682. 1908, *State v. Franklin*, 80 S. C. 332, 60 S. E. 953.  
 1910, *State v. Swenson*, 26 S. D. 589, 129 N. W. 119.  
 1912, *Patterson v. Com.*, 114 Va. 807, 75 S. E. 737.

[*Note 3; add at the end :*]

1904, *Sims v. State*, 139 Ala. 74, 36 So. 138.  
 1907, *Williams v. State*, 168 Ind. 87, 79 N. E. 1079.  
 1906, *State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016 (the only question on review is whether there was any evidence to support the finding of admissibility).

#### § 1443. *Revengeful Feelings, etc.*

[*Text*, after the quotation from *Tracy v. People*; *add a new note 1a :*]

<sup>1a</sup> 1914, *Reeves v. State*, — Miss. —, 64 So. 836.

#### § 1445. *Testimonial Qualifications, etc.*

[*Note 1; add :*]

Distinguish *R. v. Pike*, 3 C. & P. 598 (cited *ante*, § 1443, n. 1).

#### § 1445. *Testimonial Qualifications, etc.*

[*Note 6; add :*]

*Accord*: 1906, *Park v. State*, 126 Ga. 575, 55 S. E. 489.

1908, *State v. Clark*, 64 W. Va. 625, 63 S. E. 402.

*Contra*: 1908, *Lockhart v. State*, 53 Tex. Cr. 589, 111 S. W. 1024.

[*Note 7; add :*]

The following case belongs here :

1912, *State v. Law*, 150 Wis. 313, 136 N. W. 803, 137 N. W. 457 (statement made after the physician had refused to treat the deceased until she told what had happened to her, admitted).

[*Note 8, par. 1; add.:*]

1911, *People v. Madas*, 201 N. Y. 349, 94 N. E. 857 (deceased had a tube in his windpipe and could not articulate; answers by nods, admitted).

[*Note 9; add.:*]

1913, *Updike v. State*, 9 Okl. Cr. 124, 130 Pac. 1107.

[*Note 11; add.:*]

1910, *State v. Byrd*, 41 Mont. 585, 111 Pac. 407 (statement taken down by a hearer, and signed by the declarant, though not read over, admitted as the witness' report of it).

#### § 1446. Testimonial Impeachment, etc.

[*Note 1, par. 2; add.:*]

1904, *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042 (declarant's character impeached by intemperate habits).

[*Note 2; add.:*]

1904, *Nordgen v. People*, 211 Ill. 425, 71 N. E. 1042 (wife-murder; deceased declarant's malice and revengefulness to the accused, admitted).

1907, *State v. Zorn*, 202 Mo. 12, 100 S. W. 591 (whether the deceased's religious infidelity could be shown, not decided; that he did not want a minister to pray for him, held immaterial).

*Contra:* 1910, *State v. Yee Gueng*, 57 Or. 509, 112 Pac. 424 (that the deceased did not believe in future rewards and punishments, excluded).

[*Note 5; correct.:*]

For "N. C.," in l. 3, read "Cal.;" for "id.," in l. 4, read "N. C."

#### § 1447. Rule against Opinion Evidence.

[*Note 1; add.:*]

1908, *Baker v. State*, 85 Ark. 300, 107 S. W. 983. 1912, *Rhea v. State*, 104 Ark. 162, 147 S. W. 463 (as to who shot him; admitted on the facts).

1908, *Gardner v. State*, 55 Fla. 25, 45 So. 1028 ("She shot me a purpose," excluded).

1913, *State v. Klute*, — Ia. —, 140 N. W. 864 ("He just deliberately shot me," etc., admitted).

1905, *Walton v. State*, 87 Miss. 296, 39 So. 689 (why the defendant shot the deceased; excluded).

1911, *State v. Crean*, 43 Mont. 57, 114 Pac. 603 (that the defendant shot without provocation, etc., allowed).

1912, *State v. Watkins*, 159 N. C. 480, 75 S. E. 22 ("I have done nothing to be shot for," admitted).

1910, *Blair v. State*, 4 Okl. Cr. 359, 111 Pac. 1003 (not decided).

1905, *Wilson v. State*, 49 Tex. Cr. 50, 90 S. W. 312 ("They killed me for nothing," admitted; prior rulings cited).

1908, *Lockhart v. State*, 53 Tex. Cr. 589, 111 S. W. 1024 ("He killed me for nothing," admitted, by a majority; Davidson, P. J., diss.).

1912, *Hollywood v. State*, 19 Wyo. 493, 120 Pac. 471 ("Jack was not to blame; it was all my fault," excluded).

Are not these exclusion-rulings equal to any of the medieval witch-formulas and conjurers' spells, as a means of getting at the truth?

§ 1448. Rule of Completeness.

[Note 1, par. 1; *add.*:]

1906, *Park v. State*, 126 Ga. 575, 55 S. E. 489.

1906, *Cooper v. State*, 89 Miss. 351, 42 So. 666 (declaration reported in part only, excluded).

[Note 1, par. 2; *add.*:]

1910, *Beaty v. Com.*, 140 Ky. 230, 130 S. W. 1107.

[Note 1, par. 3; *add.*:]

The following belongs here: 1904, *Boyd v. State*, 84 Miss. 414, 36 So. 525 (wife-murder by poison; her statement to the doctor "I have taken nothing except what you gave me," admitted; but the question by the doctor "I told her her husband was under suspicion, and it was her duty to tell me if she had taken anything herself," excluded; this seems unsound, because the answer was an implied adoption of the question, and the only doubt could be whether she was qualified to accuse the husband).

§ 1449. Rule of Producing Original of a Document.

[Text, p. 1816, l. 1, at end; *add* a new note 1a:]

<sup>1a</sup> 1908, *Gardner v. State*, 55 Fla. 25, 45 So. 1028 (justice of the peace's copy of his original, held improperly used).

§ 1450. Rule of Preferring Written Testimony.

[Note 1, under *Accord*; *add.*:]

1910, *Mixon v. State*, 7 Ga. App. 805, 68 S. E. 315 (bystander's written report, not preferred).

[Note 2; under *Accord*, *add.*:]

1907, *Mitchell v. State*, 82 Ark. 324, 101 S. W. 763.

1906, *Brennan v. People*, 37 Colo. 256, 86 Pac. 79.

[Note 3; *add.*:]

1904, *Sims v. State*, 139 Ala. 74, 36 So. 138 (the writing not preferred, if not signed; repudiating the contrary intimation in *Boulden v. State*, *infra*, n. 4).

1894, *State v. Reed*, 53 Kan. 767, 37 Pac. 174.

*Not decided*: 1906, *Willoughby v. Terr.*, 16 Okl. 577, 86 Pac. 56.

That the writing may also be used, under the ordinary rules, to refresh *the witness' memory*, see *ante*, §§ 759 ff.

[Note 4; *add.*:]

1906, *Phillips v. State*, 50 Tex. Cr. 127, 94 S. W. 1051, *semble* (writing assented to; the opinion is faultily inconsistent).

1908, *State v. Clark*, 64 W. Va. 625, 63 S. E. 402.

[Note 5; *add.*:]

1907, *Cleveland v. Com.*, — Ky. —, 101 S. W. 93 (like *Hendrickson v. Com.*).

1904, *State v. Gianfala*, 113 La. 463, 37 So. 30.

1911, *Morris v. State*, 6 Okl. Cr. 29, 115 Pac. 1030.

1913, *Addington v. State*, 8 Okl. Cr. 703, 130 Pac. 311 (both are admissible).

1910, *Hunter v. State*, 59 Tex. Cr. App. 439, 129 S. W. 125 (cases reviewed).

1910, *State v. Vance*, 38 Utah 1, 110 Pac. 434 (an oral statement, made after the written one, also received).

## § 1451. Judge and Jury.

[Note 1, par. 1; *add*.:]

1904, *R. v. Aho*, 11 Br. C. 114 (but it is not incumbent on the judge to exclude the jury "during the inquiry as to admissibility").

1914, *People v. Hotz*, 261 Ill. 239, 103 N. E. 1007.

1907, *Williams v. State*, 168 Ind. 87, 79 N. E. 1079.

1906, *Coyle v. Com.*, 122 Ky. 781, 93 S. W. 584 (the judge alone passes on admissibility; good opinion, by Nunn, J.).

1907, *State v. Zorn*, 202 Mo. 12, 100 S. W. 591 ("the jury have absolutely nothing to do with their admissibility"). 1908, *State v. Crone*, 209 Mo. 316, 108 S. W. 555 (*State v. Zorn* approved).

1906, *State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016 ("In our opinion the question admits of but one answer; . . . [the condition of admissibility] is not reviewable by the jury"; prior cases considered; lucid opinion by Pitney, J.).

[Note 1; *add* as a new paragraph:]

For the *trial judge's discretion*, see *ante* § 1442, n. 3, at the end.

The statement that the judge must be satisfied, as to admissibility, "beyond a reasonable doubt," is sometimes made: 1911, *People v. White*, 251 Ill. 67, 95 N. E. 1036. But this is thoroughly unsound.

[Note 2; *add*.:]

1907, *Fogg v. State*, 81 Ark. 417, 99 S. W. 537.

1911, *People v. White*, 251 Ill. 67, 95 N. E. 1036.

1914, *Com. v. Johnson*, 158 Ky. 579, 165 S. W. 984.

1907, *State v. Zorn*, 202 Mo. 12, 100 S. W. 591.

1907, *State v. Barnes*, 75 N. J. L. 426, 68 Atl. 145 (compare this with *State v. Biango*, *infra*, n. 3, handed down a week earlier; such inconsistency points to one-man opinions in this Court). 1910, *State v. Leo*, 80 N. J. L. 21, 77 Atl. 523 (judge passes upon admissibility).

[Note 3; *add*.:]

1905, *People v. Thomson*, 145 Cal. 717, 79 Pac. 435.

1906, *Findley v. State*, 125 Ga. 579, 54 S. E. 106.

1908, *Jones v. State*, 130 Ga. 274, 60 S. E. 840.

1907, *State v. Biango*, 75 N. J. L. 284, 68 Atl. 125, *semble*.

1908, *State v. Doris*, 51 Or. 136, 94 Pac. 44.

A careful discussion of principle and precedents will be found in Professor V. H. Lane's article in 1 *Michigan Law Review* 624 (1903), "The Right of the Jury to review the Decision of the Court upon the Admissibility of Dying Declarations."

## § 1452. Declarations usable by Either Party.

[Note 1; *add*, under *Accord*.:]

1907, *Green v. State*, 89 Miss. 331, 42 So. 797.

1914, *People v. Hotz*, 261 Ill. 239, 103 N. E. 1007.

## § 1456. Statements against Interest; Death, Absence, etc.

[Note 4; *add*, under *Contra*.:]

1910, *Moffit v. Canadian Pacific R. Co.*, 2 Alta. 483 (letter from a mother in Ontario acknowledging receipt of money, excluded; point not raised).

[*Note 6, par. 1; add, under Accord:*]

- 1906, *Matko v. Daley*, 10 Ariz. 175, 85 Pac. 21.  
 1906, *Walnut Ridge M. Co. v. Cohn*, 79 Ark. 338, 96 S. W. 413 (on rehearing, reversing the original ruling, which was based on Greenleaf's statement quoted *infra*).  
 1905, *British Amer. Ins. Co. v. Wilson*, 77 Com. 559, 60 Atl. 293.  
 1904, *Beebe v. Redward*, 35 Wash. 615, 77 Pac. 1052.

**§ 1458. Statements predicated a Limited Interest in Property.**

[*Note 1; add:*]

- 1907, *Tompkins v. Fonda G. L. Co.*, 188 N. Y. 261, 80 N. E. 933 (declarations of a director of a corporation, admitting knowledge of the plaintiff's title to goods bought, received).  
 1912, *People v. Storrs*, 207 N. Y. 147, 100 N. E. 730 (forgery by a wife of a marriage settlement dated Aug. 21, 1909, by the husband reciting the gift to her of an automobile; the deceased husband's declarations that he had given the automobile to her, held admissible).  
 1906, *Smith v. Moore*, 142 N. C. 277, 55 S. E. 275 (deceased life-tenant's declaration, while in possession, that "she had made a deed to Mr. M. for the lot," admitted).  
 1913, *In re Thompson*, U. S. D. C. N. J., 205 Fed. 556 (bankrupt's statements, in possession of a dredge, that he was not owner of it, admitted).

**§ 1460. Statements predicated a Fact against Pecuniary Interest.**

[*Note 1; add:*]

- 1905, *Massee-Felton L. Co. v. Sirmans*, 122 Ga. 297, 50 S. E. 92 (sheriff's entry; cited *post*, § 1464).  
 1909, *Kaleikini v. Waterhouse*, 19 Haw. 359 (entries in an account book, "memorandum of my debts," etc., admitted).  
 1911, *Johnson v. Schoch*, 85 Kan. 837, 118 Pac. 696 (by the holder of notes, that the notes were paid, admitted).

**§ 1461. Statements of Sundry Facts against Interest.**

[*Note 1; add:*]

- 1903, *Rulofson v. Billings*, 140 Cal. 452, 74 Pac. 35 (action on a contract by defendant's testator to adopt and support the plaintiff as a son; the testator's declarations that he was the plaintiff's guardian, not admitted for the defendant; the reason for the ruling is questionable, because as guardian the testator was under liability to account, but not merely as adoptive father).  
 1908, *Chandler v. Mutual L. & I. Ass'n*, 131 Ga. 82, 61 S. E. 1036 (statement that the declarant had not made or authorized any application for insurance, held to be of a fact against interest).  
 1913, *Murdock v. Adamson*, 12 Ga. App. 275, 77 S. E. 181 (father's action for son's death; son's statements of his own negligence, received).  
 1909, *Wheeler v. Oregon R. & N. Co.*, 16 Ida. 375, 102 Pac. 347 (child killed and grandmother injured; in the action for the child's death, the grandmother's statement that it was her fault was excluded; but here she was not deceased).  
 1906, *Drefahl v. Security Sav. Bank*, 132 Ia. 563, 107 N. W. 179 (contract by intestate to transfer funds to R., the intestate's statements that "R. was after her money, and she did not want him to have it," not admitted as statements against interest).  
 1904, *Smith v. International & G. N. R. Co.*, 34 Tex. Civ. App. 209, 78 S. W. 556 (by the deceased, injured on a railroad track, that he was asleep when struck, admitted).  
 1908, *Smith v. Hanson*, 34 Utah 171, 96 Pac. 1087 (action for attorney's services to deceased; the latter's statement that he was "not going to sue," etc., held not to involve any fact of pecuniary or proprietary interest).

**§ 1463. Facts may or may not be against Interest, etc.**

[Note 2; add:]

1912, *Cryer v. McGuire*, 148 Ky. 100, 146 S. W. 402 (adverse possession of E. C.; statements by E. B. C. held not of facts against interest, under the circumstances).

**§ 1464. No Motive to Misrepresent, etc.**

[Note 2; add:]

1905, *Massee-Felton L. Co. v. Sirmans*, 122 Ga. 297, 50 S. E. 92 (sheriff's entry of a sale of land under a *fi. fa.*, admitted to prove the fact of an execution and levy, though it also recited his discharge from liability by payment).

**§ 1465. Statement admissible for All Facts Contained in it.**

[Note 2; add:]

1905, *Turner v. Turner*, 123 Ga. 5, 50 S. E. 969 (statement admitting a debt, received also to show the facts of a conveyance, etc., stated at the same time).

1906, *Knapp v. St. Louis T. Co.*, 199 Mo. 640, 98 S. W. 70 (testamentary insanity; an entry in a deceased physician's book of accounts "By Cash paid, \$2.," held to admit the preceding entry of the disease for which the visit was made).

1906, *Smith v. Moore*, 142 N. C. 277, 55 S. E. 275 (obscure).

**§ 1466. Against Interest at the Time of the Statement.**

[Note 3, par. 1; add:]

1881, *Bailey v. Danforth*, 53 Vt. 504 (in spite of the statute, providing that an indorsement, etc., shall not be "sufficient proof," an indorsement of payment by the payee, whether made before or after the statute has run, is admissible; the opinion cites no precedents, and does not fairly consider the inadmissibility of an indorsement made after statute run).

1903, *McDowell v. McDowell's Estate*, 75 Vt. 401, 56 Atl. 98 (*Bailey v. Danforth* approved and followed).

**§ 1476. Statements of Facts against Penal Interest.**

[Note 9; add:]

1914, *Tillman v. State*, — Ark. —, 166 S. W. 582 (murder; rule affirmed).

1906, *Perdue v. State*, 126 Ga. 112, 54 S. E. 820 (here offered to impeach the witness).

1860, *Reilley v. State*, 14 Ind. 217 (receiving stolen goods; the thief's confession, not admitted to show the theft; "it would seem to be the dictate of natural reason, but the authorities are otherwise").

1905, *Miller v. State*, 165 Ind. 566, 76 N. E. 245 (*Reilley v. State* approved).

1911, *State v. Jones*, 127 La. 694, 53 So. 959 (arson; written and oral admissions by E. W., that he had done the burning, excluded; E. W. was not accounted for).

1855, *Com. v. Elisha*, 3 Gray 460 (record of conviction of the stealer, on his plea of guilty, not receivable against the receiver of stolen goods, with certain limitations).

1904, *People v. Hutchings*, 137 Mich. 527, 100 N. W. 753 (testimony of an accomplice in the police court, the accomplice claiming privilege on the trial, excluded).

1904, *Mays v. State*, 72 Nebr. 723, 101 N. W. 979 (written confession of a fugitive from justice, excluded; no authority cited).

1913, *Davis v. State*, 8 Okl. Cr. 515, 128 Pac. 1097 (confession of two persons, not accounted for, that they were the thieves, excluded: "it would be impossible to convict any thief [if such evidence were admissible] because he could always find witnesses who would testify that they had heard some one who was absent confess to being guilty of the crime").

[*Note 9 — continued*]

1912, *Fonville v. Atlanta & C. A. L. R. Co.*, 93 S. C. 287, 75 S. E. 172 (action for death caused by derailment; to disprove negligence defendant offered the confession of A. that he had thrown the switch and caused the wreck; A. had been convicted of murder on this charge, was serving a life sentence, and was disqualified thereby to testify; excluded; Woods, J., diss.; the decision illustrates in an extreme way the absurdity of the exclusionary rule; the majority opinion unsuccessfully attempts to distinguish *Coleman v. Frazier*, *infra*, n. 10).

1913, *Donnelly v. U. S.*, 228 U. S. 243, 33 Sup. 449 (murder; confession by J. D., since deceased, that he was the one who had killed the victim, excluded; Holmes, Lurton, and Hughes, JJ., diss.; the dissenting opinion, by Holmes, J., concisely expresses the whole doctrine).

**§ 1481. Declarations about Family History; Death, etc., of Declarant.**

[*Note 2; add:*]

1910, *Makekau v. Kane*, 20 Haw. 203 (family repute heard from a grandfather and a grandmother, the former being shown deceased; admitted, without showing the latter's decease).

[*Note 3; add:*]

1912, *Jarchow v. Grosse*, 257 Ill. 36, 100 N. E. 290 (where the declarant is deceased, the matter need not be an ancient one, and other members of the family may still be living).

[*Note 4; add:*]

1904, *State v. Trusty*, 122 Ia. 82, 97 N. W. 989.

1905, *State v. Miller*, 71 Kan. 200, 80 Pac. 51 (age of a child; copy of a Russian parish record, made by the priest at the father's instance and brought over with the family, excluded, on the ground that the father was still living).

1912, *Bigliben v. State*, — Tex. Cr. —, 151 S. W. 1044 (family-Bible entry, made by the father, still living; excluded).

*Contra*: 1914, *State v. Goddard*, — Or. —, 138 Pac. 243 (holding exceptionally that the death of the entrant in a family Bible need not be proved, because L. O. L. § 727, subsect. 13, makes such entries admissible unqualifiedly).

[*Note 5; add:*]

1909, *State v. McDonald*, 55 Or. 419, 104 Pac. 967 (declarant residing without the State; admitted).

**§ 1483. Declarations, etc., before Controversy.**

[*Note 2; add:*]

1911, *Rollins v. Wicker*, 154 N. C. 559, 70 S. E. 934 (deceased declarant's testimony at a former trial of similar issue, held inadmissible as *post litem motam*).

1903, *Davis v. Moyles*, 76 Vt. 25, 56 Atl. 174 (recitals in a petition concerning confiscated lands, excluded).

[*Note 5; add:*]

1906, *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 98 S. W. 665.

**§ 1486. Sufficiency of the Declarant's Means of Knowledge, etc.**

[*Note 1, par. 2, l. 6; add:*]

1906, *Scott v. Herrell*, 27 D. C. App. 395, 400 (attorney's testimony excluded; following *Blackburn v. Crawfords*, U. S. *post*, § 1491).

[*Note 1 — continued*]

1904, *Grand Lodge v. Bartes*, 69 Nebr. 631, 98 N. W. 715 (same case as in 96 N. W., *supra*; the witness appearing, on the whole of the record, to have lived 20 years with her husband, during which period his parents lived in the family, and thus to have become "acquainted with family history, and tradition" independently of the priest's statement, her testimony was held admissible; "the date of a person's birth may be testified to by members of his family, although he may know of the fact only by hearsay founded on family tradition").

#### § 1487. Declarations of Non-Relatives.

[*Note 1; add:*]

1909, *State v. McDonald*, 55 Or. 419, 104 Pac. 967 (neighbor speaking only from repute; excluded).

1911, *Osborne v. Ramsay*, C. C. A., 191 Fed. 114 (repute or statements from persons not family members nor related; not decided).

#### § 1489. Declarations of Relatives, etc.

[*Note 3; add, under Accord:*]

1905, *State v. Hazlett*, 14 N. D. 490, 105 N. W. 617 (mother's father's family Bible admitted).

#### § 1490. Declarant's Qualifications must be Shown.

[*Note 1, col. 1, l. 9; add:*]

1905, *Lanier v. Hebard*, 123 Ga. 626, 51 S. E. 632.

1906, *Hoyt v. Lightbody*, 98 Minn. 189, 108 N. W. 818, 843.

1904, *Grand Lodge v. Bartes*, 69 Nebr. 631, 98 N. W. 715; and cases cited *ante*, § 1486, n. 1.

1906, *Bernards Tp. v. Bedminster Tp.*, 74 N. J. L. 92, 64 Atl. 960.

1903, *Davis v. Moyles*, 76 Vt. 25, 56 Atl. 174.

Nor need the *witness on the stand*, of course, have *personal knowledge* of the fact, provided he knows the family repute: Cases cited *supra*, and *ante*, § 1486, n. 1.

[*Note 1, at the end; add:*]

1909, *State v. McDonald*, 55 Or. 419, 104 Pac. 967.

1913, *McLain v. Allen*, — S. C. —, 79 S. E. 1.

#### § 1491. Relationship always Mutual, etc.

[*Note 2, par. 1; add:*]

1906, *Scheidegger v. Terrell*, 149 Ala. 338, 43 So. 26, *semble*.

But of course the deceased declarant's statements about *his own* age, birth, etc., are admissible under the present rule: 1905, *Travelers' Ins. Co. v. Henderson C. Mills*, 120 Ky. 218, 85 S. W. 1090; 1907, *Taylor v. Grand Lodge*, 101 Minn. 72, 111 N. W. 919; this is assumed in the English cases settling the rule.

[*Note 3; add:*]

1903, *Rulofson v. Billings*, 140 Cal. 452, 74 Pac. 35 (action on a contract by defendant's testator to adopt and support plaintiff; the testator's declarations that he was only the guardian of the plaintiff, excluded on the present principle; of course this is erroneous; it is a pity that the negative form of such statements seems to puzzle and mislead the minds of so many judges. If we have regard to the general principles of the Exception, and imagine a man having a boy in his family and about to speak of his relationship with the boy, it is obvious that his utterances will be neither more nor less credible whether on speaking he

[Note 3 — continued]

happens to say “He *is*” or “He *is not* my son”; *i. e.*, it is the *subject* of sonship that makes it a pedigree utterance, not the negative or affirmative tenor of the assertion).

1912, *Jarchow v. Grosse*, 257 Ill. 36, 100 N. E. 290 (“where the claimant is seeking to reach the estate of the declarant himself, . . . such declarations are admissible”; thus accepting the unsound distinction).

1912, *Vantine v. Butler*, 240 Mo. 521, 144 S. W. 807 (John B. and Jane B. had three children, and then John separated from his wife pregnant with a fourth, born thereafter; afterwards he married again; the plaintiff, Lizzie V., was the adopted child of W., and married V.; she claimed to be the last child of John B.; the declarations of the plaintiff’s mother, calling herself Jane Butler, and stating that John Butler was her husband, admitted; the opinion does not note the point, but nevertheless admits the evidence, on the ground that the relationship of Jane to John was otherwise sufficiently evidenced).

1911, *Hubatka v. Maierhoffer*, 81 N. J. L. 410, 79 Atl. 346 (action by a daughter to obtain title to land of her mother; a deed conveyed to Josephine M. and the defendant M.; the issue was whether Josephine was the wife of M.; Josephine’s declarations that she was not were held inadmissible; same fallacy; the declarations of J. ought to be interpreted as declarations about *her* relationships as including M., hence she is qualified; it is strange how difficult this simple idea seems to many learned judges).

1914, *Aalholm v. People, In re Kenneally*, — N. Y. —, 105 N. E. 647 (rule of *Blackburn v. Crawford* followed, and *Monkton v. Att’y-Gen’l* distinguished; *Werner, J.*, in a careful but unconvincing opinion, discusses the principle).

#### § 1492. Relationship of Illegitimate Child.

[Note 3; *add.*]

*Contra*, admitting the statements: 1907, *Champion v. McCarthy*, 227 Ill. 87, 81 N. E. 808 (whether plaintiff H. was the illegitimate son of S. the mother of J., who was also an illegitimate, and the intestate; S. was married to C. and had also legitimate children; declarations of J., S., and deceased members of the C. family, as to H. being a relative, held admissible; rule of *Crispin v. Doglioni* repudiated).

1909, *State v. McDonald*, 55 Or. 419, 104 Pac. 967 (declarations of the illegitimate child’s father’s sister, in whose home the illegitimate intestate was brought up; also of a half-brother of the illegitimate intestate by a subsequent lawful marriage).

#### § 1493. Testimony to One’s Own Age.

[Note 1; *add.*]

Of course, a *deceased* declarant’s statement as to his *own age* is admissible; cases cited *ante*, § 1491, n. 2; and doubtless in many of the earlier precedents this is assumed.

#### § 1495. Form of the Assertion (Bibles, etc).

[Note 5; *add.*]

1913, *Uuku v. Kaio*, 21 Haw. 710, 719 (that the witnesses “never heard from I. and K. that P. was I.’s half-brother,” admitted).

#### § 1496. Authentication; Proving Individual Authorship.

[Note 1; *add.*]

*Accord*: 1905, *State v. Hazlett*, 14 N. D. 490, 105 N. W. 617 (grandfather’s family Bible admitted). 1912, *Peterson’s Estate*, 22 N. D. 480, 134 N. W. 751 (family Bible entries, received).

[*Note 1 — continued*]

*Contra*: 1906, *Bryant v. McKinney*, 29 Ky. L. 951, 96 S. W. 809 (entry on a fly-leaf of a Bible, copied from another Bible, excluded; no authority cited for this point; the ruling is entirely unsound).

In *State v. Neasby*, 188 Mo. 467, 87 S. W. 468 (1905), was admitted a paper containing pencil entries made at the time of each child's birth by neighbors at the father's request, who testified; this was really on the principle of § 748, *ante*, though treated by the Court under the present principle.

#### § 1497. Production of Original Document.

[*Note 1; add:*]

1913, *Ewell v. Ewell*, 163 N. C. 233, 79 S. E. 509 (copy of an entry in a family Bible).

#### § 1502. Sundry Kinds of Facts.

[*Note 1; add, under Admitted:*]

1908, *Cox v. Brice*, 5th C. C. A., 159 Fed. 378 (that a person went to Texas, and was killed there while with Fannin's command, allowed; approving *Byers v. Wallace*, Tex., *supra*).

[*Note 1; add, under Excluded:*]

1905, *Luttrell v. Whitehead*, 121 Ga. 699, 49 S. E. 691 (family reputation as to possession of land by an ancestor).

#### § 1503. Kind of Issue or Litigation involved.

[*Note 3; add:*]

1905, *Travelers' Ins. Co. v. Henderson C. Mills*, 120 Ky. 218, 85 S. W. 1090 (action to indemnify for a sum paid for the death of a minor).

#### § 1510. Attesting Witness; Must be Competent at Time of Attestation.

[*Note 4; add:*]

1904, *Boyd v. McConnell*, 209 Ill. 396, 70 N. E. 649.

1904, *O'Brien v. Bonfield*, 213 Ill. 428, 72 N. E. 1090; and compare the cases cited *ante*, § 582.

#### § 1511. Implied Purport of Attestation; All Elements of Due Execution implied.

[*Note 2; add:*]

As to the sufficiency of the attestation, when the witness *on the stand fails to remember* and merely verifies by asserting that he would not have attested without knowing the facts, see the cases cited *ante*, § 1315, and also compare § 747, 98.

[*Note 3; add:*]

1889, *Canatsey v. Canatsey*, 130 Ill. 397 (the testimony of one of the witnesses, who identified his signature but recollected nothing of the circumstances, held sufficient; *Wilkin, J., diss.*). 1909, *Elston v. Montgomery*, 242 Ill. 348, 90 N. E. 3 (see the citation *post*, § 1513, n. 3).

1913, *Conrades v. Heller*, 119 Md. 448, 87 Atl. 28.

1906, *Robertson's Estate*, — Nebr. —, 109 N. W. 506 (witnesses' failure of memory).

1905, *Beggans' Will*, 68 N. J. Eq. 572, 59 Atl. 874. 1906, *Bogert v. Bateman*, — N. J. Eq. —, 65 Atl. 238. 1910, *Bioren v. Nesler*, 77 N. J. Eq. 560, 78 Atl. 201.

[*Note 3 — continued*]

1912, *Butcher v. Butcher*, — Utah —, 122 Pac. 397.

1910, *Hawkinson v. Otway*, 143 Wis. 136, 126 N. W. 683 (careful opinion, by Dodge, J.; applied to a signature by mark). 1912, *Grant's Will*, 149 Wis. 330, 135 N. W. 833.

[*Note 4; add, under Accord:*]

1904, *More v. More*, Ill., cited *post*, § 1512, n. 2.

**§ 1512. Same: Lack of Attestation — Clause is Immaterial.**

[*Note 2; add:*]

1903, *Kelly v. Moore*, 22 D. C. App. 9, 25 (imperfect clause).

1904, *More v. More*, 211 Ill. 268, 71 N. E. 988 ("an inference arises, from the mere fact of attestation, that the witnesses believed that the testator possessed testamentary capacity," and that the execution and attestation were duly performed; here one of the attesters was a lawyer).

1907, *Mead v. Presbyterian Church*, 229 Ill. 526, 82 N. E. 371 (*More v. More* followed).

1852, *Fry's Will*, 2 R. I. 88 (no attestation clause; all elements of execution implied).

1909, *Newell v. White*, 29 R. I. 343, 73 Atl. 798 (imperfect attestation clause; *Blodgett, J.*, diss.).

**§ 1513. Must the Maker's Signature, etc., be otherwise proved?**

[*Note 3; add:*]

1909, *Elston v. Montgomery*, 242 Ill. 348, 90 N. E. 3 (attesting witnesses deceased, but signatures genuine, conflicting evidence as to the testatrix' handwriting, an attestation clause reciting due execution; the judge's direction of a verdict for the proponent was held proper, on the ground that the testatrix' oral acknowledgment of a will in the witnesses' presence is legally sufficient, that therefore proof of her signature's genuineness is not essential, and that the absence of evidence negating the acknowledgment required a directed verdict; the ruling on the last point is novel, but seems sound).

1909, *Worman v. Seybert*, 78 N. J. L. 176, 73 Atl. 529 (bill of sale; attesting witnesses' signatures alone suffice; *Kingwood v. Bethlehem* not noticed; useful opinion).

N. D. St. 1907, c. 139, p. 198 ("nor shall it be permissible to prove such instrument or contract in any case by proof of the handwriting of said subscribing witness or witnesses," but proof must be made as if there were no subscribing witnesses; what this legislator doubtless meant — and, by the way, what queer whim induced him to meddle in this particular triviality of the law of Evidence? — would be expressed by inserting "alone" at the end of the quoted clause).

**§ 1518. Regular Entries; History.**

[*Note 2, par. 2, at the end; add:*]

That this statute was regarded as limiting a usage before unlimited, may be inferred from the following passage: Isaac Disraeli, "Curiosities of Literature," vol. III, p. 362, Boston ed. of 1858 (in "The Philosophy of Proverbs").

"A member of the House of Commons, in the reign of Elizabeth, made a speech entirely composed of the most homely proverbs. The subject was a bill against double-payments of book-debts. Knavish tradesmen were then in the habit of swelling out their book-debts with those who took credit, particularly to their younger customers. One of the members who began to speak 'for very fear shook,' and stood silent. The nervous orator was followed by a blunt and true representative of the famed governor of Barataria, delivering himself thus — 'It is now my chance to speak something, and that without humming or hawing. I think this law is a good law. Even reckoning makes long friends. As far goes

[Note 2 — continued]

the penny as the penny's master. *Vigilantibus non dormientibus jura subveniunt*. Pay the reckoning over-night, and you shall not be troubled in the morning. If ready money be *mensura publica*, let every one cut his coat according to his cloth. When his old suit is in the wane, let him stay till that his money bring a new suit in the increase.'"<sup>1</sup>

<sup>1</sup> Townshend's "Historical Collections," p. 283.

## § 1519. Regular Entries; Statutory Regulation.

[Note 1; add:]

Br. C. St. 1905, 5 Edw. VII, c. 14, § 89 (like St. 1902, c. 22, § 5).

N. Br.: 1906, *Anderson v. Anderson*, 37 N. Br. 432 (certain entries in the account-books of a deceased grantor, admitted, under St. 1895, c. 16, now Consol. St. 1903, c. 127, § 38).

Newf. St. 1904, c. 3, Rules of Court 30, par. 3.

N. Sc.: 1905, *Carstens v. Muggah*, 37 N. Sc. 361 (supplies of meat; plaintiff's books of account not admitted; no authority cited).

Ont. St. 1910, 10 Edw. VII, c. 32, § 119 (division courts; in money actions not exceeding \$25; "the judge on being satisfied of their general correctness, may receive the plaintiff's, defendant's, or garnishee's books as evidence").

Yukon Consol. Ord. 1902, c. 17, Ord. XXII, R. 234 (like N. Sc. Ord. 32 R. 3).

Colo. St. 1907, c. 252, p. 630, Apr. 9, amending Gen. Stats. 1883, § 3642 (inserting "association or company" before "may testify"; inserting "or his employee" after "by himself"; inserting "employee" after "were made by such"; *quære* whether this patching avails to cure the hybrid jumble of this type of statute).

Conn. Gen. St. 1902, § 981 ("In all actions for a book debt, the entries of the parties in their respective books shall be admissible in evidence"; and the defendant may have an order for oyer before pleading). 1904, *Handy v. Smith*, 77 Conn. 165, 58 Atl. 694 (statute applied, without noting the specific point involved). St. 1911, c. 175, p. 1438, Aug. 9, § 1 (in civil cases where a party has become unable to testify because of "incurable sickness, failing mind, old age, infirmity, or senility," or insanity, "the entries and memoranda of such party, made while sane, relevant to the matter in issue, may be received as evidence"); § 2 (receivable also in favor of one claiming under such person insane, etc.); § 3 (the trial Court to determine the applicability of this rule).

Ga. St. 1910, No. 309, p. 57, July 28 (amending Code 1895, § 5182, by inserting, after "blacksmith" the words "farmer, dairyman, planter").

Mass. St. 1913, c. 288 ("An entry in an account kept in a book or by a card system or by any other system of keeping accounts shall not be inadmissible in a civil proceeding as evidence of the facts stated because it is transcribed or because it is hearsay or self-serving, if the Court finds that the entry was made in good faith in the regular course of business and before the beginning of the civil proceeding aforesaid. The Court in its discretion before admitting such entry in evidence may, to such extent as it deems practicable or just but to no greater extent than the law has heretofore required, require" the offering party to produce the original or to call the person making the entry or had personal knowledge of the facts entered).

Minn. St. 1909, c. 251, p. 297, Apr. 19 (amending Rev. L. 1905, § 4719; adding a proviso that "the entry of charges or credits" etc., when they are "a part of the usual course of business of the person on whose behalf such entry is made," are admissible, by whatever book-keeping system accounts are kept, if the entry "was made by a duly authorized person contemporaneously with the transaction therein referred to, as a part of the general system of accounts," and "made in the usual and ordinary course of said business").

N. Y. St. 1909, c. 517, p. 1309 (water-supply department of first-class cities; records of observations of water-supply, its effects, etc., to be admissible when verified by officer's affidavit, if he "cannot be found or is absent, incapacitated, or dead"; this statute is one of the strangest mongrels ever bred in the legislative kennels).

[*Note 1 — continued*]

*N. C. Rev.* 1905, §§ 1622-1624 (like *Code* 1883, §§ 591-593); *Rev.* 1905, § 1625, *St.* 1897, c. 480 (in actions on an account for goods sold and delivered, "a verified itemized statement of such account" shall be *prima facie* evidence).

§ 1521. **Death, Absence, etc., of the Entrant.**

[*Note 2; add:*]

*In re Fountaine, In re Dowler*, [1909] 2 Ch. 382, 390 (death of one member of a firm does not admit the books of the firm).

[*Note 4; add:*]

*In Griffin v. Boston & M. R. Co.* (1913), — Vt. —, 89 Atl. 220 (cited more fully *post*, § 1530, n. 3), the view in the text above is approved.

[*Note 5; add, under Accord:*]

1906, *Godfrey v. Rowland*, 17 Haw. 577, 581 (baptismal record by a clergyman in Australia, admitted).

1903, *Haas v. Chubb*, 67 Kan. 787, 74 Pac. 230, *semble* (railroad-agent's entries, excluded, the entrant being out of the county but in the State).

1906, *Consolidated K. C. S. & R. Co. v. Gonzales*, 50 Tex. Civ. App. 79, 109 S. W. 946 (entrant absconded and his whereabouts unknown).

§ 1523. **Regular Course of Business, etc.**

[*Note 2; add:*]

The following ruling belongs here:

1904, *Elliott v. Sheppard*, 179 Mo. 382, 78 S. W. 627 (forgery of an acknowledged deed; to overthrow the certificate of acknowledgment, the deceased grantor's diary, with entries showing him to have been in Kentucky on the day in question, was offered; excluded, because "not in the nature of a book account"; no authority cited; the ruling is of no value, because the present point is not considered, and on the facts the ruling is thoroughly unsound).

[*Note 3; add:*]

1905, *Hagarty v. Webber*, 100 Me. 305, 61 Atl. 685 (scale-books of a timber-surveyor).

*Excluded:* 1913, *Arnold v. Hussey*, — Me. —, 88 Atl. 724 (a diary of weather conditions, regularly entered twice daily, by a deceased person, but not in pursuance of any business or duty, excluded).

§ 1524. **Same: English Rule; Duty to a Third Person.**

[*Note 1; add:*]

1904, *Mellor v. Walmsley*, 2 Ch. 525 (to identify a boundary, a field-book of a deceased surveyor, employed by the Local Board to survey, was excluded).

1904, *Mercer v. Denne*, 2 Ch. 534, 541 (reports of a surveyor in 1610-1625, excluded).

1905, *Mellor v. Walmsley*, 2 Ch. 164, 166 (*Mellor v. Walmsley*, *supra*, reversed on appeal; *Vaughan Williams, L. J.*: "Here the duty of the surveyor was . . . to record everything without which he could not arrive at that ultimate conclusion. If it was his duty to record those matters at the time, and he in fact did so contemporaneously, I think the rule as to admissibility applies").

1905, *Mercer v. Denne*, 2 Ch. 538, 554 (*Mercer v. Denne*, *supra*, affirmed on appeal).

## § 1530. Personal Knowledge of Entrant, etc.

[Note 2; add:]

- 1908, *Cummings v. Gourlay*, 1 Alta. 86 (timber scale-books, admitted).
- 1910, *St. Louis & S. F. R. Co. v. Sutton*, 169 Ala. 389, 55 So. 989 (defendant's trainsheet kept by operators at stations, recording times of arrival and departure of trains, admitted for the plaintiff without calling the operators, on the testimony of the engineer; the opinion confuses the present principle and those of *res gestæ* and parties' admissions).
- 1911, *People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009 (bank-books admitted to show that M. was not a depositor).
- 1907, *Cooke v. People*, 231 Ill. 9, 82 N. E. 863 (to show deposits to the defendant's account, the books of a bank were admitted, verified by the cashier, who had not personally made them; here the bank had ceased doing business, and the different clerks and bookkeepers "were not at the time of the trial in the employ of the bank, but were living in different places, many of them being in foreign States"; following *Chisholm v. Machine Co.*, *supra*).
- 1908, *Richardson Fueling Co. v. Seymour*, 235 Ill. 319, 85 N. E. 496 (delivery-book of a tugboat captain, verified by him, admitted; the wheelbarrow-loads were checked off by him, or by "some one else" in which case he "got a ticket signed by some one on the boat"; the delivery tickets had been lost).
- 1909, *Pittsburg C. C. & St. L. R. Co. v. Chicago*, 242 Ill. 178, 89 N. E. 1022 (destruction of numerous freight-cars by a mob; issue as to their loads and contents; reports of arrival etc. of cars, made up in parts from various employees' reports, verified by the clerk who transcribed them and the conductors who handed in the originals, the originals being destroyed in course of business, admitted under the circumstances).
- 1904, *State v. Stephenson*, 69 Kan. 405, 76 Pac. 905 (ledger verified by the bookkeeper, admitted, without calling salesmen, shipping clerks, etc.).
- 1906, *Louisville & N. R. Co. v. Daniel*, 122 Ky. 256, 91 S. W. 691 (train-movements at M., allowed to be evidenced by the train-sheet record of the train-dispatcher at E., based chiefly on telegraphic reports from others, but verified on the stand by the train-dispatcher as a correct record, without calling the various employees making the reports; lucid and forceful opinion by O'Rear, J., one of the best on the subject).
- 1907, *Madunkeunk D. & I. Co. v. Allen C. Co.*, 102 Me. 257, 66 Atl. 537 (logging scale-book, made up by an assistant, used by the surveyor, without calling the assistant).
- Mass.: (The bizarre piece of patchwork legislation in 1913, quoted *ante*, § 1519, was probably meant to affect this topic).
- 1905, *Firemen's Ins. Co. v. Seaboard A. L. Co.*, 138 N. C. 42, 50 S. E. 452 (time of arrival of a train at H.; the train-sheet, verified by the train-dispatcher at R., admitted, without calling the operator at H. who reported the arrival; one of the best modern opinions, by Connor, J.).
- 1908, *Jones v. Atlantic C. L. R. Co.*, 148 N. C. 449, 62 S. E. 521 (conductor's train record, not admitted to show condition of stock, solely because the conductor himself was not offered).
- 1904, *Wells Whip Co. v. Tanners' M. F. Ins. Co.*, 209 Pa. 488, 58 Atl. 894 (testimony to the amount of a stock of goods, by the secretary of the company, based on an inventory compiled in part by clerks, received without calling the clerks).
- 1906, *Pelican Lumber Co. v. Johnson*, 44 Tex. Civ. App. 6, 98 S. W. 207 (a secretary-manager allowed to testify that the books were to his own knowledge correct, though he was not the bookkeeper making the entries and the bookkeeper was not called).
- 1906, *Grundberg v. U. S.*, 145 Fed. 81, 97 (invoices, ledgers, etc.; principle apparently recognized).
- 1895, *Mississippi River L. Co. v. Robson*, 69 Fed. 773 (substitute this citation for *Nelson v. Bank*, *supra*, which is misnamed; the point is so decided in *M. R. L. Co. v. Robson*).
- 1907, *Greene v. U. S.*, 5th C. C. A., 154 Fed. 401, 415 (bank-books showing the accounts of the defendants with the bank, proved by the chief bookkeeper who had no personal knowledge, without calling or accounting for the 13 under-bookkeepers, ad-

## [Note 2 — continued]

mitted; *Pardee, J.*, diss.; the majority opinion does not discuss the point). 1909, *Reyburn v. Queen City S. B. & T. Co.*, 3d C. C. A., 171 Fed. 609, 616 (bank entries in the discount register, the discount ledger, and the individual ledger, verified by the clerks in charge, admitted, without calling all persons concerned in the matters recorded; the above principle approved). 1911, *Heike v. U. S.*, C. C. A., 192 Fed. 83 (weighers' records, and "pink books," admitted, affirming 175 Fed. 852).

1913, *Wisconsin Steel Co. v. Maryland Steel Co.*, 7th C. C. A., 203 Fed. 403 (cost of manufacture; workmen marked their job-time on cards; from these the bookkeepers made up the payroll, and sheets distributing the wages-amount paid for each job; from these sheets the account-books were made up; the books, with time-cards, etc., were held admissible, both by Federal common law and under Wis. Stats. §§ 4186-9).

## [Note 3; add:]

1899, *R. v. Dexter*, 19 Cox Cr. 360 (a witness, who was a solicitor, had had interviews with the accused, and had after each interview dictated to his stenographer an account of what was said, and the stenographer had written out the notes in longhand; the solicitor had within three weeks after such interview gone over the notes and could say that he believed them correct; the stenographer was now in New Zealand; *Grantham, J.*, allowed the solicitor to use the notes, saying that "the shorthand clerk is his *alter ego*"; but the opinion pays no attention to the distinction between the two kinds of recollection, and rests in part on the circumstance that the solicitor had himself verified the notes within a short time after taking, thus invoking the principle of § 748, *ante*).

1913, *Griffin v. Boston & Maine R. Co.*, — Vt. —, 89 Atl. 220 (train registers kept at stations, the entries made by the conductor of each train as it passed were offered to who was the engineer on a certain train on certain days; the conductors were called, except one, and he was proved to be unable by illness to attend; held admissible not only as "confirmatory" evidence for the witnesses who testified, but as "independent" evidence).

1911, *West Virginia Architects & Builders v. Stewart*, 68 W. Va. 506, 70 S. E. 113 (bookkeeper's entries of labor in performance of a contract, based on reports from M., the corporation president, and W. the foreman; M. the bookkeeper testified; M. was offered as a witness but was disqualified as an interested survivor; W. was not called; held, that the entries were admissible; quoting the principle of the text above).

## [Note 4; add:]

1913, *Canadian Pacific R. Co. v. Quinn*, Que. K. B., 11 D. L. R. 600 (hospital chart of the plaintiff's case, verified by the nurse-superintendent and one other nurse, but containing entries by a nurse not called and not available, held not admissible on the facts; the opinion shows no familiarity with the subject).

1906, *Matko v. Daley*, 10 Ariz. 175, 85 Pac. 721 (certain pay-rolls, in part kept by a former paymaster not accounted for, excluded).

1905, *Monarch Mfg. Co. v. Omaha, C. B. & S. R. Co.*, 127 Ia. 511, 103 N. W. 493 (weather records, kept by a railroad, but not verified by the agent in charge at the time in issue, excluded; opinion obscure, and erroneous on principle, though correct on the facts).

1909, *Fidelity & D. Co. v. Champion I. M. & C. S. Co.*, 133 Ky. 74, 117 S. W. 393 (a storage company's employee entered the names of the depositors, but not the amounts received from them; these sums he embezzled; to prove the amount embezzled, in an action against the surety company, the storage company offered a witness who had taken the list of some one hundred depositors, visited each one, heard their statements of the sum paid by each, and then prepared a list of these items; this list, as verified by that witness, held inadmissible; theoretically correct, practically unsound, because the amount was virtually undisputed).

1905, *Gould v. Hartley*, 187 Mass. 561, 73 N. E. 656 (bill for cigars, liquor, etc.; the plaintiff offered an original book, sworn to by the clerk keeping it, and made up by him from tickets

## [Note 4 — continued]

punched by a registering machine operated by the salesman, who sent the tickets to the clerk, who made up the entries; neither the tickets nor the salesman were produced; excluded; thus the Court refused a plain opportunity to make a liberal and safe application of the principle to modern business methods). 1909, *Delaney v. Framingham G. F. & P. Co.*, 202 Mass. 359, 88 N. E. 773 (certain hospital records of medical cases, made by a clerk testifying but based on slips handed to her by a specific physician who was not shown to be unavailable, excluded; otherwise, perhaps, where the entrant clerk receives the information "from various persons whom he cannot expect to remember and whom it will be impracticable to call"). 1913, *Butchers' S. & M. Ass'n v. Boston*, 214 Mass. 254, 101 N. E. 426 (drawtenders' official record of vessels passing, not admissible so far as founded on reports of substitute drawtenders; see *ante*, § 1635).

1906, *Einstein v. Holladay K. L. & L. Co.*, 118 Mo. App. 184, 94 S. W. 296 (abstracts of title, made partly by S. and partly by K., but verified by S. only, excluded).

1909, *Missouri K. & T. R. Co. v. Davis*, 24 Okl. 677, 104 Pac. 34 (stockyards book of stock deliveries, kept by a clerk on reports from the foreman and other persons; the foreman alone was offered, and the clerk was not accounted for; held that the present principle was not applicable, and also that under Wilson's Rev. & Ann. Stats. 1903, § 4574, the clerk must be accounted for).

1905, *Manchester Assur. Co. v. Oregon R. & N. Co.*, 46 Or. 162, 79 Pac. 60 (shop-book record of engine inspections, by E. and W. and a clerk; *semble*, the testimony of all three required; opinion confused).

1911, *Southern R. Co. v. Mooresville C. Mills, C. C. A.*, 187 Fed. 72 (chief freight clerk's memorandum of a weighing not personally known to him, excluded).

1911, *Coolidge v. Taylor*, 85 Vt. 39, 80 Atl. 1038 (to prove the delivery of milk to T., a book of entries of such delivery, verified on the stand by the company's secretary, who transcribed them from the delivery-clerk's daily memoranda, was excluded, because the secretary had no personal knowledge and the delivery-clerk was not called nor accounted for).

1913, *Osborne v. Grand Trunk R. Co.*, — Vt. —, 88 Atl. 512 (hospital record; one of the entrant nurses testifying, but the others being unaccounted for, it was excluded).

## § 1532. Production of Original Book.

## [Note 1; add:]

1908, *Cummings v. Gourlay*, 1 Alta. 86 (ledger entries made from scale-books; doubted).

1909, *Claudet v. Golden Giant Mines*, 15 Br. C. 13 (copy of minutes of directors' meeting kept by deceased secretary, excluded on the facts).

## [Note 2, par. 1; add:]

1905, *Manchester Assur. Co. v. Oregon R. & N. Co.*, 46 Or. 162, 79 Pac. 60.

## § 1538. Not Admissible where a Clerk was Kept.

[Note 2, par. 1; add, under *Accord*:]

1910, *Radcliffe v. Chavez*, 15 N. M. 258, 110 Pac. 699 (a wife held not a clerk).

[Note 2, par. 1; add, under *Contra*:]

1907, *Hinkle v. Smith*, 127 Ga. 437, 56 S. E. 464.

## [Note 3; add:]

1910, *Radcliffe v. Chavez*, 15 N. M. 258, 110 Pac. 699 (not decided; noting prior inconsistent rulings).

**§ 1539. Not Admissible for Cash Payments or Loans.**

[*Note 1, col. 1; add.:*]

- 1904, *Galbraith v. Starks*, 117 Ky. 915, 79 S. W. 1191.  
 1904, *Proctor v. Proctor's Adm'r*, 118 Ky. 474, 81 S. W. 272.  
 1906, *Clark v. Clark*, 122 Ky. 145, 91 S. W. 284.  
 1905, *Lewis v. England*, 14 Wyo. 128, 82 Pac. 869 (loan items, admitted).  
 1912, *Wells v. Hays*, 93 S. C. 168, 76 S. E. 195.

[*Note 2; add.:*]

- 1907, *Cooke v. People*, 231 Ill. 9, 82 N. E. 863 (books, deposit-entries of a bank, verified by the cashier, admitted).  
 1912, *Levi v. Levi*, 156 Ia. 297, 136 N. W. 696.

**§ 1540. Not Admissible for Goods delivered to Others on the Defendant's Credit.**

[*Note 1; add.:*]

- Accord:* 1912, *Wells v. Hays*, 93 S. C. 168, 76 S. E. 195.  
*Contra:* 1910, *Kamm v. Rees*, 9th C. C. A., 177 Fed. 14, 22.

**§ 1541. Not Admissible for Terms of a Special Contract.**

[*Note 1, col. 1; add.:*]

- 1907, *Jacobs v. Morgenthau*, 149 Mich. 1, 112 N. W. 492 (not admitted to show the payment of money for stock upon a special contract).

**§ 1542. Not Admissible in Certain Occupations.**

[*Note 1, l. 4; add.:*]

- 1900, *Produce Exchange T. Co. v. Bieberbach*, 176 Mass. 577, 587, 58 N. E. 162 (whether entries in bank-books fall within the rule; not decided).

**§ 1544. Rules not Flexible; Existence of Other Testimony.**

[*Note 1:*]

- Omit Eastman v. Moulton*, N. H.

[*Note 2, par. 2, l. 2; after "plaintiff," insert:*]

"Or the goods delivered to a servant of the defendant."

[*Note 2, l. 3:*]

- Omit "but this, etc.;" and insert:* 1825, *Eastman v. Moulton*, 3 N. H. 156.

**§ 1548. Regularity as affecting the Kind of Book, etc.**

[*Note 1; add.:*]

- 1904, *Freehart v. Stanford*, 77 Vt. 36, 58 Atl. 790 (*Post v. Kennerson* approved).

**§ 1549. Regularity as affecting the Kind of Item or Entry.**

[*Note 2; add.:*]

- 1904, *McKnight v. Newell*, 207 Pa. 562, 57 Atl. 39.

[*Note 3; add:*]

1909, *Reyburn v. Queen City S. B. & T. Co.*, 3d C. C. A., 171 Fed. 609 (bank-books admissible; the limitation as to cash entries held not applicable).

[*Note 4; add:*]

1909, *Graham v. Dillon*, 144 Ia. 82, 121 N. W. 47 (not decided).

1907, *Page v. Hazelton*, 74 N. H. 252, 66 Atl. 1049.

1911, *West Virginia Architects & Builders v. Stewart*, 68 W. Va. 506, 70 S. E. 113 (not decided).

#### § 1550. Contemporaneousness.

[*Note 1; add:*]

1910, *Kamm v. Rees*, 9th C. C. A., 177 Fed. 14, 22.

#### § 1552. Reputation of Correct and Honest Bookkeeping.

[*Note 1; add:*]

1910, *Radcliffe v. Chavez*, 15 N. M. 258, 110 Pac. 699 (testimony by two customers as to correctness, here held sufficient).

[*Note 2; add:*]

1909, *Bresler's Estate*, 155 Mich. 567, 119 N. W. 1104 (similar to *Montague v. Dougan*).

#### § 1554. Party's Suppletory Oath; Cross-Examination, etc.

[*Note 5; add, under Accord:*]

1904, *Cather v. Damerell*, — Nebr. —, 99 N. W. 35.

[*Note 6, par. 1; add:*]

1910, *Winslow's Will*, 146 Ia. 67, 124 N. W. 895.

[*Text, p. 1910, l. 5, at the end; add a new note 3a:*]

\* 1913, *Jackson v. Moore*, 39 Okl. 234, 134 Pac. 1114 (requiring verification of the book's correctness).

#### § 1555. Personal Knowledge of Entrant, etc.

[*Note 1; add:*]

1905, *Lewis v. England*, 14 Wyo. 128, 82 Pac. 869 (entries in the business of an illiterate saloon-keeper, made by his wife, employees, and others, admitted).

[*Note 2; add:*]

1909, *Mahoney v. Hartford Inv. Co.*, 82 Conn. 280, 73 Atl. 766 (books of a sewer-contractor, kept by a bookkeeper on slips from a foreman, admitted).

1911, *Atlas Shoe Co. v. Bloom*, 209 Mass. 563, 95 N. E. 952 (goods supplied on a guaranty of credit; memoranda in account books, made by entry clerks, and testified to by these clerks — apparently — and the superintendent, but without calling for the clerks who actually made the sales and deliveries, excluded; this Court hung back too long in its recognition of liberal principles on this subject; the penalty that ensued was the legislative bungle, quoted *ante*, § 1519).

1912, *Sullivan v. Godkin*, 172 Mich. 257, 137 N. W. 521 (two men tallying lumber, one of them entering the data in a book; the entrant being deceased and the other on the stand, the book was admitted).

[*Note 2 — continued*]

1906, *Wright v. Chicago B. & Q. R. Co.*, 118 Mo. App. 392, 94 S. W. 555 (stockyards books made up from scale-tickets, admitted to show cattle-weight; who verified them is not stated).

1908, *Corkran v. Rutter*, 76 N. J. L. 375, 69 Atl. 954 (see the citation *post*, § 1558, n. 2).

1908, *Corkran v. Taylor*, 77 N. J. L. 195, 71 Atl. 124 (see the citation *post*, § 1558, n. 2).

1908, *Schlicher v. White*, 74 N. J. L. 839, 71 Atl. 337 (ledger entries admitted, here on the doctrine of § 1074, n. 5, *ante*).

### § 1556. *Form and Language of the Entry, etc.*

[*Note 3; add:*]

1904, *Cather v. Damerell*, — Nebr. —, 99 N. W. 35 (physician's book, the items noted by dots and crosses, admitted).

[*Note 5; add:*]

1905, *Conover v. Neher-R. Co.*, 38 Wash. 172, 80 Pac. 281 (time-book not admitted, to show that a witness was not employed on a certain day).

### § 1557. *Impeaching the Book, etc.*

[*Note 2; add:*]

1913, *Northwestern Elev. Co. v. Great Northern R. Co.*, 121 Minn. 321, 141 N. W. 298 (conductor's train-books recording conditions of cars; to show the book untrustworthy, testimony was received to defects existing in cars not marked defective in the train-book).

[*Note 3; add:*]

1905, *Cairns v. Murray*, 37 N. Sc. 451, 469.

1910, *Foster v. U. S.*, 6th C. C. A., 178 Fed. 165.

1911, *Louisville & N. R. Co. v. U. S.*, C. C. A., 186 Fed. 280 (penalty for using cars lacking a safety-appliance; to identify the contents of a specific car, as shown by a way-bill, the defendant having failed on notice to produce the way-bill, the prosecution offered "an impression copy of an entry of the way-bill book," made as a part of the defendant's records by the defendant's agent; received as "an admission of the fact by the railroad company").

So also where a *duplicate original* of a delivery-entry is handed to the buyer at the time of a delivery of goods, his retention of it makes it an admission, like an account stated, and it is receivable on the principle of § 1073, *ante*.

1911, *Federal U. Surety Co. v. Indiana L. & M. Co.*, 176 Ind. 328, 95 N. E. 1104.

### § 1558. *Production of Original Book, etc.*

[*Text*, p. 1913, at the end; *add:*]

Since the book is merely a statement about the transaction, and is not the transaction itself, the Parol Evidence rule does not apply, and therefore the transaction, as such, can be proved orally *without producing or accounting for the book*.<sup>3</sup>

<sup>3</sup> 1899, *Cowdery v. McChesney*, 124 Cal. 363, 57 Pac. 221.

1899, *Rissler v. Ins. Co.*, 150 Mo. 366, 51 S. W. 755 (cited *ante*, § 1339, n. 10).

1904, *Halverson v. Seattle El. Co.*, 35 Wash. 600, 77 Pac. 1058; and cases cited *ante*, §§ 1245, 1339, *post*, § 2432; but compare the principles of §§ 1230, 1235, 1244, *ante*.

[*Note 2; add, under Admitted:*]

1909, *Mahoney v. Hartford Inv. Co.*, 82 Conn. 280, 73 Atl. 766 (original slips destroyed in the course of business).

1904, *State v. Stephenson*, 69 Kan. 405, 76 Pac. 905 (modern ledger made directly from order-slips, admitted as the original; good opinion by Johnston, C. J.).

1908, *Corkran v. Rutter*, 76 N. J. L. 375, 69 Atl. 954 (books made by the witness from time-sheets filled out by the workmen and handed in by the foreman; the books admitted, without requiring the original time-sheets).

1908, *Corkran v. Taylor*, 77 N. J. L. 195, 71 Atl. 124 (similar).

1911, *Kasenberg v. Hartshorn*, 30 Okl. 417, 120 Pac. 956 (bank account; original books required; copy-list of items excluded).

1905, *Lewis v. England*, 14 Wyo. 128, 82 Pac. 869 (ledger entries admitted on the facts, to explain the original slips of paper).

[*Note 2; add, under Excluded:*]

1911, *Hawken v. Daley*, 85 Conn. 16, 81 Atl. 1053 (single sheet copied from a page of a time-book, not admitted).

1906, *Putnam v. Grant*, 101 Me. 240, 63 Atl. 816 (a journal, made up by summarizing from certain prior books and bills, held not an original, on the facts).

#### § 1560. Statutory Competency as abolishing the Necessity for Parties' Books.

[*Note 2; add:*]

1911, *Hawken v. Daley*, 85 Conn. 16, 81 Atl. 1053.

1909, *Graham v. Dillon*, 144 Ia. 82, 121 N. W. 47.

1911, *McCants v. Thompson*, 27 Okl. 706, 115 Pac. 600.

#### § 1561. Relation of this Branch to the Main Exception, etc.

[*Note 3; add:*]

1907, *Davie v. Lloyd*, 38 Colo. 250, 88 Pac. 446.

[*Note 6; add:*]

1911, *First National Bldg. Co. v. Vandenburg*, 29 Okl. 583, 119 Pac. 224 (requiring the bookkeeper to be called, if alive and accessible).

#### § 1564. Declarations about Private Boundaries; General Scope.

[*Note 1; add:*]

1909, *Cadwalader v. Price*, 111 Md. 310, 73 Atl. 273 (declarations of D, deceased, a landowner familiar with the place, while on the land pointing out the boundaries, admitted).

1904, *Yow v. Hamilton*, 136 N. C. 357, 48 S. E. 782 (collecting the cases).

1905, *Hemphill v. Hemphill*, 138 id. 504, 51 S. E. 42.

1905, *Hill v. Dalton*, 140 id. 9, 52 S. E. 273.

1906, *Broadwell v. Morgan*, 142 N. C. 475, 55 S. E. 340.

1914, *Sullivan v. Blount*, — N. C. —, 80 S. E. 892.

This kind of evidence seems never to have obtained recognition in *England* or *Canada*: *Mellor v. Walmsley*, 1904, 2 Ch. 525, and 1905, 2 Ch. 164; *Mercer v. Denne*, 1904, 2 Ch. 535, 541, and 1905, 2 Ch. 538, 554; and cases cited *post*, § 1584.

1905, *Bartlett v. Nova Scotia S. Co.*, 37 N. Sc. 259, 264.

In *Bower v. Cohen*, 126 Ga. 35, 54 S. E. 918 (1906), this Exception seems to have been forgotten in excluding a surveyor's map.

Compare the cases on *official surveys* (*post*, § 1665).

**§ 1566. Same: No Interest to Misrepresent.**

[*Note 1; add:*]

1907, *Douglas L. Co. v. Thayer Co.*, 107 Va. 292, 58 S. E. 1101 (*Harriman v. Brown* followed).

[*Note 2; add:*]

1910, *Turgeon v. Woodward*, 83 Conn. 537, 78 Atl. 577.

1909, *Peters v. Tilghman*, 111 Md. 227, 73 Atl. 726 (guardian of infant owners; declaration excluded).

1905, *Hemphill v. Hemphill*, 138 N. C. 504, 51 S. E. 42 (deed by the owner).

[*Note 3, par. 1; add:*]

1910, *Turgeon v. Woodward*, 83 Conn. 537, 78 Atl. 577 (interesting and careful opinion by Wheeler, J.).

1905, *Hathaway v. Goslant*, 77 Vt. 199, 59 Atl. 835 (owner's declarations as to boundary, admitted).

And now in New Hampshire, the above limitation has been repudiated (thus overruling, though not citing, *Shepherd v. Thompson*, *supra*): 1908, *Keefe v. Sullivan Co. R. Co.*, 75 N. H. 116, 71 Atl. 379.

**§ 1567. Same: Massachusetts Rule, etc.**

[*Note 1, l. 8; add:*]

1907, *Goyette v. Keenan*, 196 Mass. 416, 82 N. E. 427 (declarations not made on the land, inadmissible).

[*Note 2; add under N. Hampshire:*]

1908, *Keefe v. Sullivan Co. R. Co.*, 75 N. H. 116, 71 Atl. 379.

[*Note 2; add, under Vermont:*]

The last aberration has now been repudiated in turn, and the rule of *Powers v. Silsby* restored, but with some obscurity of language:

1905, *Hathaway v. Goslant*, 77 Vt. 199, 59 Atl. 835.

[*Note 3; add:*]

1905, *Emmet v. Perry*, 100 Me. 139, 60 Atl. 872 (preceding cases said to be "settled law").

[*Note 5; add:*]

1909, *Collins v. Clough*, 222 Pa. 472, 71 Atl. 1077 (confirming the preceding cases; the learned judge's suggestion that the term "variant," above applied in the text to this rule, is misapplied, seems to ignore the circumstances that the orthodox unlimited rule began in the 1700s and was recognized in several States, including Pennsylvania in 1813, and that the "variant" only came in Pennsylvania in 1856, by imitation of *Daggett v. Shaw*, Mass.; and that it is "unfortunate," as above termed, is respectfully maintained; that epithet suits any rule which narrows a wholesome exception to the Hearsay rule).

[*Note 6; add:*]

*Contra*: N. C.: 1909, *Caldwell L. & L. Co. v. Triplett*, 151 N. C. 409, 66 S. E. 343.

[*Note 7; add:*]

1913, *Morrison v. Holder*, 214 Mass. 366, 101 N. E. 1067 (deceased owner's declarations as to use of land, tree as boundary, etc., admitted).

[Note 7 — continued]

Whether the declarant must be *deceased* is not decided:

1910, *Abbott v. Walker*, 204 Mass. 71, 90 N. E. 405 (here the declarations were receivable against the declarant's successor, being admissions of a privity in title, under § 1082, *ante*).

### § 1568. Knowledge of Declarant.

[Note 1; *add*.:]

1908, *Keefe v. Sullivan Co. R. Co.* 75 N. H. 116, 71 Atl. 379 (foreman of a railroad section, in charge of fences and roadbed, admitted).

1912, *Smith v. Stanley*, 114 Va. 117, 75 S. E. 742 (declarations excluded for lack of means of knowledge).

### § 1570. Form of Declaration; Maps, Surveys, etc.

[Note 1; *add*.:]

The following statute belongs here rather than anywhere else: Kan. St. 1909, c. 114, p. 214, Mar. 5 (where official road records are destroyed, and thereby the proceedings of road-establishment cannot be evidenced, "any map, plat, atlas, or diagram showing such road" is admissible, if made before destruction of records or if a copy of one so made; the county clerk's certificate under seal to be *prima facie* evidence of time of making); St. 1911, c. 248, p. 448, Mar. 8, § 17 (re-enacting the foregoing).

### § 1573. Ancient Deed-Recitals, etc.

[Note 2; *add*.:]

1890, *Havens v. Sea Shore L. Co.*, 47 N. J. Eq. 365, 375, 20 Atl. 497 (recital, "in an ancient deed or will, of any antecedent deed or document," admissible).

1913, *Wilson v. Snow*, 228 U. S. 217, 33 Sup. 487 (deed's recital of executrix' authority under a will; *Carver v. Jackson* approved; see *post*, § 2145, n. 4).

[Note 3; *add*.:]

1912, *Boehner v. Hirtle*, N. Sc., S. C., 6 D. L. R. 548 (recital of an earlier title in a crown grant, held not admissible).

1906, *Rollins v. Atlantic C. R. Co.*, 73 N. J. L. 64, 62 Atl. 929 (quoted *infra*, n. 7).

N. Y. St. 1909, c. 65, p. 24, Fed. 19 (re-enacting St. 1890, c. 158, § 1, as C. C. P. § 961e; sheriff's deed; cited more fully *post*, § 1664, n. 6).

[Note 4, par. 1; *add*.:]

1903, *Davis v. Moyles*, 76 Vt. 25, 56 Atl. 174 (certain recitals of confiscation in a petition of 1795 and 1799 excluded, the theory being obscure).

[Note 7, par. 1; *add*.:]

1910, *Wilson v. Snow*, 35 D. C. App. 562 (recitals that the grantor was executrix, in a deed 50 years old, admitted).

1905, *Lanier v. Hebard*, 123 Ga. 626, 51 S. E. 632 (recital of heirship in a deed of 1871, not admitted, at least without corroboration by possession or the like).

1913, *Dyer v. Marriott*, 89 Kan. 515, 131 Pac. 1185 (recital of a will, heir-at-law, etc., in a deed of recent but unspecified date, excluded).

1906, *Rollins v. Atlantic C. R. Co.*, 73 N. J. L. 64, 62 Atl. 929 (recital that "she being the issue and heir at law of G. A.," admitted; "The rule I think may be regarded as settled that a recital, whether of an ancient deed, will, lease, or pedigree, may be [admitted when] supported by any testimony which renders credible the truth of the fact recited"; here the

[Note 7 — continued]

recording of the deeds, etc., were held to suffice; the opinion does not properly distinguish the present question, that of par. (1) *supra*, and the general pedigree rule).

N. Y. St. 1913, c. 395 (amending C. C. P. by adding a new § 841b; recital of heirship in a deed, etc., more than 30 years old and duly recorded, to be evidence).

1903, *Davis v. Moyles*, 76 Vt. 25, 56 Atl. 174 (recitals of descent in a petition to the Legislature, excluded, for lack of proof of the reciter's relationship).

1904, *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409 (recitals as to widow and heir, admitted).

1906, *Webb v. Ritter*, 60 W. Va. 193, 54 S. E. 484 (recitals of heirship in a deed of 1843, admitted).

[Note 7, par. 3; add:]

*Alta.*: St. 1910, 2d sess., Evidence Act, c. 3, § 55 (like Ont. Rev. St. 1897, c. 134, § 2).

*Ont.* St. 1910, 10 Edw. VII, c. 58, § 2 (re-enacting R. S. 1897, c. 134, § 2).

1906, *Gunn v. Turner*, 13 Ont. L. R. 158 (applying the statute to admit a recital in a deed of 1864 that the grantor was administrator of his father's estate).

[Text, p. 1927; l. 5; insert a new par. (4):]

(4) A recital, in an ancient deed, of a *consideration paid*, is admissible;<sup>8</sup> though many of the cases of this sort do not deal with ancient deeds, and may better be explained as merely laying down a rule of burden of proof presuming a consideration.

<sup>8</sup> 1911, *Anderson v. Cole*, 234 Mo. 1, 136 S. W. 395 (recital of consideration in a deed dated 1878, admitted).

## § 1576. Statutory Exception for all Statements of Deceased.

[Note 8; add:]

*Mass. Rev. L.* 1902, c. 175, § 67 (embodying St. 1896, c. 445).

1904, *Cogswell v. Hall*, 185 Mass. 455, 70 N. E. 461 (action by a husband's heir against his widow's executor on a promise to pay relating to the dower estate; the deceased widow's declarations and conduct, admitted in disproof of the promise).

1904, *Tripp v. Macomber*, 187 Mass. 109, 72 N. E. 361 (action on a contract by the testator; testator's declarations admitted).

[Note 9; add:]

1900, *Mulhall v. Fallon*, 176 Mass. 266, 57 N. E. 386 (deceased's declarations as to sending money to his mother, etc., admitted under St. 1898).

1902, *Stone v. Com.*, 181 Mass. 438, 63 N. E. 1074 (deceased third person's statement as to tide-water height, admitted under St. 1898).

1905, *Nagle v. Boston N. St. R. Co.*, 188 Mass. 38, 73 N. E. 1019 (declarations of a deceased motorman, admitted; that they were made in answer to leading questions, held immaterial).

1905, *Dickinson v. Boston*, 188 Mass. 595, 75 N. E. 68 (personal injury; a statement made after serving notice of the injury to the city, held admissible; the trial Court's finding of good faith, presumed).

1906, *Gray v. Kelly*, 190 Mass. 184, 76 N. E. 724 (declarations as to boundary, admitted).

1906, *Weeks v. Boston El. R. Co.*, 190 Mass. 563, 77 N. E. 654 (more than one statement of the deceased is admissible).

1906, *Hall v. Reinherz*, 192 Mass. 52, 77 N. E. 880 (statute applied to a written statement made before the statute).

1906, *Luce v. Parsons*, 192 Mass. 8, 77 N. E. 1032 (statute applied to declarations about land).

[*Note 9 — continued*]

1906, *Putnam v. Harris*, 193 Mass. 58, 78 N. E. 747 (statute applied, the question here being as to the declarant's personal knowledge).

1907, *Chaput v. Haverhill G. & D. St. R. Co.*, 194 Mass. 218, 80 N. E. 597 (decendent in an action for personal injury).

1908, *McGivern v. Steele*, 197 Mass. 164, 83 N. E. 405 (pointing out that a deceased's testimony may be admissible under the rule of § 1387, *ante*).

1908, *Glidden v. U. S. Fidelity & G. Co.*, 198 Mass. 109, 84 N. E. 143 (statement not made "in good faith," excluded).

1908, *Supple v. Suffolk S. Bank*, 198 Mass. 393, 84 N. E. 432 (statute applied to declarations about money given).

1909, *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755 (revocation of a probate decree of adoption).

1910, *Giles v. Giles*, 204 Mass. 383, 90 N. E. 595 (whether the statute applies to admit testator's declarations of revocation not otherwise admissible; not decided).

1911, *Com. v. Stuart*, 207 Mass. 563, 93 N. E. 825 (whether applicable in criminal cases, not decided).

1912, *Randall v. Peerless Motor Car Co.*, 212 Mass. 352, 99 N. E. 221 (statute admits prior declarations of one who has testified at a former trial).

1913, *Pigeon's Case*, 216 Mass. 51, 102 N. E. 932 (the statutory exception held applicable to cases arising before the Industrial Accident Board under an industrial insurance Act).

For the doctrine as to the *judge's determination* of facts preliminary to admissibility of the declaration, see *post*, § 1550.

#### § 1582. Reputation as to Land Boundaries, etc.; Matter must be Ancient.

[*Note 2; add:*]

1905, *Dawson v. Orange*, 78 Conn. 96, 61 Atl. 101.

1906, *Bland v. Beasley*, 140 N. C. 628, 53 S. E. 443 (reputation no earlier than 1884, in a suit brought in 1901, excluded).

1914, *Sullivan v. Blount*, — N. C. —, 80 S. E. 892 (reputation of 40 years or more, admitted).

#### § 1584. Reputation, not Individual Assertion.

[*Note 3; add:*]

1904, *Mercer v. Denne*, 2 Ch. 534 (fishing-rights; depositions taken in 1639, under an information by the Attorney-General, stating the point to which the sea extended, excluded; *Farwell, J.*, holding that "depositions of deceased witnesses" are admissible against strangers "if they relate to a custom where reputation would be evidence; but then those depositions must be depositions of matters of reputation, and not of matters of fact").

1905, *Mercer v. Denne*, 2 Ch. 538, 560 (foregoing ruling affirmed on appeal, but on the principle of § 1591, *post*, by one of the three judges).

1904, *Cowles v. Lovin*, 135 N. C. 488, 47 S. E. 610 ("reputation" and "hearsay" distinguished).

1906, *Bland v. Beasley*, 140 N. C. 628, 53 S. E. 443 (a reputation sifting down merely to what *J. C.* said, *J. C.* being alive, excluded).

#### § 1586. Reputation must relate only to Matters of General Interest.

[*Note 1; add:*]

*Admitted*: 1905, *Heath v. Deane*, 2 Ch. 86, 91 (court rolls of a manor, admitted as to right of common for tenants to take stone; but not plainly on this ground).

[*Note 1 — continued*]

*Rejected*: 1904, *Hartford v. Maslen*, 76 Conn. 599, 57 Atl. 740 (whether land was tendered by the city to the State in lieu of another site; the understanding of citizens at a mass-meeting in 1872, excluded; the precise point is obscure).

§ 1587. **Same: Application of the Rule to Private Boundaries, etc.**

[*Note 3; add:*]

*Can.*: 1905, *Bartlett v. Nova Scotia S. Co.*, 37 N. Sc. 259, 264.

[*Note 7; add:*]

1770, *Redding's Lessee v. McCubbin*, 1 Harr. & McH. 368. 1735, *Howell's Lessee v. Tilden*, ib. 84.

1909, *Thurman v. Leach*, — Ky. —, 116 S. W. 300.

1904, *Cowles v. Lovin*, 135 N. C.

1854, *Tyson v. Shuey*, 5 Md. 540. 1909, *Peters v. Tilghman*, 111 Md. 227, 73 Atl. 726. 488, 47 S. E. 610 (*Shaffer v. Gaynor* followed). 1905, *Hemphill v. Hemphill*, 138 N. C. 504, 51 S. E. 42 (the reputation must be ancient and *ante litem motam*, and must refer to some monument or natural object or be corroborated by possession, etc.). 1906, *Bland v. Beasley*, 140 N. C. 628, 53 S. E. 443 (approving the foregoing cases, but here rejecting reputation because "no deed covering this tract of land is introduced, no monument or natural object is shown . . . and no occupation or possession of any such tract by H. or any of his descendants," etc.).

[*Note 8; add, under Accord:*]

1905, *Henry v. Brown*, 143 Ala. 446, 39 So. 325 (land). 1906, *Doe v. Edmondson*, 145 Ala. 557, 40 So. 505 (land).

1911, *Perkins v. Roswell*, 16 N. M. 185, 113 Pac. 609 (ordinance forbidding to "keep, maintain, or operate" a sanatorium for certain diseases; common repute that the defendant "runs" it, excluded; unsound).

1904, *Crippin v. State*, 46 Tex. Cr. 455, 80 S. W. 372 (permitting gambling in a house under control; ownership not provable by reputation; compare the cases cited *post*, § 1626, n. 7).

In these days of complicated stockholdings the following departure seems sound: Reputation is admissible to show *ownership of railroad premises or vehicles* by a specific corporation: 1904, *Chicago & E. I. R. Co. v. Schmitz*, 211 Ill. 446, 71 N. E. 1050.

*Contra*: 1903, *Louisville & N. R. Co. v. Jacobs*, 109 Tenn. 727, 72 S. W. 954 (reputation of ownership of locomotives causing a nuisance). Compare the presumption of *ownership from possession* (*post*, § 2515).

§ 1588. **Reputation Post Litem Motam, etc.**

[*Note 1, par. 1, l. 7; add:*]

(but in *Mercer v. Denne*, 1904, 2 Ch. 534, 1905, 2 Ch. 535, 560 an ancient deposition was said to be admissible, ignoring the present principle).

§ 1591. **Reputation must come from a Competent Source, etc.**

[*Note 1; add:*]

1904, *Mercer v. Denne*, 2 Ch. 535, 544 (a map of the sea-shore, made by an engineer, etc., in 1837, and found both in the British Museum and in the Admiralty, excluded, *per Farwell, J.*, apparently on the present ground in part; but the opinion is a strange one).

1905, *Mercer v. Denne*, 2 Ch. 538, 560 (foregoing ruling affirmed on appeal; *Vaughan Williams, J.*: "The second question is: Were the deponents persons to whom we ought to impute such knowledge of the subject-matter as would render their statements evidence

[*Note 1 — continued*]

of reputation?" but this part of the opinion was applied to certain ancient depositions, not to the map ruled upon by Farwell, J., *supra*).

### § 1602. Reputation of Marriage: General Principle.

[*Text*, p. 1950, last line of the section; after "disputed," add a new note 2:]

\*The singular rule is laid down in *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084 (1905) that where a ceremonial marriage is relied on reputation is inadmissible; this law would disturb thousands of lawful couples; the opinion of the majority in this case is an extraordinary one, full of loose law.

### § 1603. What constitutes Reputation; Divided Reputation.

[*Note 2; add:*]

1908, *Weidenhoft v. Primm*, 16 Wyo. 340, 94 Pac. 453 (*Barnum v. Barnum*, Md., approved).

### § 1605. Reputation of Other Facts of Family History.

[*Note 3; add:*]

1853, *Doe v. Marr*, 3 U. C. C. P. 36, 49 (inheritance and legitimacy; repute as to the mother having had illicit intercourse with S., excluded).

1914, *Hays v. Claypool*, — Ia. —, 145 N. W. 874 (inheritance by a recognized illegitimate child).

1843, *Fuller v. Saxton*, 20 N. J. L. 61, 66 (that G. K. was the daughter of D. C.; reputation admitted, though not "traced to the family").

1909, *State v. McDonald*, 55 Or. 419, 104 Pac. 967 (excluded).

[*Note 6; add:*]

1907, *Driggers v. U. S.*, 7 Ind. Terr. 752, 104 S. W. 1166 (death of a former witness; not decided).

1911, *Wiess v. Hall*, — Tex. Civ. App. —, 135 S. W. 384 (repute twenty years ago that a married woman had had a child born dead, admitted; sensible opinion by Reese, J.).

[*Note 7; add:*]

1906, *Gilliland v. Board*, 141 N. C. 482, 54 S. E. 413 (reputation as to the white race of an ancestor, admitted; here the reputation was shown by the fact that he had always been allowed to vote at public elections without objection).

1912, *Cole v. District Board*, 32 Okl. 692, 123 Pac. 426 (reputation of negro race, admissible, on an issue of school-rights).

### § 1612. Reputation must be General.

[*Note 1; add:*]

1913, *Watson v. State*, — Ala. —, 61 So. 334 ("how he stood with the law-abiding people," excluded).

### § 1614. Reputation of Character; Never Hearing anything against the Person.

[*Note 1; add, under Accord:*]

1910, *Hinson v. State*, 59 Fla. 20, 52 So. 194.

1893, *Gifford v. People*, 148 Ill. 173, 35 N. E. 754.

[*Note 1 — continued*]

- 1908, *State v. McClellan*, 79 Kan. 11, 98 Pac. 209.  
 1908, *State v. Lambert*, 104 Me. 394, 71 Atl. 1092.  
 1907, *Smitley v. Pinch*, 148 Mich. 670, 112 N. W. 686.  
 1905, *Sinclair v. State*, 87 Miss. 330, 39 So. 522.  
 1906, *Johnson v. State*, — Miss. —, 40 So. 324.  
 1907, *People v. Van Gaasbeck*, 189 N. Y. 408, 82 N. E. 718 (following *R. v. Rowton, supra*).  
 1907, *State v. Cremeans*, 62 W. Va. 134, 57 S. E. 405.  
 1907, *Spencer v. State*, 132 Wis. 509, 112 N. W. 462.

[*Note 1; add, under Contra:*]

- 1909, *Brinsfield v. Howeth*, 110 Me. 520, 73 Atl. 289 (whether the reputation was “questioned or doubted” until now, held improper, except to rebut testimony to bad reputation).

### § 1615. Reputation must be in Neighborhood of Residence.

[*Note 1; add:*]

- 1904, *Alford v. State*, 47 Fla. 1, 36 So. 436 (reputation in different places, admitted).  
 1904, *Douglass v. Agne*, 125 Ia. 67, 99 N. W. 550 (reputation in places of brief residence, admitted on the facts).  
 1905, *State v. Cambron*, 20 S. D. 282, 105 N. W. 241 (rule applied to a house of ill-fame).

### § 1616. Same: Reputation in a Circle, not the Place of Residence.

[*Note 2, par. 1; add:*]

- 1906, *People v. Lamar*, 148 Cal. 564, 83 Pac. 993 (“A man may possess different characters, or different reputations, adapted to different localities”; here, in saloons).  
 1908, *State v. Lambert*, 104 Me. 394, 71 Atl. 1092 (reputation in a town where “numerous business dealings” had been had, admitted, approving the above text).  
 1904, *State v. Brady*, 71 N. J. L. 360, 59 Atl. 6 (rape; the accused’s repute for chastity and morality “among his fellow-workmen,” excluded).  
 1905, *Southern Pac. Co. v. Hetzer*, 135 Fed. 272, 285, 68 C. C. A. 26 (reputation of a fellow-servant engineer, among conductors and brakemen, and not including “engineers and others acquainted with him,” excluded).  
 1909, *Pittsburgh R. Co. v. Thomas*, 3d C. C. A., 174 Fed. 591 (repute of a motorman among fellow-employees, admitted; “reputation in a special employment or calling is competently proved — indeed, is best proved — as it exists among those of the same calling”).  
 1910, *Moering v. Falk Co.*, 141 Wis. 294, 124 N. W. 402 (reputation of a fellow-servant for recklessness among those acquainted with his work, admitted).

### § 1618. Time of Reputation: (2) Reputation after the Time in Issue.

[*Note 1, par. 1; add, under Accord:*]

- 1904, *Gordon v. State*, 140 Ala. 29, 36 So. 1009 (reputation of the deceased after the killing, excluded).  
 1910, *In re Darrow*, 175 Ind. 44, 92 N. E. 369 (disbarment; offer of good character, not limited to the time before the alleged offence, excluded).  
 1909, *Allen v. Com.*, 134 Ky. 110, 119 S. W. 795 (defendant’s reputation after the act charged, excluded).  
 1913, *People v. Huff*, 173 Mich. 620, 139 N. W. 1033 (larceny; cross-examination of a good-character witness to matters after the date of the act charged, excluded).  
 1905, *State v. Day*, 188 Mo. 359, 87 S. W. 465 (prosecutrix in rape under age; reputation prior to the trial but after birth of the child, excluded).

## [Note 1 — continued]

1906, *Powers v. State*, 117 Tenn. 363, 97 S. W. 815 (defendant's repute after the homicide, excluded; but here the rule was erroneously applied to forbid cross-examination of a good-character witness as to reports of violent conduct; this was admissible on the principle of § 988, *ante*).

1906, *State v. Biscome*, 78 Vt. 485, 63 Atl. 877 (assault; excluded, but no authority is cited and the reasoning is confused).

1906, *State v. Barrick*, 60 W. Va. 576, 55 S. E. 652 (prosecutrix in rape; reputation after the alleged offence, inadmissible).

[Note 4; add, under *Contra*:]

1908, *State v. Blackburn*, 136 Ia. 743, 114 N. W. 531 (rape under age; the prosecutrix' repute at time of trial, admitted; unsound).

§ 1620. **Kind of Character:** (1) **Chastity**; (2) **House of Ill-fame**; (3) **Common Offender**.

## [Note 1; add:]

1906, *Ex parte Vandiveer*, 4 Cal. App. 650, 88 Pac. 993.

1906, *State v. Connor*, 142 N. C. 700, 55 S. E. 787 (criminal elopement with a married woman of virtuous character; the woman's virtuous character admitted).

1910, *State v. Mallonee*, 154 N. C. 200, 69 S. E. 786.

## [Note 2; add:]

*Accord*: 1904, *Woodruff v. State*, 72 Nebr. 815, 101 N. W. 1114.

1911, *Hast v. Terr.*, 5 Okl. Cr. 162, 114 Pac. 261.

1911, *State v. Workman*, 66 Wash. 292, 119 Pac. 751 (statutory rape; but the reputation should be confined to the purpose of discrediting the witness, Chadwick, J., diss.).

*Contra*: 1905, *State v. Hummer*, 128 Ia. 505, 104 N. W. 722 (reputation, admissible in rebuttal, but only for chastity and not for general moral character).

1912, *State v. Meister*, 60 Or. 469, 120 Pac. 406 (reputation admissible after evidence by specific unchaste acts).

## [Note 7, par. 1; add:]

*Admitted*: 1904, *State v. Steen*, 125 Ia. 307, 101 N. W. 96 (statute applied). 1910, *State v. Burns*, 145 Ia. 588, 124 N. W. 600 (living as a prostitute in a house of ill-fame; repute of the house, admitted, on the analogy of Code § 4944).

1913, *King v. Com.*, 154 Ky. 829, 159 S. W. 593 (maintaining a common public nuisance, viz. a bawdy-house; repute admitted, but not sufficient as the sole evidence; the opinion does not notice the statutory distinctions on which the rule depends).

N. Y. St. 1914, c. 365 (injunction to suppress house of ill-fame as a nuisance; amending St. 1909, c. 49; inserting a new § 343d; "evidence of the common fame and general reputation of the place, of the inmates thereof, or of those resorting thereto, shall be competent evidence to prove the existence of the nuisance").

N. C. St. 1907, c. 779, p. 1115 (on trials for keeping a bawdy-house, etc., "evidence of the general reputation or character of the house shall be admissible and competent; and evidence of the lewd, dissolute, and boisterous conversation of the inmates and frequenters, while in and around the house, shall be *prima facie* evidence of the bad character of the inmates and frequenters and of the disorderly character of the house").

Oh. St. 1913, p. 189, Apr. 23 (adding § 13031-77 to the Gen. Code; in pandering cases, "general reputation of a house as a house of prostitution or assignation" is competent).

1913, *Patterson v. State*, — Okl. Cr. —, 132 Pac. 693. 1913, *Putman v. State*, — Okl. Cr. —, 132 Pac. 916 (weighty opinion by Furman, J.).

[*Note 7 — continued*]

S. D. St. 1903, c. 154, § 3, p. 179 (to show the character of a house of ill-fame, "evidence of the general reputation of the house" is admissible). 1905, *State v. Cambron*, 20 S. D. 282, 105 N. W. 241 (the statute does not exclude other proper evidence). 1908, *Joliff v. State*, 53 Tex. Cr. 61, 109 S. W. 176 (disorderly house for illegal sale of liquor; reputation admitted; Davidson, P. J., diss.). 1912, *State v. Stone*, 66 Wash. 625, 120 Pac. 76 (placing a female in a house of prostitution). Wash. St. 1913, c. 127, p. 391, § 3 (houses of prostitution, etc.; "evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance").

*Undecided*: 1905, *State v. Harris*, 14 N. D. 501, 105 N. W. 621.

For reputation as evidence of *ownership* of such a house, see *ante*, § 1587, n. 8.

Compare the cases holding unconstitutional a statute which makes reputation *conclusive* (*ante*, § 1354, n. 9).

[*Note 8; add:*]

*Accord*: Ala. St. 1909, No. 193, Spec. Sess. p. 183, Aug. 25, § 5 ("general reputation of being gamblers," admissible in trial for gaming offences).

*Contra*: 1906, *State v. Brooks*, 74 Kan. 175, 85 Pac. 1013 (liquor nuisance).

1913, *Mitchell v. State*, — Okl. Cr. —, 130 Pac. 1175 (professional gambler).

Here compare the use of reputation to show *knowledge* merely (*ante*, § 257).

### § 1621. Same: Sanity, Temperance, etc.

[*Note 1; add, under Accord:*]

1904, *Parriah v. State*, 139 Ala. 16, 36 So. 1012.

1906, *Reed v. State*, 75 Nebr. 509, 106 N. W. 649.

[*Note 5, par. 1; add:*]

1903, *Fisher v. Weinholzer*, 91 Minn. 22, 97 N. W. 426 (reputation of a dog, admitted; the foundation for such a repute, discussed).

### § 1623. Reputation to prove Solvency.

[*Note 2; add, under Contra:*]

1905, *Allison's Ex'r v. Wood*, 104 Va. 765, 52 S. E. 559 ("particular opinions and particular acts," inadmissible).

### § 1624. Reputation to prove Partnership.

[*Note 1; add:*]

1904, *Marks v. Hardy's Adm'r*, 117 Ky. 663, 78 S. W. 864 (excluded).

[*Text*, p. 1973, after the second quotation *add* a new note 2:]

<sup>2</sup> *Accord*: 1907, *Grey v. Callan*, 133 Ia. 500, 110 N. W. 909.

### § 1625. Reputation to prove Incorporation.

[*Note 2; add:*]

1904, *State v. Knowles*, 185 Mo. 141, 83 S. W. 1083 (statute applied).

1905, *State v. Wise*, 186 Mo. 42, 84 S. W. 954 (statute applied).

For reputation to show a corporation's *ownership* of realty of personalty, see *ante*, § 1587.

## § 1626. Reputation to prove Sundry Facts.

[Note 1; add:]

1904, *Chicago City R. Co. v. Uhter*, 212 Ill. 174, 72 N. E. 195 (repute as to prior injuries sustained by plaintiff, excluded).

1908, *Knickerbocker Ice Co. v. Gray*, 171 Ind. 395, 84 N. E. 341 (general repute, not admitted to show who were superintendent and engineer).

For reputation as evidence of title or possession of realty or personalty, see *ante*, § 1587.

## § 1633. Official Statements; Nature of the Duty, etc.

[Note 2; add, under *Accord*:]

1905, *Florschein v. Fry*, 109 Mo. App. 487, 84 S. W. 1023 (but the foreign law must be shown; here a record of incorporation).

1908, *Miller v. Northern Pacific R. Co.*, 18 N. D. 19, 118 N. W. 344 (Minnesota weigh-master's record of grain weights, made under Minn. Gen. St. 1894, § 7705, admitted; approving the above passage.)

1909, *State v. McDonald*, 55 Or. 419, 104 Pac. 967 ("It is the intent of the statute that the officer having the legal custody should make his certificate according to the law of the place of record").

[Note 7, at the end; add:]

Another limitation, viz. that the entry must have been made *contemporaneously*, has once been laid down.

1913, *Butcher's S. & M., Ass'n v. Boston*, 214 Mass. 254, 101 N. E. 426 (drawtender's books).

[Text, p. 1985, l. 19 from below; insert:]

1824, *Richardson v. Mellish*, 2 Bing. 229, 240; the plaintiff ship-captain brought an action against the defendant ship-owner, in which a part of the issue of fact was the value or profit of a voyage to the East Indies by one of the East India Company's ships; as evidence of the value of such a voyage, a book was offered, "containing a list of passengers, made by the captain, and deposited in the India House, pursuant to the Act of 53 Geo. III," which provided that every ship in that trade should before clearing exhibit to the customs-officer upon oath, "a true and perfect list . . . setting forth the names, capacities, and descriptions of all persons embarked," etc., etc., and that the officer receiving such list should upon receiving it "transmit a copy of such list to the secretary of the court of directors of the said United Company." It was objected that "the captain's book is not such a public document as to entitle the plaintiff to give it in evidence." *Best*, C. J. (overruling the objection): "I come now to the next question, that is, as to the admissibility of evidence. For the purpose of proving the damage, the plaintiff put in a list returned by a captain under the authority of the St. 53 Geo. III, c. 155, §§ 15, 16. It is contended that that paper was not evidence against third parties. I am decidedly of opinion that there is no foundation for that objection. This is a public paper made out by a public officer,\* under a sanction and responsibility which impel him to make that paper out accurately; and that being the case, it is admissible in evidence, on the principle on which sailing instructions, the list of convoy, and the list of the crew of a ship are admissible. But, it may be said, 'Ay, but those are papers which come from Government officers.' I go on: But the books of the Bank of England have been made evidence, — all those are evidence that are considered as public papers, made out by persons who have a duty to the public to perform, and whose duty it is to make them out accurately. On account of that duty and responsibility, credit is given to them. . . . These are papers which the captain is ordered, by the 15th section of the statute to which we have been referred, to make out upon oath, which oath an officer of the customs is authorized to administer; for what purpose? for the purpose of informing the East India Company (who, though subjects in England, are

[Text, p. 1985 — continued]

great sovereigns in India) what kind of persons, and with what sort of arms, these persons are going to settlements the administration of the affairs of which are committed to them. If these are not public papers, made with a view to great principles of public policy, I am at a loss to know what are public papers.”<sup>28</sup>

<sup>28</sup> This phrase of the learned judge was here applied liberally; for the ship was a private ship, owned by Messrs. S. T. & S., and chartered by the East India Company for six voyages.

<sup>29</sup> The above principle is exemplified in the following case: 1906, *McInerney v. U. S.*, 143 Fed. 729, 736, C. C. A. (ship’s manifest; cited more fully *post*, § 1672, n. 1).

### § 1634. Publicity of the Document as Essential.

[Note 1; add:]

1904, *Mercer v. Denne*, 2 Ch. 534, 541, 544 (fishing-rights; a report of a surveyor, in 1610, made by order of the Warden of the Cinque Ports, and maps prepared in 1641–47 by the War Office, not admitted as public documents, following *Sturla v. Freccia*; *Farwell, J.*: “The test of publicity as put by Lord Blackburn is that the public are interested in it, and entitled to go and see it, so that if there is anything wrong in it, they would be entitled to protest”; but two charts prepared by order of the Admiralty were admitted).

1905, *Mercer v. Denne*, 2 Ch. 538, 554 (*Mercer v. Denne*, *supra*, affirmed on appeal; *Vaughan Williams, L. J.*, referring to *Sturla v. Freccia*, thought that “*Farwell, J.*, in his judgment carried the ruling of Lord Blackburn rather further than Lord Blackburn himself intended,” and believed that under that principle “records in the Exchequer of acts done by officers of the Crown in assertion or derogation of the King’s title are admissible against all the world” in a proper case; though the documents here offered did not satisfy that rule).

### § 1635. Personal Knowledge of the Official, etc.

[Note 4; add:]

1905, *Ohio Nat’l Bank v. Berlin*, 26 D. C. App. 218, 225.

1904, *Lalakea v. Hilo Sugar Co.*, 15 Haw. 570.

1906, *Com. v. Johnson*, 123 Ky. 437, 96 S. W. 801 (whether a county clerk is liable for taking an acknowledgment of an impostor).

1907, *Barnard v. Schuler*, 100 Minn. 289, 110 N. W. 966 (good opinion by *Start, C. J.*).

[Note 6; add:]

1904, *People v. Buckley*, 143 Cal. 375, 77 Pac. 169 (rule stated for an official stenographer’s transcript of testimony); *People v. Donnolly*, *ib.* 394, 77 Pac. 177 (similar).

Mass. St. 1912, c. 64 (register of deeds for Worcester Co. may authorize in a specified manner an employee “to certify or attest as chief clerk records or copies of records,” and such certified or attested documents shall be equally admissible as those done by “the register in person”).

*Contra*: 1913, *Butchers’ S. & M. Ass’n v. Boston*, 214 Mass. 254, 101 N. E. 426 (draw-tenders’ official record of vessels passing, not admissible so far as made on reports by substitute drawtenders; unsound; decided on the principle of § 1530, *ante*, but that principle does not apply here, because the substitute is equally an official, hence need not be called; *Worcester v. Northborough*, not noticed).

### § 1639. Official Registers; General Principle, etc.

[Note 1, par. 1; add:]

1905, *Monarch Mfg. Co. v. Omaha, C. B. & S. R. Co.*, 127 Ia. 511, 103 N. W. 493 (*Huston v. Council Bluffs* approved).

## [Note 1 — continued]

1906, *Jones' Estate*, 130 Ia. 177, 106 N. W. 610 (record of supervisors of a county as to a pauper, held not authorized).

1904, *Jordan v. Carberry*, 185 Mass. 181, 69 N. E. 1062 (town clerk's issuance of dog-license to C. is no evidence of C.'s ownership or keeping, unless brought to C.'s knowledge). 1904, *Cashin v. N. Y. N. H. & H. R. Co.*, 185 Mass. 543, 70 N. E. 930 (certain hospital records, excluded). 1908, *Allen v. Kidd*, 197 Mass. 256, 84 N. E. 122 (assistant city engineer's notebook, kept with the public records, not admitted to show the side lines of any and all streets, his duty not having that scope; this is a narrow decision). 1909, *Delaney v. Framingham G. F. & P. Co.*, 202 Mass. 359, 88 N. E. 773 (records of the Massachusetts General Hospital and the Carney Hospital, made before the duty imposed by St. 1905, *infra*, n. 2, requiring the keeping of records of "cases under their care," not admitted).

1911, *Worden L. & S. Co. v. Minneapolis St. P. & S. S. M. R. Co.*, 168 Mich. 74, 133 N. W. 949 (Federal weather records, here excluded because relating to the wind at another point).

1906, *Levels v. St. Louis & H. R. Co.*, 196 Mo. 606, 94 S. W. 275 (public school teacher's register of pupils' ages, kept by requirement of law, admitted).

1910, *Hufnagle v. Delaware & H. Co.*, 227 Pa. 476, 76 Atl. 205 (a diary kept by law in a U. S. Weather Bureau station, held not improperly excluded; here the Supreme Court gives the law of evidence a needless rebuff in order to save reversing the case; why not better have held that the ruling was erroneous but harmless?).

1905, *Anderson v. Hilker*, 38 Wash. 632, 80 Pac. 848 (records of the U. S. Weather Bureau, read by the officer in charge, admitted).

## [Note 2; add:]

*Alta*. St. 1910, 2d sess., Evidence Act, c. 3, § 31 (like Ont. Rev. St. 1897, c. 73, § 28).

*Br. C.* St. 1903-4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 2 (repeals § 20 of Rev. St. 1897, c. 71, and substitutes a requirement of "reasonable notice," the judge to determine reasonableness, but the time "shall not in any case be less than ten days").

*Ont.* St. 1906, 6 Edw. VII, c. 11, § 55 (books and files of the mining recorder's office, to be evidence). St. 1909, c. 43, § 28 (like R. S. 1897, c. 73, § 28).

*Sask.* St. 1907, c. 12, Evidence Act, § 11 (like Can. St. 1893, c. 31, § 17).

*Yukon* St. 1904, c. 5, § 13 (like Dom. St. 1893, c. 31, § 17, adding "or of this Territory").

*Haw.* St. 1905, No. 67, p. 132, Apr. 26 (record of payment of U. S. liquor tax, admissible to show that the person named keeps liquor for sale). St. 1907, No. 119, p. 243 Apr. 30, § 68 (foregoing statute repealed). St. 1913, No. 157, p. 283, Apr. 30 (amending St. 1907; possession of such receipt on premises is evidence of keeping for sale, etc.).

*Ky.* Gen. St. 1899, c. 81, § 17, Stats. 1903, § 3760 (official records in general; quoted *ante*, § 1352, n. 11). St. 1904, c. 127 (livery keeper's register of hirings, required to be kept, and made admissible in evidence for offences under this act "if the livery keeper at the time issue a duplicate memorandum to the person hiring," etc.).

*Mass.* St. 1905, c. 330 (certain hospitals given a duty "to keep records of the cases under their care, and the history of the same, in books kept for the purpose," and these books to be admissible "as to all matters therein contained"). St. 1908, c. 269 (amending St. 1905, c. 330, by extending it to "similar records kept prior to Apr. 25, 1905"). 1909, *Delaney v. Framingham G. F. & P. Co.*, 202 Mass. 358, 88 N. E. 776 (certain hospital records, of the kind described in St. 1905, held properly excluded, because St. 1905 was passed only after the records were made and St. 1908 was passed only after the trial took place). St. 1912, c. 442 (amends foregoing statutes to read "records of the treatment of the cases under their care and the medical history of the same," and to substitute for "all matters therein contained" the terms "so far as such records relate to the treatment and medical history of such cases, but nothing herein contained shall be admissible as evidence which has reference to the question of liability"; this childish way of trying to keep out things that do not suit the interest of one party — like leaving out or putting in the joker in a pack of cards, or

[Note 2 — *continued*]

abolishing foul balls because the pitcher's skill needs a counterpoise — is unworthy of our profession in this age).

*N. Y. St.* 1909, c. 65, p. 24, Feb. 19 (re-enacting *St.* 1897, c. 622, § 1, as *C. C. P.* § 961f.)

*U. S. St.* 1909, Mar. 4, c. 321, No. 350 (*Crim. Code*; 35 *Stat. L.* p. 1088), § 93 (embezzlement of public money; transcript of Treasury books to be evidence of balance).

*Utah St.* 1905, c. 108, Mar. 9, § 17 (State engineer's maps and records to be "*prima facie* evidence of the facts stated or delineated therein").

*Vt. St.* 1910, No. 86, p. 93 (amending *Pub. St.* § 1600, to admit *U. S.* weather records "taken under direction of any department of the *U. S.* government," in civil cases, by certified copy under oath by the officer at the place of taking and keeping).

### § 1640. Assessor's Books; Electoral Register.

[Note 1; *add*, under *Admitted*.:]

1907, *Central Pacific R. Co. v. Feldman*, 152 *Cal.* 303, 92 *Pac.* 849 (allowable on cross-examination, to test an expert).

1905, *Gossage v. Phila. B. & W. R. Co.*, 101 *Md.* 698, 61 *Atl.* 692 (county commissioners' books, based upon the plaintiff's admissions, received against him to show the value of a ship).

1907, *Ripton v. Brandon*, 80 *Vt.* 234, 67 *Atl.* 541 (quadrennial appraisal, admitted to show value of realty).

1910, *McHenry v. Parkersburg*, 66 *W. Va.* 533, 66 *S. E.* 750 (assessment admitted under *Code* 1899, c. 29, § 115, *Code* 1906, § 801).

[Note 1; *add*, under *Excluded*.:]

1909, *St. Louis I. M. & S. R. Co. v. Magness*, 93 *Ark.* 46, 123 *S. W.* 786 (assessor's valuation, excluded).

1905, *Sanitary District v. P. F. W. & C. R. Co.*, 216 *Ill.* 575, 75 *N. E.* 248 (question reserved).

1906, *Lewis v. Englewood Elev. R. Co.*, 223 *Ill.* 223, 79 *N. E.* 44 (eminent domain; the assessed valuation of the land, not allowed to be asked of the owner producing his tax receipts; on the ground that, for real property, the owner is not required to list its value for taxation and therefore the assessed valuation does not involve any admission on his part; as to the theory of official statements by the assessor, the Court merely adds that "the assessor himself might have been a competent witness"). 1914, *Kelley v. People's Nat'l F. Ins. Co.*, 262 *Ill.* 158, 104 *N. E.* 188 (assessor's schedule of value of household goods, not admissible against the owner; whether admissible as a return made by the owner or agent, not decided).

1908, *Atherton v. Emerson*, 199 *Mass.* 199, 85 *N. E.* 530 (official appraisal by appraisers in bankruptcy, excluded).

1904, *Suffolk & C. R. Co. v. West End L. & I. Co.*, 137 *N. C.* 330, 49 *S. E.* 350 (assessor's list, not admitted to show value; collecting prior cases).

1904, *Spink v. N. Y. N. H. & H. R. Co.*, 26 *R. I.* 115, 58 *Atl.* 499 (damage by a railroad fire; the assessor's valuation not admitted).

[Note 3; *add*, under *Accord*.:]

1905, *Ivey v. Cowart*, 124 *Ga.* 159, 52 *S. E.* 436 (tax-return, receivable as an admission, to show the contents of lots of land).

1904, *Fudge v. Marquell*, 164 *Ind.* 447, 72 *N. E.* 565 (action on a note; plaintiff's tax schedules received as an admission of non-ownership by omission of the note).

[Note 9; *add*.:]

*Ont. St.* 1904, 4 *Edw. VII.* c. 23, § 67 (certified copy of an assessment roll "shall be received as *prima facie* evidence").

[Note 9 — continued]

*Colo. St.* 1905, c. 100, § 14 (electoral registration books, admissible to prove the taking of oath, etc.).

*Mass. St.* 1913, c. 401 (valuation by assessors for three preceding years, admissible in condemnation proceedings).

*Mo. St.* 1913, p. 290, Apr. 7, § 24 (drains and levees; the levee tax-book of the district, to be evidence of "all matters therein contained").

*N. C. Rev.* 1905, § 4331 (electoral register, and a certified copy thereof, shall be *prima facie* evidence of a voter's right to vote); *ib.* § 4338 (poll-books shall be evidence in a trial for illegal or fraudulent voting).

*Or. St.* 1913, c. 184, p. 325, § 47 (amending Lord's Or. Laws, § 3733).

#### § 1641. Military and Naval Registers; Ship's Log-Book.

[Note 5; *add.*, at the end:]

The following cases, though not involving log-books, should serve to indicate a common-law basis for any such books required by law to be kept:

1824, *Richardson v. Mellish*, 2 Bing. 229 (list of passengers, kept under statute, admitted; quoted *ante*, § 1633).

1846, *Buckley v. U. S.*, 4 How. U. S. 251, 258 (*Richardson v. Mellish*, Eng., *supra*, cited with approval).

1906, *McInerney v. U. S.*, 143 Fed. 729, 736, C. C. A. (manifest of a shipmaster, required to be made by St. 1891, Mar. 3, c. 551, § 8, 26 Stat. 1085, reporting the name, etc., of immigrants, admitted to show the time of arrival of the defendant in the U. S.).

[Note 6; *add.*:]

1907, *The Kentucky*, 148 Fed. 500, D. C. (log-books admitted, after being used by the other party for cross-examination, though "ordinarily the entries in such books are not receivable in support of the party who makes them").

#### § 1642. Registers of Marriage, Birth, and Death; History, etc.

[Note 3; *add.*:]

The laws of the Northwest Territory, in 1791 (c. VII) provided for the recording of certificates of marriage in the county register, "an exemplification of which shall be evidence of such marriage."

#### § 1644. Registers of Marriage, Birth, and Death; Law in the Various Jurisdictions.

[Note 1; under *Statutes*, *add.*:]

*Alta. St.* 1907, c. 13, § 30 (registrar of vital statistics; certified extracts shall be "evidence of the facts therein stated").

*Man. St.* 1912, 2 Geo. V, c. 97, § 6 (certificate "of the details of any birth, marriage, or death of which there is a record," given by the Minister of the Department or the inspector of vital statistics, to be evidence of "the facts certified to be recorded").

*N. Br. St.* 1910, 10 Edw. VII, c. 43, § 3 (certified copy by the diocesan registrar of Fredericton, admissible to prove documents of church history deposited with him).

*N. Sc. St.* 1908, 8 Edw. VII, c. 1, § 31 (certificate of registrar-general of births and deaths, to be evidence "of the facts certified to be recorded").

*Ont. St.* 1908, 8 Edw. VII, c. 28, § 7 (registrar-general of vital statistics; certificate "of the details of any birth, marriage, or death" recorded, to be evidence "of the facts certified to be recorded").

## [Note 1 — continued]

*P. E. I.* St. 1906, 6 Edw. VII, c. 6, § 30 (certified copies of the official records of birth, marriage, and death, are evidence "of the facts therein stated").

*Yukon* Consol. Ord. 1902, c. 6, § 20 (certified extract of returns of births, marriages, and deaths, by the registrar of vital statistics, "shall be evidence of the entry and *prima facie* evidence of the facts therein stated").

[Note 1, under *Judicial Rulings; add:*]

*Eng.*: 1904, *Goodrich's Estate*, P. 138 (certified copy of an entry of "a register of births" for 1844, admitted, as "evidence of its contents"; here, to show the date of birth of defendant). 1912, *Drew v. Drew*, P. 175 (divorce for desertion; marriage proved by a registrar's certified copy from the register of marriages in Edinburgh, under St. 1856, 19-20 Vict. c. 96, § 2). 1913, *In re Woodward*, *Kenway v. Kidd*, 1 Ch. 393 (registers of the Society of Friends, prior to 1837, deposited at the General Registry office under St. 3-4 Vict., 1840, c. 92, were offered to be proved by certified extract from the Society's unofficial digest kept at its own office, because no index was available at the government office; excluded; this is not in keeping with the liberal informality which the Judicature Act was supposed to install).

*Can.*: 1912, *Zdrahal v. Shatney*, Man. C. A., 7 D. L. R. 554 (criminal conversation; a purporting official certificate of marriage in Hungary, with no evidence of authenticity nor of the law of Hungary, excluded; too strict).

1913, *R. v. Hutchins*, Sask. S. C., 12 D. L. R. 648 (marriage in Minneapolis, proved by certified copy of clerk's record of marriage license, etc.).

## [Note 6; add:]

*Cal.* Pol. C. 1872, § 3083, as amended by St. 1905, c. 107 (State registrar's certified copy of the record of "any marriage or birth registered under the provisions of this chapter shall be *prima facie* evidence in all courts and places of the facts therein stated"). St. 1905, c. 498 (open adultery; a new P. C. § 269b provides that "a recorded certificate of marriage or a certified copy thereof, there being no decree of divorce, proves the marriage of a person for the purposes of this section"). St. 1907, c. 236, p. 296, Mar. 15 (amending § 15 of St. 1905, c. 107, Mar. 18, by adding a similar provision for the State registrar's certified copy of a registry of death).

*Colo.* St. 1907, c. 112, p. 238, Apr. 9, § 21 (State registrar's certified copy of register of birth or death, admissible).

*Del.* St. 1909, c. 66, p. 121, Apr. 15, § 10 (official record of births, marriages, and deaths, kept by county recorder, to be admissible). St. 1911, c. 244, p. 682, Apr. 10, § 6 (marriage record book kept by county clerk of the peace, to be evidence of the facts recorded). St. 1913, c. 84, p. 206, Mar. 31, § 8 (same for marriage register of State registrar of vital statistics or of county recorder). St. 1913, c. 85, p. 219, Mar. 31, § 14 (same for birth register of same officers).

*Ga.* St. 1914, No. 466, p. 157, § 20 (vital statistics; State registrar's certified copy of record of a birth or death, to be evidence "of facts therein stated").

*Haw.*: 1905, *Kapiolani Estate v. Thurston*, 16 Haw. 471 (a "book of marriage records," kept by a minister, recording marriages among his parishioners, admitted). 1906, *Godfrey v. Rowland*, 17 Haw. 577, 581 (baptismal record by a clergyman in Australia, admitted). St. 1905, No. 64, p. 122, Apr. 26, § 3 (certificate of Hawaiian birth, by Secretary of Hawaii, to be evidence). St. 1907, No. 79, p. 101, Apr. 19 (amending the foregoing statute). St. 1909, No. 15, p. 14, Mar. 11 (repealing the foregoing two statutes). St. 1911, No. 96, p. 127, Apr. 17 (provisions re-enacted in more elaborate form). St. 1911, No. 23, p. 20, Mar. 17 (amending Rev. L. 1905, § 2214; the certificate of marriage to be evidence of the fact). St. 1913, No. 86, p. 108, Apr. 19 (amending Rev. L. 1905, § 1159; registrar-general's certified copy of record of birth, marriage, or death, admissible).

[*Note 6 — continued*]

*Ida.* St. 1911, c. 191, p. 631, Mar. 9, § 21 (State registrar's record of birth or death, to be evidence of the facts stated).

*Ill.*: 1904, *Sokol v. People*, 212 Ill. 238, 72 N. E. 382 (marriage record of N. Y. City health department, not shown to be official, excluded; but a marriage contract purporting to be by the law of Moses was admitted). 1904, *Murphy v. People*, 213 Ill. 154, 72 N. E. 779 (N. Y. Catholic church register, excluded because the priest's handwriting was not proved). *Kan.*: 1905, *State v. Miller*, 71 Kan. 200, 80 Pac. 51 (copy of a Russian parish record, excluded, because not shown to be official). St. 1911, c. 296, p. 529, Mar. 14, § 15 (registration of vital statistics; State registrar's certified copy of record of birth or death, to be evidence of "the facts stated therein"). St. 1913, c. 224, p. 398, Mar. 10, § 6 (State registrar's certified copy of marriage records, admissible).

*Ky.*: 1892, *Faustre v. Com.*, 92 Ky. 34, 17 S. W. 189 (register of marriages by registrar of an Ontario town, not admitted, for lack of evidence that the marriage "was registered in due form according to the laws of that sovereignty"; the certificate of the officer reciting the Ontario law not being sufficient; unsound). Stats. 1899, § 1638 (certified copy of "any register of births and marriages" in any "State, nation, province, colony, city or town, out of the United States," "if the same shall have been registered in due form according to the laws of such sovereignty," is admissible). St. 1910, c. 37, p. 96, Mar. 21, § 21 (vital statistics; State registrar's certified copy of record of birth, sickness, or death, to be evidence of "the facts therein stated"). 1912, *Apkins v. Com.*, 148 Ky. 662, 147 S. W. 376 (bigamy; record of marriages in Illinois, proved by the deputy county clerk on the stand, admitted). 1912, *Royal Neighbors v. Hayes*, 150 Ky. 626, 150 S. W. 845 (Irish parish priest's baptismal record, dated 1844, not admitted under Stats. § 1638; it is odd that it was not ruled in on the principle of § 1523, *ante*).

*Me.*: St. 1907, c. 99, p. 104, Mar. 21 (marriage may be evidenced by record made by regular clergyman if his ecclesiastical authority has been vouched to Secretary of State and the latter has issued certificate of authority). St. 1909, c. 161, p. 163, Mar. 29 (similar, with broader phrasing; repealing St. 1907 and Rev. St. c. 61, §§ 11, 12).

*Mich.*: 1906, *Krapp v. Metrop. L. Ins. Co.*, 143 Mich. 369, 106 N. W. 1107 (certain certificates of death and cause of death, admitted under Comp. L. § 4617, *supra*).

*Minn.* St. 1911, c. 250, p. 347, April 18 (Secretary of State's certified copy of vital statistics of births and deaths of each county to be evidence "of each and every fact contained therein"). St. 1913, c. 251, p. 342, April 11 (official record of death of a joint tenant or person on whose life any title is limited, to be evidence of "the death of such person and the termination of such joint tenancy," or other estate, when recorded by certified copy in the county registry of deeds). St. 1913, c. 579, p. 862, April 28, § 13 (vital statistics; State or local registrar's certified copy of record of "any birth or death recorded under the provisions of this Act" to be evidence of "the facts therein stated"; repealing Rev. L. 1905, §§ 2140, 2141, 2143, and St. 1911, c. 250).

*Miss.* St. 1912, c. 149, p. 158, Mar. 11, § 5 (vital statistics; State registrar's certified copy of record of birth, sickness, or death, to be evidence of "the facts therein stated").

*Mo.*: 1905, *Collins v. German-Amer. M. L. Ass'n*, 112 Mo. App. 209, 86 S. W. 891 (certain Roman Catholic registers in Ireland, deposited to be admissible by Irish law, received; *Childress v. Cutter and Morrissey v. W. F. Co.* are presumably but not expressly overruled; the opinion makes an extraordinarily confusing mixture of the Exceptions for pedigree statements, shop-books, and public documents, and is calculated to discourage any further scientific study of the Hearsay rule in this State). St. 1909, p. 538, May 6, § 21 (vital statistics; State registrar's certified copy of record of "any birth or death registered under the provisions of this Act," to be evidence of "the facts therein stated").

*Nebr.* St. 1913, c. 68, p. 201 (county judge's record of Indian agent's record of Indian marriages, admissible).

*Nev.* St. 1911, c. 199, p. 392, § 20 (vital statistics; secretary of the State board of health's certified copy of the record of birth or death, to be evidence "of the facts therein stated").

[Note 6 — continued]

*N. J.*: 1907, *Sparks v. Ross*, 72 N. J. Eq. 762, 65 Atl. 977 (a certain marriage record from a county clerk's office; its standing doubted on the facts). St. 1909, c. 109, p. 168, § 10 (certified copy of certificate of birth or death, by medical superintendent of State bureau of vital statistics, to be admissible "to prove the facts therein contained"). St. 1910, c. 274, p. 477, § 15 (vital statistics; certified copy by medical superintendent of State bureau of vital statistics, of original "certificate of marriage, marriage license, and consent to the marriage of minors," to be evidence "of the facts therein contained"). St. 1912, c. 199, p. 306, § 15 (re-enacts the foregoing).

*N. Y.* St. 1911, c. 279, p. 675 (amending Consol. L. 1909, c. 45, St. 1909, c. 49, § 22, in other respects). St. 1913, c. 619, p. 1647 (amending Consol. L. c. 45, St. 1909, c. 49, by inserting a new § 391; State commissioner of health's certified copy of record of birth or death, to be evidence "of the facts therein stated").

*N. D.* St. 1907, c. 270, p. 433, § 21 (vital statistics; State registrar's certified copy of record of a birth or death, to be evidence "of the facts therein stated").

*Pa.* St. 1905, No. 221, § 21 (State registrar's certified copy "of the record of any birth or death registered under the provisions of this act" shall be "*prima facie* evidence in all courts and places of the facts therein stated").

*S. C.*: St. 1911, No. 70, p. 131, § 7 (marriage certificate, or a copy, signed by celebrant, and certified by the clerk of court or judge of probate, to be evidence "of the contract of marriage between the parties therein named").

*S. D.*: St. 1907, c. 246, p. 485 (certified copies of "any certificate or record" in the office of the State superintendent of vital statistics, to be evidence).

*Tenn.*: 1904, *Murray v. Supreme Hive*, 112 Tenn. 664, 80 S. W. 827 (records of a board of health, admitted to show age). St. 1913, c. 30, p. 64, § 21 (vital statistics; States registrar's certified copy of record of birth or death shall be evidence "of the facts therein stated").

*Tex.*: 1907, *Burton v. State*, 51 Tex. Cr. 196, 101 S. W. 226 (bigamy; rule of § 2085, *post*, applied to a recorded marriage certificate).

St. 1907, c. 62, p. 134, § 2 (family-desertion; "certificates of baptism reciting the names of the parents" to be *prima facie* evidence of marriage and parentage).

*Utah* St. 1905, c. 120, Mar. 16, § 20 (certified copy of the State registrar's "record of a birth or death" shall be *prima facie* evidence "of the facts therein stated").

1912, *State v. Springer*, — *Utah* —, 121 Pac. 976 (adultery; certified copy of the marriage record, admissible, without noting any of the above distinctions).

*Vt.* St. 1902, No. 44 (cited *post*, § 1646, n. 2). St. 1908, No. 80, p. 72 (amending Pub. St. § 3303, to admit certified copies, by the town clerk or the secretary of State if the record is in his office").

*Va.* St. 1910, c. 28, p. 36 (amending Code 1887, § 2229; clerk's certified copy of recorded marriage certificate, to be evidence "of the facts stated therein").

*Wash.* St. 1907, c. 83, p. 145, § 20 (vital statistics; State registrar's certified copy of record of birth or death, to be evidence "of the facts therein certified").

## § 1645. Certificates of Marriage.

[Note 6; *add*.:]

1911, *Bellis' Case*, 6 Cr. App. 283 (rape under age; "a birth certificate" admitted).

1909, *People v. Le Doux*, 155 Cal. 535, 102 Pac. 517 (said *obiter* that on a charge of bigamy, a duly certified copy of a county record of marriage in Arizona, together with the minister's certificate of indorsement on the original license, would be inadmissible without other evidence of the minister's authority and of his execution of the license and certificate; unsound; but here the defendant's affidavit applying for the license was held enough, the bigamy not being essential in the trial for murder).

1906, *State v. Rocker*, 130 Ia. 239, 106 N. W. 645 (murder; certificate of defendant's marriage in Germany, formerly exhibited by him as genuine, admitted against him).

[*Note 6 — continued*]

1910, *State v. Walsh*, 25 S. D. 30, 125 N. W. 295 (original certificate required by law, admitted, although Civ. C. § 55 mentions only the record or a copy as admissible; the opinion does not discuss the principle).

**§ 1646. Personal Knowledge required, etc.**

[*Note 1; add:*]

1904, *Goodrich's Estate*, P. 138 (cited *ante*, § 1644, n. 1).

[*Note 2; add:*]

1910, *Brotherhood of Painters v. Barton*, 46 Ind. App. 160, 92 N. E. 64 (in an action on a fraternal benefit policy, to show the cause of death, the record of the board of health of a city, based on the physician's report required by law to be filed, was held inadmissible, two judges diss.).

1906, *Krapp v. Metrop. L. Ins. Co.*, 143 Mich. 369, 106 N. W. 1107 (physician's official certificates of death, admitted to show cause of death).

1909, *State v. McDonald*, 55 Or. 419, 104 Pac. 967 ("Official registers are competent evidence of the facts properly recorded therein, although they relate to matters not within the personal knowledge of the officer making them").

1904, *McKinstry v. Collins*, 76 Vt. 221, 56 Atl. 985 (assault; the same certificate as in *McKinstry v. Collins*, 74 Vt., *supra*, not admitted to show the cause of death; St. 1902, *supra*, having intervened between the two trials).

**§ 1647. Registers of Title; Shipping Registers, etc.**

[*Note 1; add:*]

Yukon St. 1904, c. 5 (like N. Br. Consol. St. 1877, c. 46, § 15).

[*Note 5, l. 1; add:*]

see also the statutes for certified copies, cited *post*, §§ 1674, 1680.

**§ 1650. Registers of Conveyances; History.**

[*Note 1, par. 1, at the end; add:*]

now reprinted in Vol. I of *Select Essays on Anglo-American Legal History* (ed. for the Association of American Law Schools, 1907).

**§ 1651. Same: Law in the United States and Canada.**

[*Note 5; add, under CANADA:*]

*Dominion*: 1910, *Musgrave v. Anglin*, 43 Can. Sup. 484 (certified copy of will by Quebec notary; stated more fully *post*, § 1681).

*Alberta*: St. 1906, c. 24, § 17 (land-title registry; the registrar's exemplification or certified copy of "any instruments affecting lands which are deposited, filed, or registered in his office" is admissible "in the same manner and with the same effect as if the original was produced"). St. 1910, 2d sess., Evidence Act, c. 3, §§ 36, 37 (like Ont. Rev. St. 1897, c. 73, § 32, but adding for the liberty of rebuttal, "proof that there is no such original, or that the copy is not a true copy of the original in some material particular"); ib. c. 3, §§ 48, 49 (instrument deposited, kept, or registered with the registrar or deputy registrar of land-titles, provable by certified copy under seal; except that "where a public officer produces upon subpoena an original document, it shall not be deposited in court unless otherwise ordered," but a copy certified by the producing officer shall be filed).

[Note 5 — continued]

*British Columbia*: St. 1903-4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 2 (repeals § 20 of Rev. St. 1897, c. 71, and substitutes another rule, as quoted *ante*, § 1639, n. 2). St. 1906, 6 Edw. VII, c. 23, § 118 (like Rev. St. 1897, c. 111, § 48); *ib.* § 120 (quoted *ante*, § 1225, n. 1). St. 1914, 4 Geo. V, c. 26, § 2 (amending Rev. St. 1911, c. 78, § 50, by substituting "twenty-five" for "ten").

*Nova Scotia*: 1905, *Bartlett v. Nova Scotia S. Co.*, 37 N. Sc. 259, 264 (certified copies of a plan found in the Crown land-office, not admitted, under Rev. St. 1900, c. 163, § 20; the Court's hostility to the statute, "of which I confess I knew nothing until the present argument," is so strong that its ruling is not to be wondered at). St. 1910, 10 Edw. VII, c. 28 (amending Rev. St. 1900, c. 163, § 27, by requiring ten days' notice of the intention to use such a document, if a will or a deed, unless the judge dispenses). 1905, *McDonald v. McDonald*, 38 N. Sc. 261, 278, 290 (the execution of the original deed need not otherwise be proved when a certified copy of the registry is offered under the Evidence Act, Rev. St. 1900, c. 163, § 21).

*Ontario*: St. 1909, c. 43, §§ 33, 34 (like R. S. 1897, c. 73, § 32, but adding liberty of rebuttal as in *Alta. St.* 1910, c. 3, §§ 36, 37); *ib.* § 46 (like R. S. 1897, c. 73, § 46); *ib.* § 47 (like *ib.* § 47).

*Saskatchewan*: St. 1906, c. 24, § 38 (land-titles; like *Alb. St.* 1906, c. 24, § 17). St. 1907, c. 12, Evidence Act, § 16 (any instrument filed or registered in a land registration district, provable by the registrar's certified copy).

*Yukon*: Consol. Ord. 1902, c. 39, § 28 (registered bills of sale and mortgages of personalty; the registration clerk's certified copies shall be "*prima facie* evidence of the execution of the original instrument," and of the date, etc.). St. 1904, c. 5, § 11 (grants, etc.; quoted *post*, § 1680); *ib.* §§ 19, 20 (provisions for proof of copies of town-site allotments, Crown grants, etc.; compare N. Sc. Rev. St. 1900, c. 163, § 20); *ib.* § 21 ("A copy of any deed, or any document on file in the land-titles' office, certified under the hand of the registrar, or proved to be a true copy taken therefrom, shall be taken in evidence in place of the original"); *ib.* § 23 (similar to N. Sc. Rev. St. 1900, c. 163, § 23, but requiring only five days' notice); *ib.* § 24 (similar to N. Sc. Rev. St. 1900, c. 163, § 24, for the Gold Commissioner's office); *ib.* § 25 (similar to N. Sc. Rev. St. 1900, c. 163, § 25); *ib.* § 26 (similar to N. Sc. Rev. St. 1900, c. 163, § 25, for the Gold Commissioner's office).

[Note 5; add, under UNITED STATES:]

*Alabama*: 1904, *Norris v. Billingsley*, — Ala. —, 37 So. 564. St. 1911, No. 52, p. 31, Feb. 20, § 2 (certified transcript of recorded corporate conveyance, admissible; unless the corporation is in possession and forgery is pleaded).

*Delaware*: St. 1907, c. 231, p. 635, Mar. 1 (record of deeds defectively acknowledged, dated before Jan. 1905, to be evidence). St. 1909, c. 218, p. 502, Feb. 25, § 4 (similar for conveyances acknowledged before consular agent). St. 1911, c. 254, p. 700, Apr. 6 (similar, for deeds defectively acknowledged, dated before Jan. 1, 1909).

*Florida*: Const. 1885, Art. 16, § 21 (certified copy of the record of a deed or mortgage is admissible as *prima facie* evidence "thereof, and of its due execution," on proof of loss, etc.). St. 1905, No. 33 (amending Rev. St. 1892, § 1973, as to mode of acknowledgment for record).

*Georgia*: 1904, *Bentley v. McCall*, 119 Ga. 530, 46 S. E. 645. 1905, *Flint R. L. Co. v. Smith*, 122 Ga. 5, 49 S. E. 745 (power of attorney). 1906, *Bower v. Cohen*, 126 Ga. 35, 54 S. E. 918. 1909, *Leverett v. Tift*, 6 Ga. App. 90, 64 S. E. 317 (ancient deed, recently recorded, and no affidavit of forgery filed; admitted, and burden of proof expounded).

*Hawaii*: St. 1909, No. 69, p. 85, Apr. 10, §§ 3, 4 (recorded conveyances out of the Territory but within the U. S.; may be acknowledged before any officer there authorized to do so, with a certificate of the Secretary of State under State seal, or of clerk of a court of record under court seal, attesting the officer's authority, as here prescribed in detail); § 5 (provisions for acknowledgment of conveyances in foreign countries).

[*Note 5 — continued*]

*Illinois*: St. 1907, May 28, p. 376, § 5 (recorded claim for horse-shoer, provable by recorder's certified copy or the certified original).

*Indiana*: 1907, *New Jersey I. & I. R. Co. v. Tutt*, 168 Ind. 205, 80 N. E. 420 (whether a 24-inch tile would suffice for a ditch, allowed).

*Kansas*: St. 1905, c. 323 (all papers lawfully "filed or recorded in any public office" are provable by the record or a certified copy of the custodian under official seal); c. 324 (similar, for instruments defectively recorded with the register of deeds for ten years past). 1911, *Van Hall v. Rea*, 85 Kan. 675, 118 Pac. 693 (a U. S. government receiver's receipt for public land, recorded but not acknowledged, admitted under the curative act of 1905).

*Minnesota*: St. 1905, c. 305, §§ 35, 42 (registration of title; similar to the Illinois act *supra*; provision made for certified copies of the certificate of title, of deeds, etc., filed with the registrar, etc.). St. 1913, c. 370, p. 520, Apr. 19 (legalizing record of certain mortgages).

*Montana*: St. 1913, c. 86, p. 378, Mar. 14, § 10 (chattel mortgages acknowledged and recorded; county clerk's certified copy admissible, "without further proof of the execution").

*New Jersey*: St. 1904, c. 117 (record of deeds, etc., to be evidence of the time of recording or filing). St. 1906, c. 250 (mode of acknowledgment of foreign deeds, amended).

*New Mexico*: St. 1905, c. 38, § 3 (recorded contract of sale, etc., of animals, provable by certified copy).

*New York*: For §§ 935, 936, 946, substitute the following corrected transcripts: C. C. P. 1877, § 935 ("A conveyance, acknowledged or proved, and certified, in the manner prescribed by law to entitle it to be recorded in the county where it is offered, is evidence without further proof thereof. Except as otherwise specially prescribed by law, the record of a conveyance, duly recorded within the State, or a transcript thereof, duly certified, is evidence, with like effect as the original conveyance"); ib. § 936 ("The certificate of the acknowledgment, or the proof of a conveyance, or the record, or the transcript of the record, of such a conveyance, is not conclusive; and it may be rebutted, and the effect thereof may be contested, by a party affected thereby. If it appears that the proof was taken upon the oath of an interested or incompetent witness, the conveyance, or the record or transcript thereof, shall not be received in evidence, until its execution is established by other competent proof"); ib. § 946 ("A conveyance of real property, situated without the State, acknowledged or proved, and certified, in like manner as a deed to be recorded within the county wherein it is offered in evidence, is evidence, without further proof thereof, as if it related to real property situated within the State. A conveyance of real property, situated within another State, or a Territory of the United States, which has been duly authenticated, according to the laws of that State or Territory, so as to be read in evidence in the courts thereof, is evidence in like manner").

*North Carolina*: Rev. 1905, §§ 1023, 1598, 1599 (like Code 1883, §§ 1251, 1253, 1263); Rev. 1905, § 1619 (like Code § 1344). 1909, *Thorp's Will*, 150 N. C. 487, 64 S. E. 379 (record in Superior Court Book of Settlements of a discharge from an insane asylum, not authorized to be recorded, excluded).

*Oregon*: St. 1907, c. 174, p. 330 (certified copy of deeds defectively executed and deeds of executors' etc. irregularly authorized, admissible).

*South Carolina*: 1905, *Uzzell v. Horn*, 71 S. C. 426, 51 S. E. 253 (*State v. Crocker* approved).

*South Dakota*: 1905, *Bruce v. Wanzer*, 20 S. D. 277, 105 N. W. 282 (certified copy of a duly recorded mortgage, admitted, under Rev. C. C. P. 1903, § 533).

*Texas*: 1907, *Burton v. State*, 51 Tex. Cr. 196, 101 S. W. 226 (bigamy; rule of Civ. St. 1895, § 2312, applied to a recorded marriage certificate). St. 1907, c. 165, p. 308 (Rev. Civ. St. § 2312, amended, for defectively acknowledged deeds).

*United States*: St. 1906, June 28, c. 3585, Stat. L. vol. 34, p. 552 (mode of certifying acknowledgments in Guam, Samoa, and the Canal Zone, provided).

*Virginia*: St. 1903, Extra, c. 486 (Code 1887, § 2501, as to mode of taking acknowledgments for record, amended). St. 1912, c. 152, p. 311 (validating the records of certain transcripts lacking clerks' signatures).

[*Note 5 — continued*]

*Washington*: 1905, *Chrast v. O'Connor*, 41 Wash. 360, 83 Pac. 238 (under the statute for deeds, the original's execution need not be otherwise evidenced than by the certified copy).  
*West Virginia*: 1908, *Cobb v. Dunlevie*, 63 W. Va. 398, 60 S. E. 384 (certified copy of record of contract not acknowledged, not admitted under Code 1899, c. 73, §§ 2, 3, Code 1906, §§ 3075, 3076).

*Wyoming*: St. 1913, c. 126, p. 174 (livestock brands; amending Comp. St. 1910, § 2604; certified copy of assignment of brand or mark recorded with the State board of livestock commissioners, to be admissible "as is now provided for certified copies of instruments affecting real estate").

§ 1652. **Registry out of the Jurisdiction.**

[*Note 4, l. 3; add:*]

and cases cited *ante*, § 1633, n. 2 (nature of duty), and § 1644 (marriage-registers).

[*Note 4, col. 3, l. 4; add:*]

1906, *McCraney v. Glos*, 222 Ill. 628, 78 N. E. 921 (certified copy of a recorded deed in Iowa admitted, the acknowledgment being defective by the law of Illinois but correct by the law of Iowa; point not noticed).

1905, *Wilcox v. Bergman*, 96 Minn. 219, 104 N. W. 955 (certified copy of a deed-record in North Dakota; held, that the statutes of that State authorizing the record must be shown, and also "the effect given to certified copies as evidence in the Courts of that State").

[*Note 4, at the end; add:*]

*Arkansas*: *Dixon v. Thatcher*, *McNeill v. Arnold*.

*Virginia*: *Peterman v. Laws*.

see also *Garrigues v. Harris, Pa.*, cited *post*, § 2105, n. 4.

§ 1653. **Modes of Proof available when Registration is Unauthorized.**

[*Note 7; add:*]

and compare the doctrines of § 1679, par. (2), *post*, and § 1635, n. 4, *ante*.

§ 1657. **Record of Assignment of Patent.**

[*Note 2; add:*]

1905, *American Graphophone Co. v. Leeds & C. Co.*, 140 Fed. 981, C. C. (certified copy of the patent-office record of an assignment, excluded, in the absence of evidence of the existence and loss of the original; *Mayor v. American Cable Co.* and *National C. R. Co. v. Navy C. R. Co.*, *supra*, followed).

1913, *Toledo Computing Scale Co. v. Computing Scale Co.*, 7th C. C. A., 208 Fed. 410 (certified copy of assignment not duly acknowledged, not admissible to prove execution).

Compare the statute for *patent-office records* (quoted *post*, § 1680, n. 1).

§ 1658. **Record of Wills.**

[*Note 2; add:*]

1906, *Thomas v. Williamson*, 51 Fla. 332, 40 So. 831 (statutes as to the effect of probate, construed).

Mich. St. 1913, No. 376, p. 721, May 14 (record of probate to be evidence of heirship).

1912, *Riley v. Carter*, 158 N. C. 484, 74 S. E. 463 (under Rev. St. 1905, § 3133, a probated will from Maryland, by certified copy signed by the register of wills, excluded; the clerk of the court of probate should have signed).

[*Note 2 — continued*]

1909, *Copley v. Ball*, 4th C. C. A., 176 Fed. 682, 688 (certain certified copies from W. Virginia, passed upon).

The statutes expressly admitting the record-copy of a foreign probate of will are collected *post*, § 1681, with other statutes for judicial records.

[*Text*, p. 2049, at the end; *add* a new paragraph:]

(5) The record of *preliminary probate*, before a judge without a jury, has in strictness no place as evidence on appeal at a final trial of probate before a jury, and therefore may be forbidden to be read;<sup>4</sup> but it seems an excess of judicial nicety to see any harm in it.

<sup>4</sup> 1904, *Weston v. Teufel*, 213 Ill. 291, 72 N. E. 906 (citing prior cases). Compare the cases cited *ante*, § 1417, n. 11.

#### § 1660. Judicial Records, etc.

[*Note 1; add:*]

N. C. Rev. 1905, §§ 327-345 (like Code §§ 55-71 and later statutes).

Cal. St. 1906, Spec. Sess., c. 55, p. 73, June 16, § 2; *id.* c. 60, p. 82, June 16.

La. St. 1910, No. 234, p. 397, July 6 (detailed provisions for use of certified copies from re-established archives, the originals being burned).

Okl. St. 1909, c. 33, p. 516, Art. I, § 5.

[*Text*, p. 2050, l. 9 of the §, after "involved," *insert:*]

The question most frequently treated as one of evidence (as distinguished from that of conclusiveness under § 1347), is whether a *judgment of conviction of crime* is admissible to prove the fact of guilt when relevant in another civil or criminal case between other parties.<sup>1a</sup>

<sup>1a</sup> Some authorities have been collected *ante*, § 1388, n. 6, par. 3 (principal and accessory in larceny) and § 1347, n. (sundry cases).

#### § 1662. Records of Legislature, etc.

[*Note 5; add:*]

Alta. St. 1910, 2d sess., Evidence Act, c. 3, § 55 (like Ont. Rev. St. 1897, c. 134, § 2); the Ontario statute is cited here in Note 6, *infra*, but belongs in Note 5.

Br. C. St. 1909, 9 Edw. VII, c. 45, § 2 (vendors and purchasers; like Ont. Rev. St. 1897, c. 134, § 2).

Ont. St. 1910, 10 Edw. VII, c. 58, § 2 (re-enacting R. S. 1897, c. 134, § 2).

1905, *Wilder v. A. D. & R. E. Traction Co.*, 216 Ill. 493, 75 N. E. 194 (recital of a petition in a city ordinance, held *prima facie* evidence).

1913, *Shawnee G. & E. Co. v. Motesenbocker*, — Okl. —, 135 Pac. 357 (city council's resolution reciting the negligent methods of the defendant in the use of its wires, excluded).

1893, *Kinhead v. U. S.*, 150 U. S. 483, 498, 14 Sup. 172 (legal effect of recitals in private-claim acts, determined; distinguishing *Branson v. Wirth*, 17 Wall. 32, and *U. S. v. Jordan*, 113 U. S. 418).

1903, *Davis v. Moyles*, 76 Vt. 25, 56 Atl. 174 (legislative report and recitals in a private act, as to the confiscation of certain land, excluded).

[*Note 6; add:*]

1904, *Bosworth v. Union R. Co.*, 26 R. I. 309, 58 Atl. 982 (injury to a passenger during a riot; the Governor's proclamation to disperse the riot, noticed).

Compare the citations under *judicial notice* (*post*, § 2578).

§ 1664. *Returns, in General; Sheriff's Return, etc.*

[*Note 2; add:*]

*Contra*: 1908, *Driggers v. U. S.*, 21 Okl. 60, 95 Pac. 612 (a marshal's return on a subpoena that the witness was dead, not admissible; but the opinion erroneously relies upon the theory that it is "not binding" except between the parties; of course it is not binding, but that is not the question; the only real doubt of law here was whether a return of death, instead of not found, was within his authority).

[*Note 3; add:*]

1907, *Driggers v. U. S.*, 7 Ind. Terr. 752, 104 S. W. 1166 (return of death, for a witness whose former testimony was offered).

[*Note 6, par. 1; add:*]

1903, *Sweeney v. Sweeney*, 119 Ga. 76, 46 S. E. 76 (prior cases examined).

1906, *Patterson v. Drake*, 126 Ga. 478, 55 S. E. 175.

N. Y. St. 1909, c. 65, p. 24, Feb. 19 (re-enacting St. 1890, c. 158, § 1, as C. C. P. § 961*e*; recital in recorded sheriff's deed of a sale twenty years before, to be evidence of a lost execution or writ, on certain conditions).

Va. St. 1912, c. 235, p. 524 (quoted *post*, § 2143, n. 5); St. 1914, c. 100, p. 186 (repealing the foregoing).

[*Note 6, par. 2; add:*]

1908, *Glanz v. Ziabek*, 233 Ill. 22, 84 N. E. 36 (tax-deed alone insufficient).

1906, *Husbands v. Polivick*, — Ky. —, 96 S. W. 825 (collector's return of a tax-sale is presumptive evidence, under Stats. 1899, c. 81, § 7, Stats. 1903, § 3760, quoted *ante*, § 1352, n. 11).

[*Note 6; at end, add:*]

Compare the statutes for *old recorded deeds* (*post*, § 2143, n. 5).

§ 1665. *Surveyor's Returns, etc.*

[*Note 1; add:*]

Compare the rule for *inquisitions of domain* (*post*, § 1670), in which the application of the principle is slightly different.

[*Note 2; add, at the beginning:*]

1838, *Evans v. Taylor*, 7 A. & E. 617 (a survey of a manor in the duchy of Lancaster, not admitted to show the boundary of the manor, because the statute *Extenta Manerii*, 4 Edw. I, c. 1, gave no authority to define the boundaries of a manor, and no authority for the survey except this statute was shown).

1867, *Phillips v. Hudson*, L. R. 2 Ch. 243 (a grant and survey of a manor formerly belonging to the Crown, made by the Crown under a general statute and recorded in the Augmentation Office, but relating to private property of the King, not admitted for the tenants against the lord).

[*Note 2; add, at the end:*]

but the following more recent cases, in which none of the above rulings were cited, are more strict:

[*Note 2 — continued*]

1904, *Mellor v. Walmsley*, 2 Ch. 525 (report of a surveyor to a municipal board, excluded).  
 1904, *Mercer v. Denne*, 2 Ch. 534, 541 (report of a surveyor made to the Warden of the Cinque Ports, excluded; quoted *ante*, § 1634, n. 1); in *Mellor v. Walmsley*, 1905, 2 Ch. 164, 166, the Court of Appeal reversed the ruling in *Mellor v. Walmsley*, *supra*, but rather on the principle of § 1524, *ante*; in *Mercer v. Denne*, 1905, 2 Ch. 538, 555, the Court of Appeal affirmed the ruling in *Mercer v. Denne*, *supra*.

[*Note 4; add:*]

1877, *Maples v. Haggard*, 58 Ga. 315 (surveys made by other than county surveyors are not admissible without calling the persons making them).  
 1906, *Bower v. Cohen*, 126 Ga. 35, 54 S. E. 918 (map by one not a county surveyor nor acting under court order, excluded).  
 1904, *Cowles v. Lovin*, 135 N. C. 488, 47 S. E. 610 (certificates of survey by a former county surveyor now in Texas, excluded; following *Burwell v. Sneed*, *supra*).

[*Note 5; add:*]

Md. St. 1908, c. 487, p. 223, Apr. 8 (county maps issued under authority of certain prior statutes, to be admissible to evidence water boundaries).  
 La. St. 1912, No. 182, p. 326, July 11 (surveys established by parish authorities; the official survey, duly certified, to be "conclusive evidence," unless set aside in a direct action for fraud or gross error).  
 Nebr. St. 1913, c. 43, p. 142, § 2 (county surveyor's certificate of "any survey made by him of any lands in the county," to be presumptive evidence, "unless such surveyor shall be interested in the same").  
 N. D. St. 1907, c. 72, p. 98 (county surveyor's or deputy's certificate of survey of lands in the county, to be presumptive evidence, unless he be interested therein).

[*Note 7; add:*]

1903, *Watkins v. Havighorst*, 13 Okl. 128, 74 Pac. 318 (survey without notice held not binding).

### § 1666. Testimony at a Former Trial; (1) Judge's Notes.

[*Note 1, par. 1; add:*]

1908, *Richards v. Com.*, 107 Va. 881, 59 S. E. 1104 (judge's notes, excluded).

### § 1667. Same: (2) Magistrate's Report.

[*Note 5, par. 1; add:*]

1899, *State v. Reinheimer*, 109 Ia. 624, 80 N. W. 669 (under Code 1897, § 5227, the committing magistrate's minutes, taken by the reporter but not read over or signed by the witness, are not admissible; compare the Iowa rule for grand jury minutes, *post*, § 1669, n. 2).  
 1907, *State v. Hoffman*, 134 Ia. 587, 112 N. W. 103 (approving *State v. Reinheimer*).

### § 1668. Same: (3) Bill of Exceptions.

[*Note 2, par. 1; add:*]

Fla. St. 1909, c. 5897, p. 45, June 3 (amending Gen. St. § 1523; on a new trial, if the Court is satisfied that evidence "used at the former trial, and incorporated in the bill of exceptions, cannot be had," then the bill of exceptions "may be used as evidence"; provided that "no evidence given upon a former trial . . . shall be used as evidence . . . except as herein provided"; the proviso is the product of some pipe-dream, for it is absurd as it reads).

[Note 2 — continued]

1911, *Finnes v. Selover* B. Co., 114 Minn. 339, 131 N. W. 371 (evidence preserved in a "settled case," allowed and certified as required by statute, is admissible on a later trial).

1911, *Howard v. Illinois C. R. Co.*, 116 Minn. 256, 133 N. W. 557 (same).

**§ 1669. Testimony at a Former Trial; (4) Notes of Stenographer, etc.**

[Note 1, par. 1; add:]

1905, *Havenor v. State*, 125 Wis. 444, 104 N. W. 116 (grand-jury's stenographic reports of testimony "are to be treated as memoranda to be used by these officials when they are called as witnesses").

Distinguish the question whether the official stenographic report, if admissible, is *preferred* to other reports of the testimony (*ante*, § 1330).

[Note 2, par. 1; add:]

CANADA: *N. Br. St.* 1913, 3 Geo. V, c. 16, § 5 (official stenographer's certified transcript of testimony to be admissible).

*P. E. I. St.* 1909, 9 Edw. VII, c. 3, § 15 (official stenographer's certified transcript of testimony, admissible).

*Sask. St.* 1907, c. 8, § 46 (official stenographer's transcript, certified by him or by the local registrar of the court, to be admissible).

UNITED STATES: *Cal. P. C.* 1872, § 869 (in cases of homicide, the testimony before the committing magistrate may be proved by a transcript in longhand certified by the reporter appointed by the magistrate and filed with the county clerk). 1904, *People v. Buckley*, 143 Cal. 375, 77 Pac. 169 (the certified transcript under P. C. § 869, *supra*, is in such cases the only mode of proving the testimony; but the record must affirmatively show the lack of such a proper certificate in the absence of a specific objection; prior cases cited on the interpretation of this statute). 1904, *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467 (preceding case approved). 1904, *People v. Moran*, 144 Cal. 48, 77 Pac. 777 (similar point). *Ia.*: 1904, *Wiltsey's Will*, 122 Ia. 423, 98 N. W. 294 (*Walker v. Walker, supra*, followed). 1904, *Lanza v. Le Grand Quarry Co.*, 124 Ia. 659, 100 N. W. 488 (testimony taken under the above statute is subject to the rules for depositions, *ante*, § 1415). 1907, *Greenlee v. Mosnat*, 136 Ia. 639, 111 N. W. 996 (*St.* 1898, c. 9, § 1, *supra*, held not to make admissible the former testimony of a party now disqualified by the opponent's death, the testimony being otherwise inadmissible on the principle of § 1409, *ante*).

*Kan. St.* 1905, c. 494, § 1 (the transcript of a court stenographer's notes, verified by his affidavit or certificate, of "all the evidence of any witness" at any trial, etc., may be used "under like circumstances and with like effect as the deposition of such witness").

1909, *Wilmoth v. Wheaton*, 81 Kan. 29, 105 Pac. 39 (*St.* 1905, c. 494, p. 810, making the court-stenographer's certified transcription admissible, does not prohibit the stenographer's oral testimony from his notes without transcription).

*Ky.*: 1904, *Beavers v. Bowen*, — Ky. —, 80 S. W. 1165 (incomplete notes by stenographer, excluded; but the part of the opinion applicable to the stipulation for using the notes as if the stenographer were present is obscure and unsound). 1904, *Fuqua v. Com.*, 118 Ky. 578, 81 S. W. 923 (former testimony of a deceased witness, admissible in a criminal trial without the defendant's consent mentioned in the above statute).

1906, *Austin v. Com.*, 124 Ky. 55, 98 S. W. 295 (the official stenographer's bill of evidence, under Stats. 1899, § 4643, *ib.* Stats. 1903, *supra*, held not to be preferred to, nor to be exclusive of, the testimony of another stenographer verifying his notes).

*Mo.*: 1906, *State v. Coleman*, 199 Mo. 112, 97 S. W. 574 (former testimony here not admitted under the statute, because the witness was present in court).

*Nev.*: *St.* 1909, c. 44, p. 73, § 13 (official stenographer's certified transcript of notes of testimony before State railroad commission, to be admissible "as if such reporter were present and testified").

## [Note 2 — continued]

*Or.*: 1911, *Beard v. Royal Neighbors*, 60 *Or.* 41, 118 *Pac.* 171 (applying the above statute, now *L. O. L.* § 932).

*Utah*: *Comp. L.* 1907, §§ 4513, 4670 (official stenographer's notes at preliminary hearing before magistrate, admissible when transcribed and filed).

1910, *State v. Vance*, 38 *Utah* 1, 110 *Pac.* 434 (stenographic notes received under the foregoing statute; procedure of filing, discussed).

*Wash.*: *St.* 1913, c. 126, p. 386, § 6 (certified transcript by official reporter, to be evidence of "testimony or other oral proceedings").

*Wis.*: 1905, *Havenor v. State*, 125 *Wis.* 444, 104 *N. W.* 116 (statute *supra* not mentioned in excluding the stenographic reports of testimony before a grand jury). 1905, *Wells v. Chase*, 126 *Wis.* 202, 105 *N. W.* 799 (the statute *supra* perversely applied; see the citation *ante*, § 1330).

*Wyo.*: *St.* 1909, c. 152, p. 209, § 5 (official stenographer's certified transcript of "facts, testimony, and proceedings," with the clerk of the court's certificate "that such person is the official reporter thereof," to be evidence).

## [Note 2, par. 2; add:]

Distinguish also the question whether the *official stenographic report* is preferred to other reports (*ante*, § 1330).

## [Note 3; add:]

1907, *Degg v. State*, 150 *Ala.* 3, 43 *So.* 484.

1906, *Williams v. Sleepy H. M. Co.*, 37 *Colo.* 62, 86 *Pac.* 337 (notes certified by a stenographer not called).

## [Note 4; add:]

*N. Y. C. C. P.* § 830 is amended by *St.* 1893, c. 595, *St.* 1899, c. 352, and *St.* 1911, c. 764, p. 2029.

In *Washington*, the stenographer need not be accounted for; *St.* 1905, c. 26 (testimony at a prior trial, etc., "when reported by a stenographer, or reduced to writing, and certified by the trial judge," upon three days' notice to the opponent with service of copy, "may be given in evidence in the trial of any civil action, etc.")).

## [Note 5; add:]

1911, *Jones v. State*, 174 *Ala.* 85, 57 *So.* 36.

1909, *Wilmoth v. Wheaton*, 81 *Kan.* 29, 105 *Pac.* 39. 1912, *State v. Gentry*, 86 *Kan.* 534, 121 *Pac.* 352.

1907, *Lake v. Com.*, — *Ky.* —, 104 *S. W.* 1003 (official stenographer).

1909, *State v. Longstreth*, 19 *N. D.* 268, 121 *N. W.* 1114 (Ellsworth, J., diss. on not easily intelligible grounds).

1910, *Smith v. State*, 60 *Tex. Cr.* 293, 131 *S. W.* 1081 (prior cases examined).

## [Note 6, par. 1; add:]

1906, *State v. Woodard*, 132 *Ia.* 675, 108 *N. W.* 753, *semble* (minutes of testimony before the grand jury, though not usable to impeach the witness, may be used by counsel as the basis for framing questions).

## [Note 7; add:]

1906, *State v. Woodard*, *Ia.*, *supra*, n. 6. 1902, *State v. Phillips*, 118 *Ia.* 660, 92 *N. W.* 876 (under Code 1897, § 5258, providing that the grand jury's clerk shall take the testimony and that the minutes shall be read over and signed by the witness, the minutes are receivable, to impeach the witness; pointing out that *State v. Hayden* is no longer law for grand jury minutes).

[Note 7 — continued]

1907, *State v. Hoffman*, 134 Ia. 587, 112 N. W. 103 (following *State v. Phillips*).

1905, *Havenor v. State*, Wis., *supra*, n. 1.

§ 1670. Reports and Inquisitions; Domain, etc.

[Note 4; add:]

1828, *Rowe v. Brenton*, 8 B. & C. 737, 743 (a "caption of seisin," made by commissioners of the Duke of Cornwall, and showing the tenants and rental of each holding, admitted).

[Note 5; add:]

Compare the cases of an *official survey* (*ante*, § 1665), in which the application of the principle is slightly different.

[Note 7; add:]

Compare the cases cited *ante*, § 1664.

§ 1671. Same: Inquisitions of Lunacy, Death, Population.

[Note 1, par. 1; add:]

1905, *King v. Gilson*, 191 Mo. 307, 90 S. W. 367 (capacity of testator; guardianship not conclusive).

1907, *Sbarbero v. Miller*, 72 N. J. Eq. 248, 65 Atl. 472 (bill of account by a lunatic's guardian; the finding of the commission of lunacy admitted).

1904, *Wheelock's Will*, 76 Vt. 235, 56 Atl. 1013 (raising a presumption of testamentary incapacity).

[Note 1; add, as a new par. 4:]

The following ruling went on the present analogy:

*Hill v. Clifford*, [1907] 2 Ch. 236 (dentists' partnership dissoluble in case of "professional misconduct"; order of Medical Council, having sole authority, expelling a partner for professional misconduct, admitted to prove the misconduct; one judge diss.).

[Note 4; add:]

*Excluded*: 1905, *Hicks v. State*, 165 Ind. 440, 75 N. E. 641 (proceedings of committal for insanity, not admitted to impeach the person as a witness).

*Admitted*: 1907, *Slaughter v. Heath*, 127 Ga. 747, 57 S. E. 69 (will; a finding on an inquisition of lunacy "is admissible, but not conclusive," whether for or against sanity).

1910, *Taylor v. Taylor*, 174 Ind. 670, 93 N. E. 9 (adjudication of insanity appointing a conservator, held admissible, but here excluded on the principle of § 233, *ante*).

1910, *Van Houten's Will*, 147 Ia. 725, 124 N. W. 886 (finding in a proceeding for confinement and guardianship, admissible as *prima facie* evidence).

1913, *Bullard's Estate*, *McAllister v. Rowland*, 124 Minn. 27, 144 N. W. 412 (adjudication of guardianship for an insane person, made two months after a will made, admitted; repudiating the contrary ruling in *Pinney's Will*, 27 Minn. 280, 6 N. W. 791, 7 id. 144).

1914, *Bond v. State*, — Tenn. —, 165 S. W. 229 (plea of insanity in Sept. 1913, inquisition of lunacy in Nov. 1909, and verdict of insanity at a former trial in May, 1910, admitted).

1904, *Keely v. Moore*, 196 U. S. 38, 25 Sup. 169 (committal to an asylum, received, and discharge therefrom, but not the certificate of the examining physicians; yet *Leggate v. Clark*, Mass., is approved).

1909, *Ex parte Allen*, 82 Vt. 365, 73 Atl. 1078 (physician's sworn certificate, admitted, under a statute expressly making them admissible).

## [Note 4 — continued]

The following statute goes upon this principle :

Haw. St. 1905, No. 19, p. 22, Apr. 3 (divorce for leprosy ; that the person "has been declared according to law to be a leper" shall be *prima facie* evidence).

## [Note 6; add:]

1906, *State v. Hopkins*, 118 La. 99, 42 So. 660 (murder ; coroner's certificate of death, admitted).

1905, *State v. Coleman*, 186 Mo. 151, 84 S. W. 978 (murder ; inadmissible).

1910, *Hedger v. State*, 144 Wis. 279, 128 N. W. 80 (murder ; coroner's verdict excluded).

## [Note 8, par. 1; add:]

1906, *Grand Lodge v. Banister*, 80 Ark. 190, 96 S. W. 742 (not decided).

1906, *Dolbeer's Estate*, 149 Cal. 227, 86 Pac. 695 (testator's capacity ; coroner's verdict excluded).

Del. St. 1911, c. 69, p. 145, Mar. 15 (coroner's record of inquest to be admissible to prove cause of death, etc.).

1904, *Knights Templar & M. L. I. Co. v. Crayton*, 209 Ill. 550, 70 N. E. 1066 (verdict admitted). 1910, *People v. McMahon*, 224 Ill. 45, 91 N. E. 104 (reading coroner's verdict and grand jury's indictment so as to show that another person was exonerated, held improper). 1913, *Foster v. Shepherd*, 258 Ill. 164, 101 N. E. 411 (death by wrongful act ; coroner's verdict admitted).

1900, *Metzradt v. Modern Brotherhood*, 112 Ia. 522, 84 N. W. 498, *semble* (admissible).

1913, *Tomlinson v. Sovereign Camp*, — Ia. —, 141 N. W. 950 (admitted ; but with an insinuation that *Metzradt v. Brotherhood* is now doubted).

1904, *Ætna L. Ins. Co. v. Milward*, 118 Ky. 716, 82 S. W. 364 (excluded ; best opinion on the subject, by O'Rear, J.).

1910, *Queatham v. Modern Woodmen*, 148 Mo. App. 33, 127 S. W. 651 (admissible to show death, but not the cause of it).

1911, *Walden v. Bankers' Life Ass'n*, 89 Nebr. 546, 131 N. W. 962 (coroner's verdict, excluded).

1905, *Puls v. Grand Lodge*, 13 N. D. 559, 102 N. W. 165 (not decided). 1905, *Kinney v. Brotherhood*, 15 N. D. 21, 106 N. W. 44 (coroner's inquest-blank, filled out, excluded, no inquest having been held ; but *Puls v. Grand Lodge*, *supra*, is referred to as if it decided something on this point).

1904, *Chambers v. Modern Woodmen*, 18 S. D. 173, 99 N. W. 1107 (benefit insurance ; coroner's verdict not admitted to show the cause of death).

1905, *Boehme v. Sovereign Camp*, 36 Tex. Civ. App. 501, 85 S. W. 444 (verdict not admitted to show suicide).

1884, *Whitehurst v. Com.*, 79 Va. 556, 557 (murder ; coroner's verdict excluded).

1904, *Fey v. I. O. O. F. Ins. Soc'y*, 120 Wis. 358, 98 N. W. 206 (doubted). 1913, *Krogh v. Modern Woodmen*, 153 Wis. 397, 141 N. W. 276 (coroner's verdict, excluded).

## [Note 9; add:]

*Eng. St.* 1910, 10 Edw. VII & 1 Geo. V, c. 11, § 8 (Census Ireland Act ; certificate from the General Register office, purporting to be signed by the Registrar-General, to be evidence of population in any county, etc.).

*U. S.* : 1907, *Gregory v. Woodbery*, 53 Fla. 566, 43 So. 504 (population of a town ; State census admitted, under the express provision of St. 1903, c. 5191, p. 134, § 3).

*Ia. St.* 1904, c. 8, § 8 (census of Iowa to be evidence of "all matters therein contained"). *St.* 1911, c. 3, p. 2, Feb. 27 (Federal census report of Iowa population, to be evidence when published by the Secretary of State with a certificate as specified).

*Minn. St.* 1911, c. 200, p. 255, April 28 (Federal census reports of population of Minnesota filed with Secretary of State to be evidence of "the facts therein disclosed").

[Note 10; add:]

*Accord*: 1905, *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201 (census list, not admitted to show that L. W. was "not in *esse* at the date of the deed").

1906, *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 98 S. W. 665 (Federal census not admitted to show the existence, etc., of particular persons).

*Contra*: 1906, *Priddy v. Boice*, 201 Mo. 309, 99 S. W. 1055 (title by deeds executed by minors; a certified copy of the Federal census record of the ages of these families, covering the censuses 1830-1890, admitted to show the ages of individuals).

1904, *Murray v. Supreme Hive*, 112 Tenn. 664, 80 S. W. 827 (British census report, "admitted to show a person's age").

## § 1672. Sundry Instances of Returns and Reports.

[Note 1; add:]

1913, *Arlington Oil & G. Co. v. Swann*, 13 Ga. App. 562, 79 S. E. 476 (State chemist's certificate of analysis of fertilizer, deposited under Civ. Code, § 1773, admissible; analysis of the specific lot sold to the party is not necessary).

1906, *People v. Michigan C. R. Co.*, 145 Mich. 140, 108 N. W. 772 (taxation; certain official acts and reports, noticed and taken as evidence).

1846, *Buckley v. U. S.*, 4 How. U. S. 251, 258 (official appraiser's appraisal of goods imported, in a return filed in the custom-house, admitted).

[Note 2; add:]

*Cal. St.* 1885, c. 43 (State analyst's certificate of analysis of food, drug, liquid, etc., duly submitted to him, to be "*prima facie* evidence of the properties of the articles analyzed by him"). *St.* 1903, c. 225, § 11 (the certificate of the State University director of the agricultural experiment station, under University seal, of his analysis of a sample of commercial fertilizer, shall be *prima facie* evidence, etc.).

*Fla. St.* 1905, No. 81, § 9 (State chemist's certificate of analysis of a sample of commercial feedstuff, to be evidence).

*Ky. Gen. St.* 1899, c. 81, § 17, *Stats.* 1903, § 3760 (official returns in general; quoted *ante*, § 1352, n. 11). *Stats.* 1903, § 2725 (report of the State inspector of mines; a certified copy "shall be *prima facie* evidence of the truth of the recitals therein contained"). 1905, *Andricus' Adm'r v. Pineville Coal Co.*, — *Ky.* —, 90 S. W. 233 (inspector's report admitted, under the foregoing statute, to show defective ventilation of a mine).

*N. Y. St.* 1913, c. 559, p. 1515, § 11 (amending *Consol. L. c.* 45, *St.* 1909, c. 49, by inserting § 21*b*; written reports of public health officers and their representatives "on questions of fact" under the health laws, to be admissible).

*N. C. Rev.* 1905, § 3951 (certificate of State chemist, attested with the seal of the department of agriculture, to be evidence of his analysis of a sample of fertilizer drawn under the rules of the department); *ib.* § 3950 (analysis of the unlawful ingredients of a fertilizer, published in the *Bulletin* of the department, to be evidence in an action to recover the price).

*U. S.*: *St.* 1906, June 29, § 15, c. 3592, *Stat. L.* vol. 34, p. 601 (for cancelling a certificate of citizenship of a naturalized alien returning to his original country, the "statements duly certified" of U. S. diplomatic and consular officers as to the residence of such persons abroad are admissible).

[Note 4; add:]

1906, *Austin v. Terry*, 38 Colo. 407, 88 Pac. 189 (inventory admitted to show property to be "parcel of the estate").

1908, *Bailey v. Robinson*, 233 Ill. 614, 84 N. E. 660 (statute applied).

§ 1674. *Certificates; Sundry Instances, etc.*[Note 6; *add.*]

1904, *Taylor v. State*, 120 Ga. 857, 48 S. E. 361 (certificate of honorable military discharge and of good character, excluded).

1908, *Lederer v. Saake*, C. C. E. D. Pa., 166 Fed. 810 (certificate by the Librarian of Congress that book-copies were duly on deposit with him for copyright, admitted).

1909, *Dunkin v. Hoquiam*, 56 Wash. 47, 105 Pac. 149 (army medical examiner's certificate of disability entitling to pension, not receivable in an action for personal injury). 1913, *State v. Shaw*, 75 Wash. 326, 135 Pac. 20 (murder; to discredit the accused as a witness, a military certificate of discharge for bad conduct, signed by the commanding officer, was excluded; this shows the unmanageable crudeness of the common-law rule).

[Note 7; *add.*]

ENGLAND: St. 1905, 5 Edw. VII, c. 15, § 51 (trade-marks; the registrar's certificate to be evidence of matters certified). St. 1907, 7 Edw. VII, c. 29, § 78, Patents and Designs Act (comptroller's certificate of any matter or entry authorized, admissible). St. 1908, 8 Edw. VII, c. 67, § 88 (reform school certificate of reception of juvenile offender, or of sum due, etc., to be evidence). St. 1912, 2-3 Geo. V, c. 5, § 6 (certificate of deserting soldier's surrender, admissible).

CANADA: *Dom.* St. 1903, 3 Edw. VII, c. 11, § 33 (animal contagious diseases; an order of the Governor, or the minister, or a certified copy of the inspector's declaration, etc., is *prima facie* evidence of the existence of infection, etc., in a place, vehicle, etc.); *ib.* § 35 (officer's certificate is *prima facie* evidence of an animal's infection, etc.). St. 1914, c. 12, § 8 (white phosphorus matches; certificate of an inspector as to their use, etc., to be evidence "of the matter certified").

*Newf.* St. 1907, c. 19, Registration of Deeds Act, § 27 (registrar's certificate to evidence time and fact of registration).

*Ont.* St. 1906, 6 Edw. VII, c. 47, § 16 (in prosecutions for liquor offences, the certificate of the government analyst as to "the analysis of any liquor" is conclusive).

*Sask.* St. 1913, c. 36 (amending the Evidence Act, Rev. St. 1909, c. 60, by inserting §§ 12a-d; certain certificates of inspection, etc., issued under the Canada Grain Act, to be evidence). St. 1913, c. 64, § 124 (liquor offences; in prosecutions the provincial analyst's certificate of analysis of liquor, to be admissible).

*Yukon* St. 1904, c. 5, § 12 (Treasury board's certificate under *Dom.* St. 1893, c. 31, § 14, admissible, on proof of signature).

UNITED STATES: *Ala.* St. 1911, No. 119, p. 104, Mar. 9, § 9 (certificate of official analyst of commercial feeding stuffs, under oath; to be evidence in prosecutions under the act).

*Ariz.* St. 1907, c. 70, p. 109, Mar. 21, § 18 (inspector's sworn certificate of violation of infected sheep law, to be evidence).

*Ark.* St. 1907, No. 398, p. 995, May 27, § 12 ("only said official analyses" of fertilizer samples shall be admissible on any issue as to "the merits of such fertilizer"; but did the Legislature suppose that it had power to say "only"?)

*Fla.* St. 1909, c. 5935, p. 115, June 7, § 10 (State chemist or assistant's certificate of analysis of sample of food or drug, verified by his affidavit, to be evidence). St. 1911, c. 6122, p. 17, June 5, § 12 (similar).

*Ill.* St. 1909, p. 145, June 4, § 2 (validation of deeds executed outside of the State without a seal; certificate of Secretary of State or court of record or judge thereof, under seal, of the "country or other place," where executed, as to local law or usage dispensing with seal, admissible).

*Ky.* Gen. Stats. 1899, c. 81, § 17, Stats. 1903, § 3760 (official certificates in general; quoted *ante*, § 1352, n. 11).

*La.* St. 1908, No. 40, p. 40, June 20 (U. S. internal revenue collector's certificate showing

[Note 7 — continued]

a license or permit within one year preceding, to be *prima facie* evidence of illegal keeping of liquor, etc.).

*Miss.* St. 1912, c. 139, p. 140, Mar. 16, § 9 (in prosecutions for offences concerning commercial feeds, the State chemist's certificate of analysis to be evidence of "the facts therein certified").

St. 1912, c. 138, p. 133, Mar. 16, § 16 (on trial of "any issue involving the merits of any fertilizer, cottonseed meal, or fertilizing material," the State chemist's "official analysis" of samples, under seal, to be evidence "in any reports [sic? Courts] of this State").

*Mont.* St. 1909, c. 94, p. 124, Mar. 6 (Secretary of State's certificate of articles of incorporation duly filed, to be evidence).

*N. J.* St. 1911, c. 201, p. 414, § 33 (department of weights and measures; State, county, or municipal superintendent's certificate of correctness of weight or measure, admissible).

*N. Y.* St. 1909, c. 66, § 1, p. 87 (re-enacting St. 1878, c. 290, § 1, as C. Cr. P. § 514a). St. 1909, c. 65, p. 22, Feb. 17 (placing St. 1851, c. 134, in C. C. P. as § 841a).

*N. D.* St. 1905, c. 9, § 5, and c. 10, § 12 (State chemist's certificate of analysis of Paris green, drugs, or medicines, to be evidence).

*Or.* St. 1905, c. 106 (fish warden's certificate issuance or non-issuance of a license, admissible).

*S. C.* St. 1906, No. 97 (amending Code 1902, § 1538, to make the sworn certificate of the chemist of Clemson Agricultural College evidence of the "analysis and commercial value of the fertilizers or cottonseed meal" analyzed by him). St. 1909, No. 126, p. 195, § 13 (commercial fertilizers; "sworn certificate of the chemist of the Clemson Agricultural College of South Carolina of analysis of the various brands," to be evidence of "the analysis and commercial value of the fertilizer or cottonseed meal so analyzed").

*U. S.* St. 1909, Mar. 4, c. 320, No. 349 (35 Stat. L. p. 1075), § 55 (register of copyright's certificate under seal, to be evidence of "the facts stated therein" as to copyright).

*Utah* St. 1913, c. 66, § 3 (food adulteration; State chemist's certificate of "any analysis or examination of any article" mentioned, to be evidence of the "facts set forth in such certificate").

*Va.* St. 1904, Extra, c. 565 (amending Code 1887, § 1345; county-clerk's certificate of a recorded log-brand or mark, to be evidence of it). St. 1908, c. 338, p. 598 (amending Code 1887, § 3334).

*Wis.* St. 1909, c. 196, Stats. § 2276a (county judge's certificate under seal of names of heirs and interests of each, admissible when recorded in the registry of deeds). St. 1913, c. 486, p. 550 (Stats. § 2276a, providing for the county judge's certificate of heirship, extended to include homesteads under U. S. land laws).

[Note 11; add:]

*Newf.* St. 1904, c. 3, Rules of Court 50, par. 29 (similar to Man. Rev. St. 1902, c. 40, rule 164, inserting "expert and" before "scientific").

*Yukon* Consol. Ord. 1902, c. 17, Ord. XL, R. 498 (similar to Man. Rule 164, omitting the word "actuaries").

### § 1675. Notary's Certificate of Protest.

[Note 9; add:]

1904, *Ewen v. Wilbor*, 208 Ill. 492, 70 N. E. 575 (inland promissory note).

[Note 11; add:]

*Alta.* St. 1910, 2d sess., Evidence Act, c. 3, §§ 38, 39.

*Ont.* St. 1909, c. 43, §§ 35, 36 (like R. S. 1897, c. 73, §§ 34, 35).

*Sask.* St. 1907, c. 12, Evidence Act, §§ 17, 18, 19.

*Yukon* St. 1904, c. 5, §§ 28, 29.

[*Note 11 — continued*]

*Me. St.* 1905, c. 58 (notaries' powers amended).

*N. C. Code* 1883, § 49 seems to be omitted in *Rev.* 1905.

### § 1676. Certificates of Execution of Deeds.

[*Note 2; add:*]

*Ala. St.* 1911, No. 52, p. 31, Feb. 20, § 2 (corporate conveyances, executed by president, etc., when recorded, are admissible "without further proof").

*Fla. Const.* 1885, Art. 16, § 21 (lawfully recorded deeds and mortgages are admissible "without requiring proof of the execution").

*Ill. St.* 1907, May 28, p. 376, § 5 (horse-shoer's lien).

*N. C. St.* 1913, c. 69, p. 115 (making admissible certain certificates of acknowledgment by consuls, etc., which lack a seal).

*Pa. St.* 1911, May 11, p. 259 (sheriff's deeds; prothonotary's certificate of acknowledgment under Court seal, when the deed is recorded, suffices).

*Tex. St.* 1907, c. 165, p. 308 (*Rev. Civ. St.* § 2312, amended, for defectively acknowledged deeds).

[*Note 11; add:*]

*Br. C. St.* 1906, 6 *Edw. VII*, c. 23, § 62 (like *Rev. St.* 1897, c. 111, § 58).

*Yukon St.* 1904, c. 5, § 27 (like *N. Sc. Rev. St.* 1900, c. 163, § 26, inserting "bill of sale or other document").

*Colo. St.* 1909, c. 1, p. 33, Apr. 23 (enumeration of officers in foreign countries whose certificates under seal of acknowledgment of a deed will suffice).

*Ga.*: 1904, *Long v. Powell*, 120 *Ga.* 621, 48 *S. E.* 184 (U. S. consul's certificate of acknowledgment, admissible under Code § 3621).

*La.*: 1905, *Werner v. Marx*, 113 *La.* 1002, 37 *So.* 905 (power of attorney from Germany, held duly authenticated by a U. S. consul's certificate to the signature and seal of the German police officer taking the acknowledgment, under *Rev. St.* 1876, § 1436).

*Minn.*: 1907, *Tucker v. Helgren*, 102 *Minn.* 382, 113 *N. W.* 912.

*Nebr.*: 1903, *McKenzie v. Beaumont*, 70 *Nebr.* 179, 97 *N. W.* 225 (statute applied to a mortgage).

*N. Y. C. C. P.* 1877, § 937 ("any instrument, except a promissory note, a bill of exchange, or a last will, may be acknowledged, or proved, and certified, in the manner prescribed by law for the taking and certifying the acknowledgment or proof of a conveyance of real property; and thereupon it is evidence, as if it was a conveyance of real property"); *ib.* § 946 (conveyance of real property; quoted *ante*, § 1651, n. 5). *St.* 1913, c. 208, p. 369 (amending *Consol. L.* c. 18, *St.* 1909, c. 23, § 105, relating to notary's powers to certify the execution of deeds for use within the county). *St.* 1913, c. 209, p. 371 (amending *Consol. L.* c. 50, *St.* 1909, c. 52, § 311, as to certificates of execution of deeds without the State).

*S. D. St.* 1907, c. 3, p. 3 (amending *Civ. C.* 1903, §§ 970-973, as to officers taking acknowledgments).

*U. S. St.* 1904, April 19, c. 1398, *Stat. L.* vol. 33, p. 186 (when a U. S. land-office register is subpoenaed to produce any original application for entry, etc., in any U. S. court or State court of record, the commissioner of the general office shall transmit it to him with a certificate of authenticity under official seal, and it shall then be received in evidence). *St.* 1909, Mar. 4, c. 320, No. 349 (35 *Stat. L.* p. 1075), § 43 (assignment of copyright executed in foreign country; certificate of acknowledgment under official seal of U. S. consular officer or secretary of legation, admissible).

*Wash.*: 1913, *Koloff v. Chicago M. & P. S. R. Co.*, 71 *Wash.* 543, 129 *Pac.* 398 (Bulgarian power of attorney to sue; certificate of acknowledgment, not admitted).

[Note 11 — continued]

*W. Va.*: 1904, *Rutherford v. Rutherford*, 55 W. Va. 56, 47 S. E. 240 (certificate of acknowledgment of a release unrecorded, or not entitled to be recorded, inadmissible).

Compare the *presumption of execution* for a recorded or acknowledged deed, *post*, § 2521.

[Note 12; *add*.:]

1904, *Markey v. State*, 47 Fla. 38, 37 So. 53.

The *jurat* suffices as *prima facie* evidence of the taking of the oath, even though the witness if called to the stand *cannot remember* the circumstances (precisely as in the attestation of a subscribing witness, *ante*, § 1302): 1906, *Komp v. State*, 129 Wis. 20, 108 N. W. 46.

[Note 13; *add*.:]

*Alta.* St. 1910, 2d sess., Evidence Act, c. 3, § 40 (officers authorized to take affidavits).

*Ont.* R. S. 1897, c. 73, § 37, *Ont.* St. 1909, c. 43, § 38 (officers authorized to take affidavits).

*Sask.* St. 1907, c. 12, Evidence Act, § 39 (officers authorized to take affidavits).

*Ill.*: 1914, *Tompkins v. Tompkins*, 257 Ill. 562, 100 N. E. 965 (officer taking a deposition without the State of Illinois acts by virtue of Illinois authority to prepare the testimony for use in an Illinois court, and not by virtue of the foreign State's authority, hence the authority of the foreign State need not be shown; see comments on this case in the *Illinois Law Review*, IX, 61).

*Or.* St. 1909, c. 42, p. 90 (amending § 819 of Bell. & C. Annot. Codes & Stats.).

### § 1677. Certified Copies; General Principle.

[Note 3; *add*.:]

"As the costs were in proportion to the length of the pleadings, it will readily be seen that the solicitors had every temptation to prolixity. Thus, a witness testified before the Chancery Commission of 1852 (First Report of the Commission, App. A, p. 180): 'If I draw a document of 120 folios, I get £8, and if I compress that into 30 folios I get only 30 shillings. In fact, the worse the business is done, the better it is paid for'; a folio being, as I believe, 15 lines of 6 words each. . . . Then again, every party had to take office copies of every paper filed, or at least pay for them, on penalty of incurring the displeasure of the officials" (John Marshall Gest, "The Lawyer in Literature," 1913, p. 23).

[Text, p. 2107; *add* a new par. (4) at the end of § 1677:]

(4) Or course, the *original itself* always suffices; the statutory permission for copies is not meant to be exclusive (*ante*, § 1186).

### § 1678. Certified Copies; Certificate as to Effect, etc. of Original.

[Note 1; *add*.:]

1905, *Kelley v. Laconia*, L. Dist., 74 Ark. 202, 85 S. W. 249 (U. S. land office commissioner's letter as to entries in the office, excluded).

1905, *Glos v. Dyche*, 214 Ill. 417, 73 N. E. 757 (tax judgment; the clerk's certified copy of the proceedings "so far as relates to the premises described" held sufficient, where the only material part was in fact included; the clerk's conclusion being thus immaterial).

1911, *General Conference Ass'n v. Michigan S. & B. Ass'n*, 166 Mich. 504, 132 N. W. 94 (probate register's certificate to an administrator's appointment "as appears by the records," held inadmissible).

1909, *Sampson v. Northwestern Nat'l L. Ins. Co.*, 85 Nebr. 319, 123 N. W. 302 (State auditor's certificate of securities on file, etc., excluded).

Compare the cases cited *post*, §§ 2109, 2110.

[Note 2; add:]

Ia. St. 1911, c. 105, p. 104, Apr. 15 (U. S. internal revenue collector's "certified copy" of the names of persons who have paid liquor tax, to be evidence of such person's being engaged in sale, etc., of liquors).

1906, *Smithers v. Lowrance*, 100 Tex. 77, 93 S. W. 1064 (State land commissioner's certificates of contents of his records, admitted under the statute; but the precise distinctions taken are not clear).

Compare the citations *post*, §§ 2109, 2110.

1911, *State v. Polk*, 86 Wash. 411, 119 Pac. 846 (certificate of result of local option election, admitted under Rem. & Bal. Code, § 6297).

[Note 3; add:]

Ia.: 1906, *Colton's Estate*, 129 Ia. 542, 105 N. W. 1008 (a certificate of the lack of a record of a particular document is inadmissible without statute).

Ky.: 1913, *Com. v. O'Bryan, U. & Co.*, 153 Ky. 406, 155 S. W. 1126 (official certificate that a document is not on file, excluded).

N. Y. St. 1909, c. 425, p. 906 (adding § 931c to C. C. P.; State comptroller's certificate of extract from records, stating that it contains all relating to a certain piece of land, admissible).

[Note 4; add:]

1905, *State v. Rosenthal*, 123 Wis. 442, 102 N. W. 49 (the foregoing statute is not exclusive of the method of proof noted in § 1244, *ante*). Wis. St. 1907, c. 276 (amending Stats. § 4163).

#### § 1679. Same: Authentication of the Copy.

[Note 5; add:]

and *ante*, § 1653, par. (4), § 1635, n. 4.

[Note 6; add:]

some cases are collected in *Lalakea v. Hilo Sugar Co.*, 1904, 15 Haw. 570 (defective certificate of acknowledgment).

#### § 1680. Certified Copies of Miscellaneous Public Documents.

[Note 1; add:]

ENGLAND: St. 1882, 45 & 46 Vict. c. 50, § 24 (Municipal Corporations Act; a written copy of a by-law of a municipal council "authenticated by the corporate seal" is admissible).

1905, *Robinson v. Gregory*, 1 K. B. 534 (statute applied); St. 1905, 5 Edw. VII, c. 15, § 50 (trade-marks; the registrar's certified printed or written copies of the register, under seal of the patent-office, to be admissible "without further proof of production of the originals"); ib. § 51 (the registrar's purporting certificate of an entry, admissible). St. 1907, 7 Edw. VII, c. 29, § 79, Patents and Designs Act (certified copies of registers, patents, etc., kept under this Act, under seal of the patent office and certified by the comptroller, admissible). St. 1908, 8 Edw. VII, c. 67, § 88 (reform school certificate, and rules; certified copy by chief inspector, admissible).

CANADA: *Dominion*: St. 1903, 3 Edw. VII, c. 58, §§ 26, 27 (railway act; similar to §§ 26, 27 of Ont. St. 1906, c. 31, cited *infra*, except that under § 26 copies by the minister or inspecting engineer are also included). St. 1904, 4 Edw. VII, c. 15, § 18 (certified copy, by the deputy minister of commerce or by a justice of the peace, of the oath of a grain inspection officer, admissible).

*Alberta*: St. 1906, c. 3, § 7, par. 55 (a regulation or order in council is provable by copy attested by "the signature of the clerk of the executive council; an order in writing signed by the council member acting as provincial secretary and purporting to be by command of

[*Note 1 — continued*]

the Lieutenant-Governor shall be received as his order"); ib. § 9 (acts of the Legislative assembly are provable by clerk's certified copy under seal of the Province, etc., as in Yukon Consol. Ord. 1902, c. 1, § 10). St. 1906, c. 57, § 535 (certificate of registration of veterinary surgeon, "purporting to be signed and issued by the registrar and under the seal of the association," admissible); c. 28, §§ 64, 65 (provision for proof of registration as a medical practitioner, by certificate). St. 1910, 2d sess., Evidence Act, c. 3, § 24 ("Letters patent under the Great Seal of the United Kingdom" or any British dominion, provable by "exemplification thereof, or of the enrolment thereof, under the Great Seal under which the same may have issued"); ib. § 26 (substantially like Ont. R. S. 1897, c. 73, §§ 22, 23); ib. § 29 (like Can. St. 1893, c. 31, § 12, but restricted to documents in Alberta and corporation, chartered in Alberta and carrying on business therein); ib. § 32 (like Eng. St. 1851, c. 99 § 14, omitting the clause "and no statute exists," etc.); ib. § 34 (like Can. St. 1893, c. 31, § 14).

*British Columbia*: St. 1903-4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 2 (repeals § 20 of Rev. St. 1897, c. 71, and substitutes another requirement, as quoted *ante*, § 1639, n. 2). St. 1911, 1 Geo. V, c. 33, § 102 (coal mines; inspector's certified copy of special rules, admissible). St. 1912, 2 Geo. V, c. 17, § 93 (certificate of timber mark registration, by Minister of Lands Department, to be evidence, without proof of signature).

*Manitoba*: St. 1908, 7-8 Edw. VII, c. 63, § 16 (telephones and telegraphs; certified copy of documents in the Department, by the Minister, to be evidence).

*Ontario*: St. 1904, 4 Edw. VII, c. 23, § 67 (certified copy of an assessment roll shall be received without "the production of the original assessment roll"). St. 1906, 6 Edw. VII, c. 11, § 55 (mining recorder's office; every copy of "any entry in any of the said books, or of any documents filed" in the office, certified by the recorder, shall be "evidence of the matters therein contained"). St. 1906, 6 Edw. VII, c. 30, § 59, par. 12 (railway maps, surveys, etc., when filed, provable by copy certified by the registrar of deeds or the secretary). St. 1906, 6 Edw. VII, c. 31, § 26 (documents signed by the chairman or secretary of the railway and municipal board, admissible as copies to prove any regulation, etc.); ib. § 27 (the secretary's certified copy of any document deposited with the board is admissible; the secretary's certified copy, under seal of the board, of any document in the custody of the board or of record with it, is admissible). St. 1909, c. 43, § 21 (like R. S. 1897, c. 324, § 12); ib. § 23 (like ib. §§ 22, 23); ib. § 26 (like ib. § 26); ib. § 28 (like ib. § 28). St. 1911, 1 Geo. V, c. 41, § 44 (surveyor's register; re-enacting R. S. 1897, c. 180, § 45).

*Prince Edward Island*: St. 1906, 6 Edw. VII, c. 6, §§ 25, 30 (certified copies, by the registrar-general or his assistant, of the records of birth, marriage, and death, admissible). St. 1909, 9 Edw. VII, c. 6, § 1 (repeals St. 1898, 61 Vict. c. 3).

*Saskatchewan*: St. 1906, c. 10, § 21 (records, documents, etc., in the department of public works, are provable by copy attested by the signature of the commissioner or deputy); c. 28, §§ 61, 62 (provision for certified copies of the official register of the medical profession). St. 1907, c. 12, Evidence Act, § 10 (like Can. St. 1893, c. 31, § 12); ib. § 12 (like Eng. St. 1851, 14-15 Vict. c. 99, § 14); ib. § 13 (like Alta. St. 1910, 2d sess., c. 3, §§ 36, 37). St. 1909, c. 9, § 62 (records and documents belonging to or deposited in the department of public works; copy attested by minister or deputy minister, receivable). St. 1913, c. 64, § 123 (liquor license; attorney-general's certificate admissible). 1913, R. v. Hutchins, Sask. S. C., 12 D. L. R. 648 (certified copy of clerk's record of marriage license, etc., in Minneapolis, admitted under Can. Evidence Act, § 23).

*Yukon*: Consol. Ord. 1902, c. 1, § 8, par. 54 (Commissioner's regulation or order, provable by written copy attested by the Territorial secretary); ib. § 10 (Territorial secretary's certified copies of ordinances, under Territorial seal, "shall be held to be duplicate originals and also to be evidence, as if printed by lawful authority, of such ordinances and of their contents"); c. 6, § 20 (registry of vital statistics, provable by certified extract); c. 48, §§ 38, 48 (provision for certified copies of the official registry of medical practitioners); c. 50, § 28 (provision of similar purpose for pharmaceutical practitioners); c. 61, § 11 (certified copy, by

[*Note 1 — continued*]

the clerk of the territorial court or his deputy, of a filed declaration of benevolent incorporation, etc., admissible); c. 76, § 101 (provision for chief inspector's certificate of a license, in liquor cases); ib. § 102 (provision for certified copy of a regulation, in liquor cases). St. 1904, c. 5, § 5 (proclamation, etc., of Governor-General; like Dom. St. 1893, c. 31, § 8); ib. § 6 (proclamation, etc., of a Lieutenant-Governor, etc., or of the Yukon Commissioner; like Dom. St. 1893, c. 31, § 9); ib. § 9 ("Proclamations, treaties, and other acts of state of any foreign State or of any British colony may be proved by the production of a copy purporting to be sealed with the seal of the foreign State or British colony to which the original document belongs"); ib. § 11 (like Dom. St. 1893, c. 31, § 12, inserting "grant, map, plan, report, letter" and "belonging to or deposited in" for the first class, and "or of this Territory or of any Territory of Canada" for the second class); ib. § 13 (official books; like Dom. St. 1893, c. 31, § 17, adding "or of this Territory"); ib. § 14 (like Dom. St. 1893, c. 31, § 13); ib. § 31 (like Dom. St. 1893, c. 31, § 14, inserting "grant, map, plan, will, deed"); ib. § 17 (shipping register; like N. Br. Consol. St. 1877, c. 46, § 15).

UNITED STATES: *Alabama*: Code 1897, § 5086 (U. S. revenue liquor-license may be proved by parol evidence). 1904, *Burton v. Dangerfield*, 141 Ala. 285, 37 So. 350 (certified transcript of a constable's bond recorded with the probate judge, admitted under Code § 1816). *Arizona*: St. 1905, c. 51, § 65 (certified copy of the official record of live-stock brands is admissible).

*California*: Pol. C. 1872, § 3083, as amended by St. 1905, c. 107 (State registrar's record of marriages and births, provable by his certified copy). St. 1907, c. 236, p. 296, Mar. 15 (similar for State registrar's certificate of death; amending § 15 of St. 1905).

*Colorado*: St. 1905, c. 100, § 14 (county clerk's certified copy of electoral registration-book, admissible). St. 1907, c. 112, p. 238, Apr. 9, § 21 (State registrar's certified copy of register of birth or death, admissible). St. 1911, c. 90, p. 219, June 5, §§ 1, 7, 8, and St. 1913, c. 47, p. 142, Mar. 31, §§ 1, 7, 8 (record of stock-brand, provable by copy certified by State board of stock inspection commissioners).

*Delaware*: St. 1909, c. 66, p. 121, Apr. 15, § 10 (certified copy of county recorder's record of births, marriages, and deaths, admissible). St. 1911, c. 69, p. 145, Mar. 15 (certified copy of coroner's inquest record, admissible). St. 1913, c. 84, p. 206, Mar. 31, § 8 (same for certified copy of marriage register of State registrar of vital statistics or of county recorder). St. 1913, c. 85, p. 219, Mar. 31, § 14 (same for birth register of same officers).

*Florida*: St. 1907, c. 5688, p. 201, May 11 (amending Gen. St. § 3558; U. S. revenue license or tax stamp provable by certified copy).

*Hawaii*: St. 1905, No. 67, p. 132, Apr. 26 (certified copy of record of U. S. liquor tax, admissible). St. 1907, No. 119, p. 243, Apr. 33, § 68 (foregoing statute repealed). St. 1907, No. 8, p. 7, Mar. 5 (any book or document "deposited in the building set apart for public archives," provable by certified copy by Secretary of Territory or by Librarian).

*Idaho*: St. 1911, c. 191, p. 631, Mar. 9, § 21 (State Registrar's certified copy of birth and death record, admissible).

*Illinois*: 1904, *Tift v. Greene*, 211 Ill. 389, 71 N. E. 1630 (copies of records of tax-sales, etc., held inadmissible because certified by the clerk of the county court, instead of by the proper custodian the county clerk, though the same person filled both offices). 1910, *Prairie du Rocher v. Schoening K. M. Co.*, 248 Ill. 57, 93 N. E. 425 (the certified copy under the statute is evidence that the ordinance has been duly passed). 1913, *Decatur v. Barteau*, 260 Ill. 612, 103 N. E. 601 (city ordinance provable by the city clerk's certified copy under seal, under Rev. St. c. 24, § 65, *supra*).

*Indiana*: St. 1905, c. 53, § 19 (railroad commission's certified or printed copies of rates, regulations, etc., admissible).

*Kansas*: St. 1905, c. 323 (amending one of the above statutes; quoted *ante*, § 1225, n. 1). St. 1907, c. 168, p. 267, Feb. 15 (transcript of county records, lost, stolen, or destroyed, made from documents of the State Historical Society and certified by the secretary under its seal, to be admissible).

## [Note 1 — continued]

**Kentucky:** St. 1906, c. 27 (amending Stats. 1903, § 4545, by adding, for the Secretary of State, that "copies of records and papers in his office, certified by him, shall in all cases be evidence equally with the originals," and that when presented, "the same shall be *prima facie* evidence of their contents, and the personal presence of the Secretary of State as a witness in such case shall be dispensed with, provided that such records shall be mailed under seal to the circuit court clerk" like depositions). 1910, *Henderson M. & M. Co. v. Nicholson*, — Ky. —, 126 S. W. 139 (assistant mine-inspector's report, under Stats. § 2739, admitted).

**Maine:** St. 1907, c. 99, p. 104, Mar. 21 (marriage record by authorized clergyman; certified copy by town clerk, admissible). St. 1909, c. 161, p. 163, Mar. 29 (same).

**Massachusetts:** 1913, *Com. v. Merrill*, 215 Mass. 204, 102 N. E. 446 (copy of a constitution of the Order of Owls, signed by the Supreme Secretary, not admitted as a certified copy of the charter of a foreign beneficiary insurance corporation, under the statutes in force at the time).

**Michigan:** 1906, *Murphy v. Cady*, 145 Mich. 33, 108 N. W. 493 (exemplified copy of U. S. pension-vouchers, admitted, under U. S. Rev. St. 1878, § 882, cited *infra*).

**Minnesota:** St. 1909, c. 127, p. 120, Mar. 29 (drainage boards, repealing St. 1907, c. 191; by § 30, certified copy of records of board of supervisors to be evidence). St. 1911, c. 200, p. 255, April 18 (certified copies of Federal census reports filed in the office of the Secretary of State, admissible).

**Missouri:** 1905, *Florsheim v. Fry*, 109 Mo. App. 487, 84 S. W. 1023 (under Rev. St. 1899, § 3098, a certified copy of articles of incorporation in Illinois was excluded because the Illinois law authorizing the Secretary of State to keep or record was not proved; unsound, because the seal of State is of itself an authority for the purpose, *ante*, § 1679, par. *b*, *post*, § 2163); 1906, *Stewart v. L. B. Land Co.*, — Mo. —, 98 S. W. 767 (properly certified copies of platbooks admissible under Rev. St. 1899, § 3094, *supra*).

**Nebraska:** 1905, *Rieck v. Griffin*, 74 Nebr. 102, 103 N. W. 1061 (copy of sections of the Arkansas statutes, under seal of the Secretary of State, admitted).

**New Hampshire:** St. 1911, c. 133, § 24 (Secretary of State's certified copy of motor vehicle registration certificate or license, to have the same effect as the original).

**New Jersey:** St. 1912, c. 260, p. 465 (amending St. 1900, c. 150, § 27).

**New Mexico:** St. 1905, c. 79, § 8 (certified copy of certificate of incorporation, by county recorder or Secretary of the Territory, admissible). St. 1907, c. 49, p. 71, § 10 (territorial engineer's records, provable by certified copy); § 71 (water-right records; county recorder's certified copies, admissible). St. 1909, c. 76, p. 210, § 3 (Secretary of Territory's or county recorder's certified copy of certificate of organization of water user's association, admissible). St. 1912, c. 82, § 76 (State land office; commissioner's certified copies of records, admissible). **New York:** St. 1909, c. 65, p. 22, Feb. 17 (adding § 931a to the C. C. P.; exemplified copy of the designation of a person on whom to make service for a corporation, with a certificate of non-revocation, to be evidence). St. 1912, c. 97, p. 167 (amending C. C. P. § 956, by providing for U. S. consular certified copies, and by including documents "on file"). St. 1913 c. 71, p. 122 (amending Consol. L. c. 45, St. 1909, c. 49, § 296, as to certified copies of licenses, for undertaking and embalming).

**North Carolina:** Revision 1905, § 300 (like Code 1883, § 662). Rev. 1905, § 1616 (like Code §§ 715, 1342). Rev. 1905, § 1593 (like Code § 1340). Rev. 1905, § 1594 (like Code § 1338). Rev. 1905, § 1595, St. 1899, c. 277, § 2 (violation of town ordinances; mayor's certified copy of the ordinance admissible). Rev. 1905, § 1596 (like Code § 1341). Rev. 1905, § 1617 (copies of "bonds, contracts, or other papers" concerning the "settlement of any account" between the U. S. and an individual, or "extracts therefrom when complete on any one subject," or copies of "books or papers on file or records of any public office of the State or the U. S.," are receivable when certified under official seal by "the chief officer in said office or department"). Rev. 1905, § 4684 (papers in the office of the insurance commissioner may be proved by his certified copy under official seal, and conveyances, etc., executed by him

[*Note 1 — continued*]

under seal may be recorded with like effect as deeds). Rev. 1905, § 5070 (State librarian's certificate, under his and the official seal, "to the authenticity and genuineness of any document, paper, or extract from any document, paper, or book or other writing which may be on file in his office," is admissible). St. 1911, c. 175, p. 328 (Secretary of State's certified copy of certain maps of Cherokee lands, admissible). 1907, *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002 (illegal sale of liquor; U. S. revenue collector's certified copy of a Federal liquor license admitted, the license being part of a record kept under U. S. Rev. St. § 3240, and the copy being admissible under N. C. Rev. Code 1905, §§ 1616, 1617).

*North Dakota*: 1912, *Peterson's Estate*, 22 N. D. 480, 134 N. W. 751 (Norwegian parish records, verified by the keeper, the district judge, the royal minister of religion, and the U. S. consul-general, not admitted; in the absence of statute, the great seal of State alone suffices).

*Oregon*: St. 1905, c. 51 (C. C. P. § 731, *supra*, amended so as to read, "certified by the clerk, or other person having the legal custody of the record, with the seal of the Court affixed thereto, if there be a seal, together with the certificate of the chief judge, or presiding magistrate, that the certificate is in due form and made by the clerk or other person having the legal custody of the original"). St. 1909, c. 199, p. 293 (U. S. internal revenue license, etc., provable by collector's certified copy). St. 1911, c. 12, p. 30 (amending § 755 of Bell. & C. Annot. Codes & Stats.). St. 1911, c. 172, p. 256 (certified copy of articles of incorporation for irrigation company, etc., admissible). 1909, *State v. McDonald*, 55 Or. 419, 104 Pac. 967 (certified copy of New Zealand official registry of death, held properly authenticated under B. & C. Comp. § 755, subd. 8).

*South Carolina*: 1906, *Montgomery v. Seaboard A. L. R. Co.*, 73 S. C. 503, 53 S. E. 987 (under Code 1902, §§ 2051, 2888, the Secretary of State's certified copy of a charter of consolidated railroads is not admissible).

*South Dakota*: St. 1905, c. 125, § 8 (Secretary of State's certified copy of articles of incorporation for mutual life insurance, admissible). St. 1911, c. 256, p. 447, § 28 (public bank examiner; certified copies under official seal of all records and papers in his office, admissible).

*Tennessee*: St. 1909, c. 384, p. 1365 (records of U. S. internal revenue collector, showing payment of liquor tax, etc., provable by certified copy).

*Texas*: 1906, *Smithers v. Lowrance*, 100 Tex. 77, 93 S. W. 1064 (State land commissioner's records; certified copy admitted).

*United States*: St. 1906, June 29, § 5, c. 3591, Stat. L. vol. 34, p. 592 (contracts, reports, schedules, etc., of common carriers, preserved as public records by the Interstate Commerce Commission, shall be "received as *prima facie* evidence of what they purport to be"; and a copy certified by the secretary of the Commission under its seal is receivable). 1905, *Howard v. Perrin*, 200 U. S. 71, 26 Sup. 195 (certified copy of land-office papers, admitted under Rev. St. § 891). 1906, *U. S. v. Pierson*, 145 Fed. 814, C. C. A. (effect of a certified transcript of Treasury department records, in an action for official delinquency, under U. S. Rev. St. 1878, § 886).

*Utah*: St. 1905, c. 120, Mar. 16, § 20 (State Registrar's record of births and deaths, provable by his copy properly certified). St. 1905, c. 108, Mar. 9, § 17 (State engineer's maps and records provable by certified copies). St. 1911, c. 106, p. 152, § 35 (liquor offences; U. S. internal revenue collector's certified copy of application for revenue stamp, to be evidence).

*Vermont*: 1906, *Clement v. Graham*, 78 Vt. 290, 63 Atl. 146 (St. 1904, No. 24, p. 27, concerning the State auditor's certified copies, considered). St. 1906, No. 118, § 4 (amends Stats. 1894, § 3765, *supra*).

*Virginia*: St. 1908, c. 338, p. 598 (amending Code 1887, § 3334).

*Washington*: 1904, *James v. James*, 35 Wash. 650, 77 Pac. 1080 (a public record from another State, is not provided for under the above statutes); 1906, *State v. Kniffen*, 44 Wash. 485, 87 Pac. 837 (deputy county clerk's certified copy of a marriage record in Michigan, excluded, because not certified according to U. S. Rev. St. 1878, § 906).

*Wisconsin*: 1906, *Rohloff v. Aid Ass'n*, 130 Wis. 61, 109 N. W. 989 (certified copy of a death

[Note 1 — continued]

certificate filed in the register's office under Rev. St. 1898, §§ 1024, 1024a, excluded, as "not the best evidence"). St. 1909, c. 219, Stats. § 186 (land office records; certified copy by chief clerk or any commissioner under commissioners' seal, admissible).

*Wyoming*: St. 1907, c. 24, p. 30 (papers, etc., lawfully on file with the State engineer or State board of control, provable by certified copy).

Compare also the rule against merely certifying to the *effect or non-existence* of the document (*ante*, § 1678), and the rule requiring the copy to include the *whole of the document* (*post*, § 2109).

[Note 3, p. 2138; *add.*]

Yet where the local State has not provided for proof of copies of records in other States, the Federal statute may have to be relied on:

1905, *Wilcox v. Bergman*, 96 Minn. 219, 104 N. W. 955 (North Dakota deed-records, admitted under the Federal statute, though the local statute made no provision for certified copies from other States); 1904, *James v. James*, 35 Wash. 650, 77 Pac. 1080. This doctrine, however, should not lead us to ignore the common-law propriety of using a copy duly certified according to the laws of the other State (*ante*, § 1633, n. 1, § 1652, n. 4).

### § 1681. Certified Copies of Judicial Records.

[Note 12; *add.*]

ENGLAND: St. 1908, 8 Edw. VII, c. 67, § 88 (Children Act; clerk's certified copy of court order, admissible).

CANADA: *Dominion*: 1910, *Musgrave v. Anglin*, 43 Can. Sup. 484 (certified copy by a Quebec notary, of a will in his custody held admissible under U. S. Rev. St. 1900, c. 163, § 22, and not under § 27; the will had not been probated; affirming N. Sc. decision; the opinions are interesting, but show how the modern judge has lost understanding of the general principles of the law of evidence, and yields intellectual slavery to the statutes on the subject).

*Alberta*: St. 1910, 2d Sess., c. 3, § 35 (like Ont. Rev. St. 1897, c. 73, § 31); *ib.* § 43 (like P. E. I. St. 1889, c. 9, §§ 55, 56); *ib.* § 44 (probate of a will or a copy under seal of the District or Supreme Court, to be evidence); *ib.* § 45 (like B. C. Rev. St. 1897, c. 71, § 37, but substituting "unless the Court otherwise orders" for the proviso); *ib.* § 46 (like *ib.* § 38).

*British Columbia*: St. 1903-4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 2 (repeals § 20 of Rev. St. 1897, c. 71, and substitutes another requirement, as quoted *ante*, § 1639, n. 2). St. 1908, 8 Edw. VII, c. 2, § 51 (registration of dental practitioner, provable by certificate of registrar under seal of college, without proof of signature). St. 1910, 10 Edw. VII, c. 7, § 163 (Companies Act; like Rev. St. c. 44, § 135).

*Newfoundland*: St. 1904, c. 3, Rules of Court 33, par. 3 (like Rules of 1892).

*Nova Scotia*: 1909, *Angle v. Musgrave*, 44 N. Sc. 38 (Quebec notary's certified copy of a will on record in his office, admitted without further proof, under Rev. St. c. 163, § 27, though the will had not been probated in Nova Scotia; Townshend, C. J., diss.).

*Ontario*: St. 1909, c. 43, § 32 (like R. S. 1897, c. 73, § 31); *ib.* § 42 (like R. S. 1897, c. 73, § 41, but abolishing the notice required, and making slight changes); *ib.* § 43 (like *ib.* § 42, with slight changes).

*Saskatchewan*: St. 1907, c. 12, Evidence Act, § 14 (like Ont. Rules of Court 1897, § 496); § 20 (will is provable by the probate of a certified copy by the clerk of court; but the Court "may order the original will to be produced in evidence or may direct such other proof" as is needed to authenticate it, etc.; this to apply also to wills probated out of the province, if the original will was deposited and the court had jurisdiction). St. 1907, c. 12, § 15, now Rev. St. 1909, c. 60, Evidence Act, § 16, as amended by St. 1912, c. 42, § 16 (like Can. St. 1893, c. 31, § 10, but including the superior courts of Scotland and the railway commissioners of Canada). 1909, *In re Cheshire*, 2 Sask. 218 (exemplification of letters probate in England under the seal of the High Court of England, sufficient).

[*Note 12 — continued*]

*Yukon*: St. 1904, c. 5, § 15 (par. (1): "a copy of any document, writing, or proceeding, filed in any court in this Territory, shall be received as evidence to the same extent as the original, if it is certified under the seal of the court, or by the proper officer under his hand"; par. (2): "a copy of any order for judgment, or of the entry of the judgment in the docket of judgments, certified under the hand of the proper officer, suffices to prove the judgment without producing other part of the record"); *ib.* § 16 (like Dom. St. 1893, c. 31, § 10, inserting "or territory" of Canada); *ib.* §§ 22, 23 (like N. Sc. Rev. St. 1900, c. 163, §§ 21, 22, substituting as certifier the clerk of the Territorial court, and the word "probated" for "recorded," and requiring only five days' notice).

*UNITED STATES*: *Ala.*: 1910, *Pearce v. Fisher*, 170 Ala. 456, 54 So. 164 (bankrupt court record, certified by clerk of court under seal of court, admitted).

*Ark.*: 1904, *Ramsey v. Flowers*, 72 Ark. 316, 80 S. W. 147 (certified transcript of proceedings before a commissioner for U. S. Courts, admitted).

*Colo.*: St. 1903, c. 181, § 172 (copies of probate "records and entries or of any papers or exhibits on file in such court," certified by the clerk or judge under seal of the court, are admissible).

St. 1903, c. 181, § 159 ("authenticated copies" of probate inventories, etc., are admissible). 1909, *Henry Investment Co. v. Semonian*, 45 Colo. 260, 100 Pac. 425 (copy of Nebraska judgment lacking both attestation and certificate, excluded).

*D. C.*: 1906, *Scott v. Herrell*, 27 D. C. App. 395, 398 (certified copy of a will, admitted under Code 1901, § 1071).

*Fla.*: 1906, *Mansfield v. Johnson*, 51 Fla. 239, 40 So. 196 (execution returned and on file, proved by the clerk's certified copy); 1906, *Thomas v. Williamson*, 51 Fla. 332, 40 So. 831 (statutory rule for certified copies of probated wills, construed).

*Ga.*: 1905, *Conrad v. Kennedy*, 123 Ga. 242, 51 S. E. 299 (under Code § 5237, a certified copy of a will probate in another State must be attested as in due form by the judge, etc.); 1906, *Patterson v. Drake*, 126 Ga. 478, 55 S. E. 175 (Code 1895, § 5214, *supra*, applied); 1907, *Sellers v. Page*, 127 Ga. 633, 56 S. E. 1011 (transcript of a court of ordinary; Code § 4250 applied). St. 1908, No. 566, p. 85, Aug. 17 (foreign probated wills, proved by exemplification of the probate record "certified according to the Act of Congress").

*Haw.* St. 1911, No. 64, p. 68, Apr. 6 (record of a case in office of clerk of a Supreme Court may be proved by clerk's certified copy).

*Ia.*: 1904, *Tomlin v. Woods*, 125 Ia. 367, 101 N. W. 135 (Code § 4646 applied to a California justice's record).

*La.*: 1904, *State v. Allen*, 113 La. 705, 37 So. 614 (bigamy; certified copy of an official Indiana marriage certificate, recorded in a circuit court held properly authenticated).

*Mich.*: St. 1909, No. 191, p. 356, June 1 (amending Comp. St. 1897, §§ 10144, 10145, regarding authentication of affidavits and judicial records without the State). 1911, *General Conference Ass'n v. Michigan S. & B. Ass'n*, 166 Mich. 504, 132 N. W. 94 (certified copy of a Canadian will probate, admitted).

*Miss.*: 1904, *Wise v. Kerr Thread Co.*, 84 Miss. 200, 36 So. 244 (certified copy of a justice's judgment, admitted, under St. 1866, c. 101, Code 1892, § 2413).

*Mo.*: 1906, *Stevens v. Oliver*, 200 Mo. 492, 98 S. W. 492 (certified copy of a recorded probate of an Ohio will, admitted under Rev. St. 1899, § 4635, *supra*).

*Nebr.*: 1903, *Martin v. Martin*, 70 Nebr. 207, 97 N. W. 289 (statute applied to admit a certified copy of a probate of a will in Pennsylvania); 1906, *Gordon Bros. v. Wageman*, 77 Nebr. 185, 108 N. W. 1067 (transcript of Missouri justice's judgment, held properly authenticated under the above statute). 1908, *Koltermann v. Chilvers*, 82 Nebr. 216, 117 N. W. 405 (a will-probate, admitted under the curative provisions of *Cobbey's Annot.* St. 1903, §§ 4817, 5008, 5025, 5026).

*N. J.* St. 1909, c. 153, p. 228 (certified copy, under seal of court, of "any pleading . . . or of judgments, orders, decrees or writs of any kind," in the courts of the State, to be admis-

[*Note 12 — continued*].

sible). 1912, *McDevitt v. Deacon*, 83 M. J. L. 712, 85 Atl. 186 (certified copy of a will admitted, under Gen. St. Orphans Courts, § 20, *supra*).

N. Y. St. 1909, c. 66, § 1, p. 85 (re-enacting Rev. St. pt. IV, c. 2, tit. 6, § 10, as C. Cr. P. § 482a; clerk's certified copy of minute of conviction, with indictment, to be evidence where no record of judgment was signed and filed). St. 1909, c. 578, p. 1416 (amending C. C. P. § 2629 in an unspecified detail). St. 1914, c. 443, §§ 2608, 2621-2623 (replacing C. C. P. §§ 2629-2632; mode of proving probated will by copy, prescribed); § 2630 (ancillary letters upon foreign grant of administration; kind of copy prescribed); § 2719 (certified copy of settlement of account, recorded in surrogate's court, to be evidence of contents and execution).

N. C.: Revision 1905, §§ 1616, 1618, 1619, 3133, 3130 (like Code 1883, §§ 1342, 1343, 1344, 2156, 2157); Rev. 1905, §§ 1603, 1607, 1608 (like Code §§ 2175, 2181, 2182); Rev. 1905, § 1609, Code 1883, § 2183 (copy, not certified, of a probated will destroyed during the war, admissible on certain conditions).

N. D.: 1907, *Strecker v. Railson*, 16 N. D. 68, 111 N. W. 612 (justice of the peace's record in another State, held not to be within the statutes).

S. D. St. 1911, c. 148, p. 182 (C. C. P. 1903, § 529, amended in unspecified particulars).

Tenn. St. 1909, c. 87, p. 252 (certified copies of foreign wills probated in the county court, admissible.)

U. S.: 1909, *Pineland Club v. Robert*, 4th C. C. A., 170 Fed. 341 (an exemplification of a will under S. C. Civ. Code 1892, § 2494, must be under seal of the Court and hand of the judge).

Vt.: St. 1900, No. 36 (amending Stats. 1894, § 2367, *supra*, as to foreign wills); St. 1904, No. 67 (similar).

Va. St. 1908, c. 338, p. 598 (amending Code 1887, § 3334). St. 1910, c. 334, p. 532 (any "paper forming part of the record of a proceeding in bankruptcy" in a Federal court may be evidenced by clerk of court's certified copy recorded in any court of record of the State, or by his certified copy thereof).

Wis. St. 1911, c. 180, p. 177 (amending Stats. § 4145, by adding "or in the manner provided by Acts of Congress for the authentication of judicial proceedings," and changing "annexed" to "affixed").

Wyo. St. 1911, c. 87, p. 133 (making admissible certified copies of "duly certified copies" of "proceeding in foreign courts mentioned and referred to in §§ 3707, 3708, and 3711," Comp. St. 1910, "when recorded in the office of the county clerk of the county where the land involved is situated").

Compare also the rule against merely certifying to the *effect or non-existence* of the record (*ante*, § 1678), and the rule requiring the copy to include the *whole of the record* (*post*, §§ 1664, 2109, 2110).

[*Note 14*, par. 1; *add*.]

1904, *Tomlin v. Woods*, 125 Ia. 367, 101 N. W. 135.

[*Note 14*, par. 2, l. 4; *add*.]

or though the local statute provides nothing: compare the cases as to *records of foreign deeds*, cited *ante*, § 1652, n. 4, § 1680, n. 3.

[*Note 16*, par. 1; *add*.]

1905, *Chapman v. Chapman*, 74 Nebr. 388, 104 N. W. 880.

1907, *Strecker v. Railson*, 16 N. D. 68, 111 N. W. 612 (justice of the peace).

1913, *Ganow v. Ashton*, 32 S. D. 458, 143 N. W. 383 (for a Federal District Court within the State, the judge's certificate, certifying to the clerk's, is not necessary).

[*Note 16, par. 2; add, five lines from the end:*]

The following cases seem to countenance this error: 1908, *Britton v. Chamberlain*, 234 Ill. 246, 84 N. E. 895 (decree of Supreme Court of New York; the clerk certified under court seal the correctness of the copy, the justice J. S. L. certified that the attestation was in due form and the clerk certified that J. S. L. was justice; "we think the decree was properly certified").

1908, *Light v. Reed*, 234 Ill. 626, 85 N. E. 282 (the opinion refers to such an erroneous triple certificate of a judicial record as being "in strict accord with the act of Congress").

[*Note 16, par. 2; at the end, add a new par.:*]

It is therefore not quite correct to say (as in *Ganow v. Ashton*, 32 S. D. 458, 143 N. W. 383, following certain annotators) that in U. S. Rev. St. 1878, § 905, the reason for requiring a judge's certificate to the clerk's certificate is that "the [local] Court is not presumed to know or to take judicial notice of the laws in force or what is 'due form' in another State or foreign jurisdiction." The reason is (*ante*, § 1679) that the local court (where the document is offered) does not know, and the foreign judge does know, (1) whether his clerk was genuinely the signer and sealer, (2) whether J. S. was the clerk, and (3) whether the clerk was by law the custodian; but of these three things, only (3) is a point of law. The "due form" of the Federal statute is merely a technical phrase covering those three elements; there is no peculiarity of "form" involved in the certificate; (1) and (2) are pure fact, and (3) is pure law.

#### § 1683. Quasi-Official Copies Certified by Private Persons.

[*Note 3; add:*]

*England*: 1911, *Albutt's and Screen's Case*, 6 Cr. App. 55 (under St. 1879, 42 Vict. c. 11, § 4, a copy of a banker's book need not be by an officer of the bank; here by a chartered accountant).

*Canada*: *Ont.* St. 1909, c. 43, § 26 (like R. S. 1897, c. 73, § 26). *Sask.* St. 1906, c. 30, § 194 (regulation, etc., of a railway company, provable by copy certified "by the president, secretary, or other executive officer," under company seal).

*Yukon* St. 1904, c. 5, § 11 (like Dom. St. 1893, c. 31, § 12; quoted *ante*, § 1680).

*U. S.*: *Nebr.*: St. 1905, c. 157 (documents in the custody of the Nebraska State Historical Society are provable by certified copy of its secretary or curator "under seal and oath").

Compare also the cases cited *ante*, § 1674, notes 10, 11 (certificates by private persons).

#### § 1684. Officially Printed Copies.

[*Note 15; add:*]

*ENGLAND*: St. 1907, 8 Edw. VII, c. 16, § 1, Evidence Colonial Statutes Act (Acts, etc., of the Legislature of any British possession, and orders, etc., made thereunder, provable by copy "purporting to be printed by the Government printer"). St. 1908, 8 Edw. VII, c. 67, § 88 (reform school certificate; London Gazette to be evidence).

*CANADA*: *Dominion*: St. 1903, 3 Edw. VII, c. 61, § 11 ("copies of the said Revised Statutes [of 190-, authorized by this act to be prepared], purporting to be printed by the King's printer, from the amended roll so deposited, shall be evidence of the said Revised Statutes"). St. 1907, 6-7 Edw. VII, c. 43, § 11 (Revised Statutes 1906; copies in French or English "purporting to be printed by the King's printer, shall be evidence of the said Revised Statutes and of their contents").

*Alberta*: St. 1906, c. 3, § 7, par. 54 (a legislative act, public or private, is provable by a copy "printed by authority of law," and every copy so purporting shall be deemed *prima facie* to be so printed); *ib.* par. 55 (the King's printer's copy of a regulation or order in council is admissible). St. 1910, 2d sess., Evidence Act. c. 3, § 25 ("Copies of statutes, official gazettes, ordinances, regulations, proclamations, journals, orders, appointments to office, notices

[*Note 15 — continued*]

thereof, and other public documents, purporting to be printed by or under the authority of the Parliament of Great Britain and Ireland or of the Imperial Government" or any Government or legislature of the British dominions, "shall be admitted in evidence to prove the contents thereof"; *ib.* § 26 (substantially like *Ont. R. S.* 1897, c. 73, §§ 22, 23); *ib.* § 28 (like *Ont. R. S.* 1897, c. 73, § 25, including the *Alberta Gazette* and "the official gazette of any province or territory in Canada").

*Br. C. St.* 1908, 8 *Edw. VII*, c. 2, § 51 (registration of dental practitioner, provable by list printed in *B. C. Gazette*).

*St.* 1910, 10 *Edw. VII*, c. 7, § 163 (*Companies Act*; like *Rev. St.* c. 44, § 135).

*N. W. Terr.*: *Can. Rev. St.* 1886, c. 50, § 111 (cited *supra*, under *Dominion*).

*Ont. St.* 1909, c. 43, § 22 (like *R. S.* 1897, c. 73, § 21, but enlarging it to include Great Britain and Ireland, the Imperial Government and any possession, etc. within the King's dominions); *ib.* § 23 (like *R. S.* 1897, c. 73, §§ 22, 23); *ib.* § 25 (like *ib.* § 25).

*Sask. St.* 1907, c. 12, *Evidence Act*, § 3 (British or Canadian statutes and ordinances, provable by copy "printed or purporting to be printed by the Queen's or King's or government printer"); *ib.* § 4 (like *Can. St.* 1893, c. 31, § 11, adding the Government printer for Saskatchewan); *ib.* § 5 (like *Can. St.* 1893, c. 31, § 8); *ib.* § 6 (like *Can. St.* 1893, c. 31, § 9, adding the government printer for Saskatchewan); *ib.* § 9 (like *Ont. R. S.* 1897, c. 73, § 25, substituting the Saskatchewan Gazette). *St.* 1908, c. 38, § 30 (adding a sub-section (2) to the *Evidence Act* 1907, c. 12, § 9; "publications in the Saskatchewan Gazette" and all documents "printed or purporting to be printed by the government printer" shall be deemed to be "authentic copies of the originals" and admissible "without proof as the originals might be").

*Yukon*: *Consol. Ord.* 1902, c. 1, § 8, par. 54 (Commissioner's regulation or order, provable by printed copy in the *Yukon Official Gazette*); *ib.* par. 53 (a printed copy of an ordinance, public or private, purporting to be printed by authority of law, is admissible); c. 57, § 74 (notice of joint-stock incorporation-patent in *Yukon Official Gazette*, admissible); c. 76, § 102 (provision for a printed copy of liquor regulations). *St.* 1904, c. 5, § 3 (statutes of the Imperial or Dominion Parliament, or of a province, etc., of Canada, or ordinances of this Territory or another of Canada, are provable by copy purporting to be printed and published by the King's printer or respective Government printer); *ib.* § 4 (Imperial proclamations, etc.; like *Dom. St.* 1893, c. 31, § 11, adding "Yukon Territory" under cl. c); *ib.* § 5 (Dominion proclamations, etc.; like *Dom. St.* 1893, c. 31, § 8); *ib.* § 6 (proclamation, etc., of a Lieutenant-Governor, etc., or of the Yukon Commissioner; like *Dom. St.* 1893, c. 31, § 9); *ib.* § 10 (like *Dom. St.* 1893, c. 31, § 16, adding the *Yukon Gazette*).

*UNITED STATES*: *Colo. St.* 1907, c. 37, p. 93, Apr. 9, § 4 ("Revised Statutes of Colorado 1908," under Secretary of State's certificate, to be evidence). *St.* 1911, c. 109, p. 406, Apr. 15 ("Mills' Annotated Statutes of the State of Colorado, revised edition edited and annotated by John H. Gabriel, Esq." 1912, receivable in evidence).

*Ga.*: 1907, *Missouri S. L. Ins. Co. v. Lovelace*, 1 *Ga. App.* 446, 58 *S. E.* 93 (a purporting official printed copy of Missouri insurance laws, received).

*Ill.*: 1906, *McCraney v. Glos*, 222 *Ill.* 628, 78 *N. E.* 921 (printed book of Iowa statutes, with the title-page reading, "published by authority of the State," admitted under *Rev. St.* 1874, c. 51, § 10).

1906, *Chicago & A. R. Co. v. Wilson*, 225 *Ill.* 50, 80 *N. E.* 56 (under *Rev. St.* c. 24, § 65, *supra*, the printed copy is of course not conclusive). 1907, *Illinois C. R. Co. v. Warriner*, 229 *Ill.* 91, 82 *N. E.* 246 (village ordinance, purporting to be published by authority, although the printed certificate on it contained an inconsistent date).

*Ind.*: 1909, *State v. Wheeler*, 172 *Ind.* 578, 89 *N. E.* 1 (official book of annual Acts is *prima facie* evidence).

*Ia.*: 1904, *Summitt v. U. S. Life Ins. Co.*, 123 *Ia.* 681, 99 *N. W.* 563 (*N. Y. Session Laws*, held to "purport to have been published, etc.," under Code § 4651).

*Kan.*: *St.* 1897, c. 136, § 4 (Webb's edition, 1897, of the general statutes of Kansas, shall be

[Note 15 — continued]

*prima facie* evidence of the statutes, etc., when approved in a certain tenor by the certificates of the Supreme Court and the attorney-general). 1906, *State v. Carter*, 74 Kan. 156, 86 Pac. 138 (the foregoing edition held not to be adequately approved as required, and therefore to be no more "than a private compilation, and are not even *prima facie* evidence of the statute law of the State").

*Ky.*: 1906, *Graziani v. Burton*, — Ky. —, 97 S. W. 800 (copy of the Ohio law, proved by the Secretary of State to have been received by him, etc., admitted under Stats. § 1642).

*Md.* St. 1912, c. 21, p. 58, Mar. 13 (Bagby's Annotated Code of the Public Civil Laws of Maryland, to be evidence of the Code and Statutes to 1912 inclusive, save such as "relate exclusively to Crimes and Punishments").

*Minn.*: 1906, *Clagett v. Duluth*, 143 Fed. 824, C. C. A. (Young's and Wenzel's official compilation of Minnesota statutes, held not conclusive).

*Mo.*: St. 1905, Mar. 10, p. 208 (adding § 4164b to Rev. St. 1899, making admissible the Secretary of State's printed compilation of amendments to the Constitution since 1898).

*Nebr.* St. 1913, c. 241, p. 753, § 14 ("Revised Statutes of Nebraska for 1913," with Secretary of State's certificate, to be evidence of the laws "without further authentication," but "the existing editions" of the Compiled Statutes and Cobbe's Annotated Statutes, to be evidence of "the law as therein contained").

*N. J.*: St. 1905, c. 199 (amending St. 1899, Mar. 21, and making admissible in actions for penalties the printed copy of city ordinances, etc., published by authority of the common council).

*N. Y.*: St. 1909, c. 65, p. 22, Feb. 17 (adding § 941a to the C. C. P.; compilation of colonial statutes pursuant to St. 1891, c. 125, to be evidence of the original, if it purports to be a copy from the original). St. 1913, c. 597, p. 1609, § 1 (amending St. 1910, c. 480, § 7; printed proceedings of public service commissions, admissible).

*N. C.*: Rev. 1905, §§ 1592, 1593, 1594 (like Code 1883, §§ 1338, 1339, 1340). 1906, *State v. Southern R. Co.*, 141 N. C. 846, 54 S. E. 294 (printed copy of Federal department of agriculture's regulations, not received on the facts).

*Or.*: 1909, *State v. McDonald*, 55 Or. 419, 104 Pac. 967 (New Zealand statute book, admitted).

*S. C.* St. 1911, No. 88, p. 146 (printed copies of statutes, cases, etc., "by any other sovereignty," etc., "purporting to be published under the authority thereof, or purporting to be an authentic publication by a reputable publisher," to be admissible).

*U. S.*: Rev. St. 1878, § 892 (printed copies of patent-office records; quoted *ante*, § 1680, n. 1). St. 1906, June 29, § 5, c. 3591, Stat. L. vol. 34, p. 589 ("authorized publications" of the reports and decisions of the Interstate Commerce Commission, in the form provided by it, are to be "competent evidence" of the reports and decisions). 1904, *Drewson v. Hartje P. M. Co.*, 131 Fed. 734, 738, 65 C. C. A. 548 (patent-office printed copy of a patent, held sufficient to show the date of application, on the facts). 1914, *Stewart v. U. S.*, 9th C. C. A., 211 Fed. 41 (U. S. General Land Office map, recited to be issued by authority of the Secretary of the Interior, admitted).

*Utah*: 1912, *Stuart v. Peterson*, — Utah —, 125 Pac. 395 (Mills' Annotated Statutes of Colorado admitted).

*Vt.*: St. 1912, No. 259, p. 334 (officially printed volume of State charters, etc. to be evidence).

*Va.*: St. 1906, c. 20 (Pollard's edition of the authorized Code of Virginia of 1904, to be evidence).

[Note 15, p. 2160; *add*, at the end of par. (1):]

(6) A certified copy under seal by the Secretary of State may be usable on the principle of § 1680, *ante*.

§ 1691. **Learned Treatises; General Principle, etc.**

[Text, p. 2173, l. 2 from the end of the section; add a new note 4:]

<sup>4</sup> An example of the good sense and utility of such a rule, if it could be adopted, may be seen in *Bailey v. Kreutzmann*, 141 Cal. 519, 75 Pac. 104 (1904).

§ 1693. **Jurisdictions in which the Exception is Recognized.**

[Note 1, par. 1; add:]

1906, *Birmingham R. L. & P. Co. v. Moore*, 148 Ala. 115, 42 So. 1024 (two books on surgery, admitted on a question concerning appendicitis).

[Note 3; add:]

1888, *People v. Goldenson*, 76 Cal. 348, 19 Pac. 170.

1891, *Lilley v. Parkinson*, 91 Cal. 655, 27 Pac. 1091.

1904, *Bailey v. Kreutzmann*, 141 Cal. 519, 75 Pac. 104.

1906, *State v. Wilhite*, 132 Ia. 226, 109 N. W. 730 (a standard medical dictionary is admissible for definitions, as distinguished from "the symptoms and cure of disease"). 1909, *Bruggeman v. Illinois C. R. Co.*, 147 Ia. 187, 123 N. W. 1007 (books on air brakes, to show the time required for stopping, excluded).

§ 1696. **Jurisdictions Rejecting a General Exception.**

[Note 1; add:]

1912, *Denver City T. Co. v. Gawley*, 23 Colo. App. 332, 129 Pac. 258.

§ 1697. **Partial Recognition; (1) Legal Treatises.**

[Note 2, under *Accord*, add:]

1904, *Banco de Sonora v. Bankers' M. C. Co.*, 124 Ia. 576, 100 N. W. 532 (similar to the prior ruling in this case).

§ 1698. **Same: (2) Life Tables, Almanacs, etc.**

[Note 1, par. 1; add:]

1907, *Calvert v. Springfield Electric L. & P. Co.*, 231 Ill. 290, 83 N. E. 185 (Wigglesworth Tables). 1909, *Winn v. Cleveland C. C. & St. L. R. Co.*, 239 Ill. 132, 87 N. E. 954 (Wigglesworth Tables admitted). 1911, *Marshall v. Marshall*, 252 Ill. 568, 96 N. E. 907 (Carlisle and other tables).

1906, *Pittsburgh C. C. & St. L. R. Co. v. Lightheiser*, 168 Ind. 438, 78 N. E. 1033 (Carlisle Tables admitted).

1904, *Knott v. Peterson*, 125 Ia. 404, 101 N. W. 173. 1907, *Clark v. Van Vleck*, 135 Ia. 194, 112 N. W. 648 (tables published in the Code Supplement of 1902, admitted).

1909, *Peterson v. Brackey*, 143 Ia. 75, 119 N. W. 967.

1913, *Scott v. Chicago C. R. S. & P. R. Co.*, — Ia. —, 141 N. W. 1066.

1905, *Illinois C. R. Co. v. Hauchins*, 121 Ky. 526, 89 S. W. 530 (American Mortality Table, admitted).

1907, *Banks v. Braman*, 195, Mass. 97, 80 N. E. 799 (a certain insurance table, not shown to be standard or recognized, not admitted).

1907, *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45.

1905, *Horst v. Lewis*, 71 Nebr. 365, 103 N. W. 460.

N. C. Rev. 1905, § 1626 (like Code, § 1352).

1904, *Reynolds v. Narragansett E. L. Co.*, 26 R. I. 457, 59 Atl. 393 (standard annuity tables, admitted).

[*Note 1 — continued*]

1905, *Hyland v. Southern B. T. & T. Co.*, 70 S. C. 315, 49 S. E. 879 (statute applied).

1912, *Richardson v. Spokane*, 67 Wash. 621, 122 Pac. 330.

[*Note 3; add:*]

1911, *Lynes v. Northern Pacific R. Co.*, 43 Mont. 317, 117 Pac. 81 (mathematical tables showing the respective distances at which trains could be stopped by air-brakes, held admissible).

§ 1699. **Same: (3) Dictionaries and Histories.**

[*Note 2; add:*]

1913, *Merriam Co. v. Syndicate Pub. Co.*, 2d C. C. A., 207 Fed. 515 (a dictionary — author's prefatory recital of the sources used by him, admitted; sensible opinion by Hand, D. J., approved in the C. C. A.).

[*Note 3; add:*]

1909, *In re Najour*, C. C. N. D. Ga., 174 Fed. 735 (Keane's *The World's People*, quoted to prove the classification of world races, in a naturalization case).

§ 1700. **Same: (4) Sundry Instances, etc.**

[*Note 1, l. 9; add:*]

*Contra*: cases cited *ante*, § 1693, n. 3, § 1696.

[*Note 2; add:*]

1913, *Travelers' Ins. Co. v. Davies*, 152 Ky. 600, 153 S. W. 956 (following *Williams v. Nally*).

1913, *Eckels & S. I. M. Co. v. Cornell E. Co.*, 119 Md. 107, 86 Atl. 38 (asking an expert whether he would adhere to his opinion if a writer in a certain article stated the contrary, but not showing the article, though it was at hand; held that counsel, not having objected to the question, could not inspect the article; clearly unsound; the method of the cross-examiner was capable of being a mere lying insinuation that the article did contradict the expert; and the only fair course was to compel counsel to read it or to let the opposite counsel inspect it to discover the trick if there was one).

1909, *MacDonald v. Metropolitan St. R. Co.*, 219 Mo. 468, 118 S. W. 78 (the cross-examiner may frame questions in the language of books held in his hand, and ask the witness whether he agrees to that view).

[*Note 4; add:*]

1912, *Denver City T. Co. v. Gawley*, 23 Colo. App. 332, 129 Pac. 258 (a physician may not on cross-examination be asked if he agrees with the view of a certain other not cited by him). 1907, *Chicago Union T. Co. v. Ertrachter*, 228 Ill. 114, 81 N. E. 816 (*Bloomington v. Schrock* followed).

1904, *Cronk v. Wabash R. Co.*, 123 Ia. 349, 98 N. W. 884. 1905, *State v. Thompson*, 127 Ia. 440, 103 N. W. 377. 1907, *State v. Blackburn*, — Ia. —, 110 N. W. 275 (cross-examination to books stated by the witness to be standard authorities, allowed). 1908, *State v. Blackburn*, 136 Ia. 743, 114 N. W. 531 (a cross-examination of a medical man held improper, in which the question continually assumed that universal professional opinion was contrary to his).

1906, *Harper v. Weikel*, — Ky. —, 89 S. W. 1125.

1911, *Com. v. Jordan*, 207 Mass. 259, 93 N. E. 809 (whether he would change his opinion if Professor B. said the contrary, not allowed). 1911, *Com. Phelps*, 210 Mass. 109, 96

[Note 4 — *continued*]

N. E. 69 (reading from another expert to contradict the expert testifying, excluded on mixed grounds). 1912, *Allen v. Boston Elevated R. Co.*, 212 Mass. 191, 98 N. E. 618 (similar). 1913, *In re Dubois*, 164 Mich. 8, 128 N. W. 1092 (like *Hall v. Murdock*, *supra*).

1904, *Mitchell v. Leech*, 69 S. C. 413, 48 S. E. 290.

1903, *Stone v. Seattle*, 33 Wash. 644, 74 Pac. 808.

[Note 7; *add*:]

1904, *Quattlebaum v. State*, 119 Ga. 433, 46 S. E. 677.

[Note 8; *add*:]

1905, *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. 358 (cyclopedias quoted on the experience of foreign countries as to vaccination against smallpox).

### § 1702. Reports of Judicial Decisions.

[Note 1, lines 2 and 3; *read*, instead:]

it is now known that the Year Books were not official, so that this is perhaps a precedent.

[Note 2; *add*:]

N. C. Rev. 1905, § 1594 (like Code, § 1338).

### § 1704. Standard Price-Lists and Market Reports.

[Note 1; *add*:]

1905, *Kentucky Ref. Co. v. Conner*, 145 Ala. 664, 39 So. 728 (certain letters held not to be within the statute).

1908, *Mount Vernon B. Co. v. Teschner*, 108 Md. 158, 69 Atl. 702 (newspaper accepted by the trade as trustworthy in stating market prices, admissible, without any showing of the publisher's method of obtaining the information; careful and liberal opinion by Boyd, C. J.).

1906, *Tri-State Milling Co. v. Breisch*, 145 Mich. 232, 108 N. W. 657 (*Sisson v. R. Co.*, followed; market quotations in a Detroit daily newspaper, received).

1905, *Fountain v. Wabash R. Co.*, 114 Mo. App. 676, 90 S. W. 393 (trade journals, not admitted without showing that reliable sources were used in their reports).

1905, *Chicago, B. & Q. R. Co. v. Todd*, 74 Nebr. 712, 105 N. W. 83 (*Sisson v. R. Co.*, *supra*, followed; *Daily Drivers' Journal-Stockman* admitted to show sales of sheep on certain days).

1907, *Moseley v. Johnson*, 144 N. C. 257, 274, 56 S. E. 922 (value of Georgia corporate securities; the market reports of a daily newspaper in Georgia, admitted).

1913, *Peters v. McPhadden*, 75 Wash. 525, 135 Pac. 26 (newspaper advertisements of stock prices offered, here excluded).

### § 1705. Abstracts of Title.

[Note 1; *add*:]

But not, apparently, in this country: 1906, *Einstein v. Holladay K. L. & L. Co.*, 118 Mo. App. 184, 94 S. W. 296 (lost deeds and burnt records; set of abstracts made partly by S., and partly by K., but verified by S. only, excluded).

[Note 2; *add*:]

CANADA: *Alta. St.* 1910, 2d Sess., Evidence Act, c. 3, § 48 ("an abstract of title or a general certificate under seal," by a land-title registrar, "shall be prima facie evidence of the contents thereof").

UNITED STATES: *Cal. St.* 1906, Spec. Sess., c. 52, June 16, C. C. P. § 1855a (abstracts of title for lost or destroyed records, when made "in the ordinary course of business prior

[*Note 2 — continued*]

to such loss or destruction," admissible "without further proof by the person who actually made the copies" etc., on notice to opponent and opportunity to inspect).

*Ill.*: St. 1903, pp. 121, 122 (amending St. 1897, May 21, §§ 7, 18, being Hurd's Rev. St. 1903, c. 30, § 61, concerning title-registration, so as to permit the use of abstracts of title). 1903, *Glos v. Cessna*, 207 Ill. 69, 69 N. E. 634 (abstract rejected because it was not on file in the recorder's office and the loss of originals was not proved). 1904, *Glos v. Paterson*, 209 Ill. 448, 70 N. E. 911 (certain abstracts held sufficiently shown to be within the description of the statute). 1904, *Glos v. Talcott*, 213 Ill. 81, 72 N. E. 707 (certain abstracts held improperly admitted without proof of loss of the original, preparation in the course of business, etc.). 1906, *Glos v. Holberg*, 220 Ill. 167, 77 N. E. 80 (abstract excluded, for lack of statutory compliance). 1906, *Messenger v. Messenger*, 223 Ill. 282, 79 N. E. 27 (the above statute of 1903 held not to have been lawfully adopted in Cook Co., and certain abstracts therefore rejected). 1907, *Glos v. Wheeler*, 229 Ill. 272, 82 N. E. 234 (abstract rejected because the original deed or record was not accounted for). 1909, *McMahon v. Rowley*, 238 Ill. 31, 87 N. E. 66 (certain abstracts admitted). 1911, *Culver v. Waters*, 248 Ill. 163, 93 N. E. 747 (abstracts must be "made by the abstracters" in the ordinary course of business, not "ordered by the owner" in the ordinary course of his business). 1911, *Hammond v. Glos*, 250 Ill. 32, 95 N. E. 39 (copy of an uncertified copy not admitted). 1911, *Caswell v. Glos*, 251 Ill. 505, 96 N. E. 251 (abstracts admitted, the witness' personal knowledge of their mode of compilation being sufficient on the facts).

*Minn.* St. 1905, c. 193, § 1 (on affidavit that an instrument or court records affecting a landed interest "are lost or destroyed and not within the power of such party to produce," and that the record of it is "destroyed by fire or otherwise," the Court may receive "any abstract of title to such lands made in the ordinary course of business before such loss or destruction," and also "any copy, extract, or minutes from such destroyed records or from the original thereof, which were, at the date of such destruction or loss, in the possession of any person then engaged in the business of making abstracts of title for others for hire"); *ib.* § 2 (a sworn copy of any such writing, made by the possessor, is receivable, provided reasonable notice is given to the opponent for verifying its correctness).

*Mo.* St. 1905, Mar. 23 and St. 1905, Apr. 15, pp. 148, 150 (certain abstracts of title to lands in Taney and Pulaski counties, made admissible). St. 1907, p. 271, Feb. 27, § 1 (where records affecting real estate are destroyed, etc., circuit judges may certify that abstracts etc. "were fairly made before such loss" etc. "in the ordinary and usual course of business," and that they "tend to show a connected chain of title," and thereupon such abstracts etc., or "authenticated copies" are to be admissible); § 3 (any abstracts, etc. "which are fair upon their face" and "made by any person" etc. "in the usual and ordinary course of business prior to the loss" etc., are admissible, upon proof that the original deeds etc. "are lost, destroyed, or so injured as to be illegible or that the said originals are not within the power of the party to produce," and that the records are lost, etc.).

*N. D.* St. 1907, c. 2, p. 2 (lost or destroyed records; "the abstract of a regular bonded abstractor or abstractors" of the county, to be admissible).

*Okla.* St. 1909, c. 33, p. 516, Art. I, §§ 12, 13 (similar to Ill. Rev. St. c. 116).

## § 1706. Sundry Commercial and Professional Registers.

[*Note 1; add:*]

1907, *Warrick v. Reinhardt*, 136 Ia. 27, 111 N. W. 983 (killing of a thoroughbred sow; a certificate of registry in the Iowa Breeders' Association, admitted).

*Ky.* St. 1904, c. 127 (livery-keeper's register; cited more fully *ante*, § 1639, n. 2). 1904, *Marks v. Hardy's Adm'r*, 117 Ky. 663, 78 S. W. 864, 1105 (reports of mercantile agency, not admitted as reputation to show a partnership).

Compare the cases cited *ante*, § 1621, n. 5 (reputation of an animal's character).

§ 1708. **Affidavits; Inadmissible at Common Law.**

[*Text*, p. 2191, l. 5, after "cross-examination"; *add* a new note 1a:]

<sup>1a</sup> 1908, *Fender v. Ramsey*, 131 Ga. 440, 62 S. E. 527.

§ 1709. **Same: Exceptions at Common Law.**

[*Note* 4; *add*.:]

For the authorities on the rule for *habeas corpus* proceedings, see a careful opinion by Lumpkin, J., in *Robertson v. Heath* (1909), 132 Ga. 310, 64 S. E. 73.

§ 1710. **Affidavits; Exceptions created by Statute.**

[*Note* 6; *add*.:]

ENGLAND: for some English statutes, see *ante*, § 1380, n. 3.

CANADA: *Newf. St.* 1904, c. 3, Rules of Court 33, par. 1, par. 31, Rule 34, par. 1, par. 24 (similar; quoted *ante*, § 1411).

*Ont. St.* 1910, 10 Edw. VII, c. 32, § 119 (division courts; judge may receive affidavit of a person out of the county, but may require interrogatories).

UNITED STATES: *Ia. St.* 1913, c. 272, p. 288, Apr. 16, § 5 (curing defective conveyances; affidavits already filed explaining any defects in title prior to Jan. 1, 1900, to be evidence).

*Mass. St.* 1913, c. 716, § 3 (Supreme Court on appellate proceedings may take supplementary evidence by affidavit).

*Nebr. St.* 1913, c. 75, p. 218 (recorded affidavits "explaining or correcting any apparent defect in the chain of title to any real estate," admissible).

*Wis. St.* 1909, c. 302, Stats. § 2238a (affidavits admissible, when recorded, to evidence identity of parties to a conveyance).

§ 1712. **Voter's Declarations as to Qualifications, etc.**

[*Note* 3; *add*.:]

1905, *State v. Rosenthal*, 123 Wis. 442, 102 N. W. 49 (*State v. Olin*, *supra*, followed).

§ 1715. **Circumstantial Evidence and Res Gestae Rule, distinguished.**

[*Text*, p. 2207, l. 1; after "Exception," *add* a new note 3a:]

<sup>3a</sup> 1901, *Baldwin, J.*, in *Vivian's Appeal*, 74 Conn. 257, 261, 50 Atl. 797: "A feeling is a fact; and an ultimate fact. If one says that he loves another, he expresses a sentiment existing at the time when he speaks."

§ 1719. **Statements of Pain or Suffering; to a Physician or Layman.**

[*Note* 8; *add*.:]

*Ill.*: 1904, *Chicago City R. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28 (Carr case approved). 1909, *Fuhry v. Chicago City R. Co.*, 239 Ill. 548, 88 N. E. 221 (a physician called to treat the injury testified to the patient's subjective symptoms among others; the opinion cites the *Donworth* and *Greinke* cases (*post*, § 1721, n. 1) for the rule that "a physician who has not treated the injured person, but has made an examination to enable him to testify on a trial as to his condition, must base his opinion on objective and not subjective conditions," but then proceeds to say that "the testimony as to the pressure of her hands . . . was incompetent;" if such loose judicial opinions continue to be written, a premium is offered to gamble on a decision). 1909, *Schmidt v. Chicago City R. Co.*, 239 Ill. 494, 88 N. E. 275 (physician's testimony to a contraction of the muscles which might have been voluntary but was not,

[Note 8 — *continued*]

admitted; also to a limp). 1910, *Louth v. Chicago M. T. Co.*, 244 Ill. 244, 91 N.E. 341 (see citation *post*, § 1721, n. 1).

*Kan.*: 1908, *Federal Betterment Co. v. Reeves*, 77 Kan. 111, 93 Pac. 627, *semble*.

*Ky.*: 1905, *Louisville & N. R. Co. v. Smith*, — Ky. —, 84 S. W. 755; 1913, *Louisville & N. R. Co. v. Sealf*, 155 Ky. 273, 159 S. W. 804.

*S. D.*: 1905, *Klingaman v. Fish & H. Co.*, 19 S. D. 139, 102 N. W. 601 (here the Court, while adopting the inferior rule, inexcusably cites the Massachusetts cases as if they supported it).

[Text: p. 2212, l. 1; before "repudiated," *insert*:]

or impliedly.

[Note 9; *add*:]

*Ala.*: 1903, *Montgomery St. R. Co. v. Shanks*, 139 Ala. 489, 37 So. 166 (complaints and crying, admitted). 1905, *Kansas City M. & B. R. Co. v. Butler*, 143 Ala. 262, 38 So. 1024. 1905, *Kansas City M. & B. R. Co. v. Matthews*, 142 Ala. 298, 39 So. 207. 1905, *Birmingham R. L. & P. Co. v. Rutledge*, 142 Ala. 195, 39 So. 338.

*Ia.*: 1904, *Buce v. Eldon*, 122 Ia. 92, 97, N. W. 989. 1904, *Battis v. Chicago R. I. & P. R. Co.*, 124 Ia. 623, 100 N. W. 543 (like *Keyes v. Cedar Falls*, *supra*). 1905, *Fishburn v. Burlington & N. W. R. Co.*, 127 Ia. 483, 103 N. W. 481, *semble* (similar; but the point decided is left obscure). 1907, *Patton v. Sanborn*, 133 Ia. 650, 110 N. W. 1032. 1907, *State v. Blydenburg*, 135 Ia. 264, 112 N. W. 634 (approving *Keyes v. Cedar Falls*).

*Kan.*: 1908, *St. Louis & S. F. R. Co. v. Chaney*, 77 Kan. 276, 94 Pac. 126 (there must be preliminary evidence to indicate that the statements were spontaneous and not manufactured; explaining *A. T. & S. F. R. Co. v. Johns*; no authority cited for this novel requirement); [N. B. in Vol. I, p. 2213, § 1719, n. 9, of the present work, the *Johns Case supra* is cited by volume and page, but by the erroneous title of *Brooks v. Hall*]. 1912, *State v. Buck*, 88 Kan. 114, 127 Pac. 631 (murder by poisoning; deceased's statements that the doses burned her stomach, admitted).

*Mo.*: 1905, *McHugh v. St. Louis T. Co.*, 190 Mo. 85, 88 S. W. 853.

*Nebr.*: 1905, *Western Travelers' Acc. Ass'n v. Munson*, 73 Nebr. 858, 103 N. W. 688. 1907, *Nixon v. Omaha & C. B. St. R. Co.*, 79 Nebr. 550, 113 N. W. 117.

*Nev.*: 1910, *Sherman v. Southern Pacific Co.*, 33 Nev. 385, 111 Pac. 416.

*N. D.*: 1905, *Puls v. Grand Lodge*, 13 N. D. 559, 102 N. W. 165.

*Or.*: 1909, *Smith v. Smith*, 55 Or. 128, 105 Pac. 706.

*W. Va.*: 1905, *Stevens v. Friedman*, 58 W. Va. 78, 51 S. E. 132 (battery; complaints "exhibiting the natural symptoms and effects of the injury," admitted).

## § 1721. Statements Post Litem Motam.

Note 1; *add*:]

*Ill.*: 1904, *Chicago City R. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28 (during treatment, but after action begun, admitted).

1908, *Greinke v. R. Co.*, 234 Ill. 564, 85 N. E. 327 ("declarations of the injured party made to a physician who has made an examination of such party with a view to qualify himself to testify as a witness, only, are not admissible;" *semble*, movements controllable by volition are equally excluded). 1908, *Shaughnessy v. Holt*, 236 Ill. 485, 86 N. E. 256 (patient's expressed sensations and answers made at an examination by physicians solely for the purpose of qualifying as witnesses, excluded). 1908, *Casey v. Chicago City R. Co.*, 237 Ill. 140, 86 N. E. 606 (similar). 1910, *Louth v. Chicago M. T. Co.*, 244 Ill. 244, 91 N. E. 431 (personal injury; laymen who have observed the plaintiff in ordinary course of life may testify to his appearance and expressions with reference to nervousness and the like; *Greinke v. R. Co.* and *Shaughnessy v. Holt* distinguished as applying only to physicians consulted to qualify them for trial testimony).

[*Note 1 — continued*]

*Ia.*: 1909, *Johnston v. Cedar Rapids & M. C. R. Co.*, 141 *Ia.* 114, 119 *N. W.* 286 (undecided).

*Mich.*: 1904, *Comstock v. Georgetown*, 137 *Mich.* 541, 100 *N. W.* 788 (testimony as to an injured person's "flinching," etc., at the touch of a doctor called a week before trial, and not for treatment, excluded). 1905, *McCormick v. Detroit G. H. & M. R. Co.*, 141 *Mich.* 17, 104 *N. W.* 390 (*Strudgeon v. Sand Beach*, *supra*, approved and applied). 1905, *O'Dea v. Michigan C. R. Co.*, 142 *Mich.* 265, 105 *N. W.* 746 (statements to the defendant's physician, called in expectation of his giving testimony, excluded).

*Wis.*: 1904, *Kath v. Wisconsin C. R. Co.*, 121 *Wis.* 503, 99 *N. W.* 217 (not admissible when made to a physician "after action is brought or threatened").

### § 1722. Kind of Fact Narrated, etc.

[*Note 1, par. 1; add:*]

1912, *Amys v. Barton*, 1 *K. B.* 40 (injury to a workman in a field; his statement that a wasp stung him, etc., held inadmissible).

1912, *Youlden v. London G. & A. Co.*, *Ont. H. C. J.*, 4 *D. L. R.* 721 (by a workman injured, that "he thought he had hurt himself," admitted, to show the internal condition, but not its cause; English cases under the Workmen's Compensation Act, examined).

1913, *St. Louis I. M. & S. R. Co. v. Williams*, 108 *Ark.* 387, 158 *S. W.* 494.

1906, *Indiana U. T. Co. v. Jacobs*, 167 *Ind.* 85, 78 *N. E.* 325 ("She told me that she had an injured limb," admitted).

1905, *Shade's Adm'r v. Covington C. E. R. & T. & B. Co.*, 119 *Ky.* 592, 84 *S. W.* 733 (that she had fallen on the ice on the defendant's bridge, excluded).

1904, *Fallon v. Rapid City*, 17 *S. D.* 570, 97 *N. W.* 1009 (that a sprain was caused by a defective sidewalk, excluded).

[*Note 2, par. 1; add, under Accord:*]

1904, *Cashin v. N. Y. H. H. & H. R. Co.*, 185 *Mass.* 543, 70 *N. E.* 930.

1906, *Weeks v. Boston El. R. Co.*, 190 *Mass.* 563, 77 *N. E.* 654 (certain complaints, held here not to state past pain).

1904, *Boyd v. State*, 84 *Miss.* 414, 36 *So.* 525 (poisoning; statements of symptoms a few days before, excluded).

1908, *Wilkins v. Brock*, 81 *Vt.* 332, 70 *Atl.* 572.

[*Note 3; add:*]

In *Louisville & N. R. Co. v. Smith*, — *Ky.* —, 84 *S. W.* 755 (1905), statements as to *mental suffering* were excluded, but improperly, it would seem.

[*Note 4, par. 1; add, under Accord:*]

1907, *State v. Blydenburg*, 135 *Ia.* 264, 112 *N. W.* 634 ("the clinical history of the case," allowed; following *Roosa v. Loan Co.*, *Mass.*).

1905, *Shade's Adm'r v. Covington C. E. R. & T. & B. Co.*, 119 *Ky.* 592, 84 *S. W.* 733 (perhaps qualifying the *Omberg* case).

1907, *Com. v. Sinclair*, 195 *Mass.* 100, 80 *N. E.* 799 (abortion; statements by the patient to a physician that she had been operated on for pregnancy and had had a miscarriage, not admitted under the rule of *Roosa v. Loan Co.*).

1912, *Acme C. P. Co. v. Westman*, 20 *Wyo.* 143, 122 *Pac.* 89.

[*Note 5, par 1; add:*]

1913, *Louisville & N. R. Co. v. Sealf*, 155 *Ky.* 273, 159 *S. W.* 804 (not clear in its limitations).

§ 1725. **Statements of Design or Plan.**

[*Note 1; add:*]

1905, *Nordan v. State*, 143 Ala. 13, 39 So. 406 (murder by abortion: deceased's expressions of intent to commit suicide, admitted).

1904, *State v. Kelly*, 77 Conn. 266, 58 Atl. 705 (murder by poisoning; deceased's declarations of intention to commit suicide, held admissible, but confined in the trial Court's discretion to a period of two months before; good opinion by Prentice, J., on the subject of remoteness of time; *Com. v. Trefethen* approved).

1912, *State v. Beeson*, 155 Ia. 355, 136 N. W. 317 (wife-murder; her expressions of intention to commit suicide, etc., admitted; approving *Com. v. Trefethen*, and the text *supra*). 1913, *Ott v. Murphy*, — Ia. —, 141 N. W. 463 (libel on a candidate for public office; on the issue whether he was a candidate, his declarations of intention were admitted).

1910, *Com. v. Howard*, 205 Mass. 128, 91 N. E. 397 (whether a deed was suicide or murder; the deceased's statements of intention in going to the place, admitted for the prosecution). 1912, *People v. Fritch*, 170 Mich. 258, 136 N. W. 493 (death by abortion; the deceased's declarations, before and after visiting the defendant, held admissible only so far as involving statements of her intention to have an operation, but not posterior statements of her transaction with the defendant).

1909, *State v. Kane*, 77 N. J. L. 244, 72 Atl. 39 (burglary; declaration of intention, the prior day, as to a meeting at the place where arrested, admitted).

1905, *Clemens v. Royal Neighbors*, 14 N. D. 116, 103 N. W. 402 (note written by deceased just before death, admitted on the issue of suicide).

[*Note 2; add:*]

1904, *People v. Barker*, 144 Cal. 705, 78 Pac. 266 (letters from the absent person, admitted to show his absence and intent not to return).

1898, *Hill v. Winston*, 73 Minn. 80, 75 N. W. 1030 (absent person's declarations as to residence, and the sheriff's return of not found, admitted).

*Contra*: 1907, *Cuff v. Frazee S. & C. Co.*, 14 Ont. L. R. 263 (unsound; no authority cited on this point).

But the present principle need not be strained in admitting such evidence, for the broader principle of § 1789, *post*, suffices.

[*Note 3; add:*]

1908, *Dunham v. Cox*, 81 Conn. 268, 70 Atl. 1033 (issue of payment; the party's statements of intention to pay, while on the way with the money, held admissible, but here not properly offered).

[*Note 4; add:*]

The following ruling is unique:

1907, *Conklin v. Consolidated R. Co.*, 196 Mass. 302, 82 N. E. 23 (assault by a car-conductor on a passenger; to show that the conductor began the affray, the conductor's statement, shortly before, that he would "assault some one on the car before he got through," was excluded; the opinion concedes its relevancy, but excludes it because it did not satisfy the rule for agents' admissions; this perverse ruling is calculated to shake one's faith in the possibility of ever improving our law of evidence, for it ignores the simple and fundamental principle of multiple relevancy, *ante*, § 13).

§ 1726. **Same: Contrary Rulings Explained.**

[*Note 4; add:*]

1912, *Thomson's Case*, 7 Cr. App. 276, 3 K. B. 19 (abortion in March, 1912; the woman's statement in February that she intended to do it herself, excluded: no authority cited:

[Note 4 — continued]

it is strange that in this day and generation an English court can be so uninformed upon the principles of the law of evidence; the K. B. report is not accurate).

1904, *Nordgren v. People*, 211 Ill. 425, 71 N. E. 1042 (wife-murder by poisoning; deceased's expressions of intention to commit suicide, and of depression of mind, held admissible; *Siebert v. People*, *supra*, held to represent "undoubtedly the correct rule," but distinguished because here the declarations were "part of the *res gestae*," explanatory of the acts of keeping liquor and strychnine in her room; this is a groundless distinction; the Court should have plainly abandoned the improper rule of *Siebert v. People*, instead of introducing new opportunity for confusion; *Jumpertz v. People*, *ante*, § 143, n. 1, is not cited).

1906, *Clark v. People*, 224 Ill. 554, 79 N. E. 941 (murder by attempted abortion; the deceased's declarations, over a year before her death, that she had committed an abortion upon herself "and would repeat it if necessary," held inadmissible, as "mere hearsay," following *Siebert v. People*).

[Note 5; add:]

1913, *Foster v. Shepherd*, 258 Ill. 164, 101 N. E. 411 (deceased's expressions of intention to spend the night at his mother's home, as evidence of his conduct in being later at a certain place, excluded citing the Chancellor case; see an extended comment in 8 Illinois Law Review 203).

1913, *Barker v. Massachusetts M. L. Ins. Co.*, 163 N. C. 175, 79 S. E. 424 (declarations of a husband, a fortnight before death, as to need of a pistol, excluded in an action on the policy with an issue of suicide; ill-considered opinion, citing not a single authority).

1909, *Clark v. State*, 56 Tex. Cr. 293, 120 S. W. 179 (deceased's expressions of intention to arrest defendant, excluded, here on the ground that his intention was immaterial; unsound).

1912, *Mullins v. Com.*, 113 Va. 787, 75 S. E. 193 (murder; deceased's statement before leaving that accused was going with him, excluded; unsound).

#### § 1727. Statements of Intent, in Domicil Cases.

[Note 2; add:]

1895, *Davis v. Adair*, L. R. 1 Ire. 379, 396, 430, 438, 444 (a peculiar case).

#### § 1729. Statements of Motive, Reason, or Intent.

[Note 2, par. 1; add:]

1908, *Barry v. McCollom*, 81 Conn. 293, 70 Atl. 1035 (libel; defendant's declarations, showing a good motive, made a week or two before, admitted).

1905, *Flynn v. Coolidge*, 188 Mass. 214, 74 N. E. 342 (malicious prosecution, and damage by C.'s refusal to lease a building to the plaintiff; C.'s statement of his reason for refusing, excluded only because not made before action begun). 1906, *Pierson v. Boston El. R. Co.*, 191 Mass. 223, 77 N. E. 769 (damage by noise; the statements of reasons given by the plaintiff's customers when leaving his restaurant, "We can't talk here and hear ourselves," admitted). 1908, *Hubbard v. Allyn*, 200 Mass. 166, 86 N. E. 356 (libel; customers' statements declining to buy because of the badness of the merchandise of the plaintiff as alleged by the defendant, admitted, on the issue of damage).

1911, *Lawlor v. Loewe*, C. C. A., 187 Fed. 522 (action for damage done by a boycott by a labor union; testimony of the plaintiff's salesman that customers had reported to him threats by labor union representatives of trouble from the union if he handled the plaintiff's goods, held improper since "in some of the instances testified to" the present rule "should not be extended as far as it was").

1908, *State v. Ryder*, 80 Vt. 422, 68 Atl. 652 (motive for destroying letters; statement made while burning them, admitted).

## EXCEPTIONS: STATEMENTS OF MENTAL CONDITION, ETC. § 1730

### § 1730. *Statements of Emotion, Bias, Malice, Affection, etc.*

[*Note 1; add:*]

1909, *Luckey v. Western U. Tel. Co.*, 151 N. C. 551, 66 S. E. 596 (non-delivery of a telegram announcing a mother's death; the mother's expressions showing affection for a son, admitted).

[*Note 2; add:*]

1894, *Williams v. Williams*, 20 Colo. 51, 37 Pac. 614 (alienation of a husband's affections by his mother; the husband's declarations as to the defendant's conduct, admitted "to determine the cause or motive which prompted his separation from his wife").

1906, *Hardwick v. Hardwick*, 130 Ia. 230, 106 N. W. 639 (alienation of a husband's affections by a father-in-law; the husband's statements to his wife, on taking leave, as to being influenced by his father, admitted; two judges dissent, citing no authority). (In this treatise, original text, the Iowa case cited as *Kennedy v. Hensley*, 94 Ia. 629, should be *Bailey v. Bailey*, 94 Ia. 528.)

1904, *Nevins v. Nevins*, 68 Kan. 410, 75 Pac. 492 (alienation of affections; husband's statements admitted to show the source of his change of mind).

1910, *Fuller v. Robinson*, 230 Mo. 22, 130 S. W. 343 (statements by the wife, admitted; *semble*, statements after her alleged misconduct would be inadmissible, if collusion with the husband were likely; so also the defendant's wife's conduct indicating coolness is admissible).

1909, *Cochran v. Cochran*, 196 N. Y. 86, 89 N. E. 470 (husband's declarations, excluded; *E. T. Bartlett, J., diss.*).

1913, *Ickes v. Ickes*, 237 Pa. 582, 85 Atl. 885 (alienation of affections; defendant's statement of his intention to leave and his motive therefor, made prior to leaving, admitted; but the Court seems incorrectly to place the ruling on the principle of § 1725, *ante*).

1911, *Luick v. Arends*, — N. D. —, 132 N. W. 353 (alienation of wife's affections; her declarations of affection or the opposite, up to the time of the defendant's influence, admissible, but not to include statements of the conduct causing it).

1909, *White v. White*, 140 Wis. 538, 122 N. W. 1051 (husband's declaration, in wife's action, admitted).

[*Text*, p. 2227, l. 3; *insert the following:*]

In such an action, in particular for *alienation of affections*, the utterances of the alienated spouse, exhibiting the mental condition of alienation and the motives therefor, sometimes refer to *acts and utterances of the defendant* as the alienating influence, *e.g.* when the alienated wife says to her husband, referring to the defendant, "He offered to marry me if I could get a divorce from you and so I am ready to leave you." Here the alleged utterances of the defendant need not be taken as facts, much less as true assertions (*post*, § 1768), but the wife's reference to them is plainly evidential of the relation of cause and effect *in her mind* between her present alienation of affections and the defendant's influence, *i.e.* her motive (*ante*, § 1729); therefore, supposing that the fact of the defendant's efforts and influence is otherwise evidenced, the wife's utterances of the above sort should be received to show their result on her state of mind.<sup>2a</sup> In this aspect, the defendant's utterances and acts as recited by her are not hearsay, but fall under the principle of § 1768, *post*.

<sup>2a</sup> *Accord:*

1894, *Williams v. Williams*, 20 Colo. 51, 58, 37 Pac. 614.

1908, *Hillers v. Taylor*, 108 Md. 148, 69 Atl. 715 (doctrine approved; but held not to admit

[Text, p. 2227 — continued]

an utterance which merely recited conduct of the defendant, and thus had no significance under the present doctrine).

1911, *Hillers v. Taylor*, 116 Md. 165, 81 Atl. 286 (husband's conversations, unspecified, here held admissible, following the rule of the prior decision).

1887, *Edgell v. Francis*, 66 Mich. 303, 33 N. W. 501 (cited *supra*, n. 2).

*Contra*: 1905, *Humphrey v. Pope*, 1 Cal. App. 374, 82 Pac. 223.

1889, *Huling v. Huling*, 32 Ill. App. 519, 521.

1884, *Higham v. Vanosdol*, 101 Ind. 160, 164 (cited *supra*, n. 2).

1908, *Leucht v. Leucht*, 129 Ky. 700, 112 S. W. 845 (the opinion apparently does not perceive the distinction).

1861, *Preston v. Bowers*, 13 Oh. St. 1, 11 (cited *supra*, n. 2). 1878, *Westlake v. Westlake*, 34 id. 621, 634.

1914, *Brison v. McKellop*, — Okl. —, 137 Pac. 154 (alienation of husband's affections; the husband's statements to the wife as to what the defendant his mother had said to him, excluded).

[Note 3; add:]

1907, *Gilbert v. The King*, 38 Can. Sup. 284 (by the deceased, on the approach of the defendant, "don't let him knife me," admitted).

1909, *State v. Draughon*, 151 N. C. 667, 65 S. E. 913 (father's expressions of gratitude etc. to his son, admitted).

### § 1732. Sundry Statements by an Accused Person.

[Note 3; add, under *Contra*.:]

1905, *State v. Dean*, 72 S. C. 74, 51 S. E. 524 (murder; the accused's prior statements of innocent purpose in going to the place, excluded).

[Note 4; add:]

1908, *Hill v. State*, 156 Ala. 3, 46 So. 864.

[Note 6; add:]

1909, *Maddox v. State*, 159 Ala. 53, 48 So. 689 (Mayfield, J., "The writer of this opinion thinks that this Court and some trial Courts have gone too far, in certain of the cases reported, in admitting such evidence against the accused"; here admitting declarations of the accused made at and about the time of leaving home, but excluding others made later; the learned Court, instead of excluding more evidence *against* accused persons, should admit more evidence *for* them; the logic-chopping in such cases as the present seems a pitiable method of getting at the truth about a murder, — pitiable, that is, when one reflects that it is the method used by able men administering a great legal system, and fancying themselves to be doing its proper service; it is the emptiness of their illusion that is so pitiable). 1910, *White v. State*, 59 Fla. 53, 52 So. 805 (certain prior conversations, held admissible). 1904, *Taylor v. State*, 121 Ga. 348, 49 S. E. 303 (statements that he was afraid to go where the deceased was, excluded).

1910, *State v. Kinchen*, 126 La. 39, 52 So. 185 (here the Court falls back in defence, as many others have done, on the bugbear phrase, invented apparently by Mr. Wharton, "self-serving," a term which merely perpetuates the long-abandoned doctrine of interest, i.e. every person when speaking on a matter in which he is interested is presumably false in every detail; this worn-out notion should be totally discarded).

1905, *State v. Atchley*, 186 Mo. 174, 84 S. W. 984 (murder; defendant's application to have the deceased put under a peace-bond, excluded).

1904, *State v. Raymo*, 76 Vt. 430, 57 Atl. 993 (assault on B.; plea, self-defence; defendant's declarations of fear of B. prior to the assault, excluded).

EXCEPTIONS: STATEMENTS OF MENTAL CONDITION, ETC. § 1736

[Note 7, par. 1; add:]

1905, *Merrell v. Dudley*, 139 N. C. 57, 51 S. E. 777 (malicious prosecution; defendant's statements at the time of suing out the warrant, admitted in his favor).

1909, *Huntington v. U. S.*, 8th C. C. A., 175 Fed. 950, 956 (fraudulent entries under the homestead laws, by false representations to entrymen; true representations to other entrymen during the same period, excluded; *Philips, J.*, diss., citing the above text).

1913, *Gould v. U. S.*, 8th C. C. C., 209 Fed. 730 (fraudulent use of mails for irrigation lands investment; letter of one defendant to another held admissible to show good faith).

[Note 10; add:]

*Accord*: 1907, *State v. Rutledge*, 135 Ia. 581, 113 N. W. 461.

*Contra*: 1907, *Day v. State*, 54 Fla. 25, 44 So. 715 (murder; statement when handing over the knife upon arrest, excluded).

1908, *Lyles v. State*, 130 Ga. 294, 60 S. E. 578 (wife-murder; immediately upon the sound of the shots, witnesses arrived, and the defendant said: "Gentlemen, come in here; my God! I have shot my wife!" excluded; a flagrant instance of the dogged and needless cruelty to which our technical methods lead).

[Text, p. 2230, l. 9 from below:]

After "should," insert "not."

§ 1736. Post-Testamentary Statements as to Execution, etc.

[Note 2; add:]

1895, *Leslie v. McMurty*, 60 Ark. 301, 30 S. W. 33 (declarations that he had made no will, admissible on an issue of forgery).

1905, *Spencer's Appeal*, 77 Conn. 638, 60 Atl. 289 (certain declarations admitted, but only because of lack of proper objection).

1906, *Dunahugh's Will*, 130 Ia. 692, 107 N. W. 925 (whether a revoking will had been made; the testatrix' statements, just before death, that she had made one, excluded; the opinion relies upon a passage in an encyclopedia "citing the following cases" which include *Sugden v. St. Leonards*, Engl., *Lane v. Hill*, N. H., and *Tynan v. Paschal*, Tex., *infra*, n. 3; the learned judge evidently was not aware that the cases cited decide precisely the opposite). 1907, *Smith v. Ryan*, 136 Ia. 335, 112 N. W. 8 (subsequent declarations, not admitted to show revocation). 1912, *Nixon v. Snellbaker*, 155 Ia. 390, 136 N. W. 223.

1910, *Giles v. Giles*, 204 Mass. 383, 90 N. E. 595 (testator's declarations not admitted to show that a revocatory writing, executed as required by law, had been made; the Court fails to distinguish between prior declarations of intention and subsequent assertions).

1904, *Colbert's Estate*, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248 (whether a lost will had been revoked; the testator's statements that he was satisfied with it, excluded; following *Throckmorton v. Holt*, U. S.).

1903, *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916 (will found, but alleged to have been revoked; declarations of the testator that he had revoked it, excluded; yet the opinion purports to approve *Lane v. Hill*, N. H., *infra*, n. 3, and perhaps would have admitted the evidence as corroborative).

1901, *Throckmorton v. Holt*, U. S., cited *supra*; in view of the authority of this Court, and the frequent citation of this decision, it should be noted that the opinion is only a quicksand for those who seek guidance on this subject.

[Note 3; add:]

1903, *Stewart v. Walker*, 6 Ont. L. R. 495, 503 ("while the decision in *Sugden v. Lord St. Leonards* stands, it must be accepted as the law that declarations subsequent to the making of a will are admissible as secondary evidence of its contents").

[Note 3 — continued]

1914, *Burton v. Wyld*, 261 Ill. 397, 103 N. E. 976 (revocation by cutting out the signature, etc.; testatrix' declarations that she had destroyed her will, admitted; sensible opinion, ignoring all the vain theoretical distinctions, and admitting virtually all post-testamentary utterances).

1906, *Inlow v. Hughes*, 38 Ind. App. 375, 76 N. E. 763 (post-testamentary declarations as to the tenor of a lost will, held admissible only "by way of corroboration" of the testimony of two witnesses required by Rev. St. 1901, § 2779, quoted *post*, § 2052).

1905, *Mann v. Balfour*, 187 Mo. 290, 86 S. W. 103 (after evidence of execution and loss, the testator's declarations as to contents, etc., are admissible in corroboration).

1904, *Davenport v. Davenport*, 67 N. J. Eq. 320, 58 Atl. 535 (lost will; the testator's declarations of contents "a few days after the alleged will was executed," admitted; purporting to follow *Rusling v. Rusling*, N. J., *post*, § 1738, which deals with a different question, and ignoring *Boylan v. Meeker and Gordon's Will*, N. J., *supra*, n. 2).

1906, *Shelton's Will*, 143 N. C. 218, 55 S. E. 705 (exception recognized, following *Jessel, M. R.*, in *Sugden v. St. Leonards*, and *Reel v. Reel*, N. C., cited *post*, § 1738, n. 2; here a will bore a revocatory writing, legally sufficient, and the testator's subsequent declarations were admitted on the issue of its genuineness).

1907, *Miller's Will*, 49 Or. 452, 90 Pac. 1002 (lost will; testatrix' declarations, up to a short time before her death, that it was still on deposit in the bank and unrevoked, held admissible; following *Cockburn, C. J.'s*, view in *Sugden v. St. Leonards*; able opinion by *King, C.*).

[Note 4; add:]

1913, *Longer v. Beakley*, 106 Ark. 213, 153 S. W. 811 (whether an insurance-policy request for change of beneficiary had been authorized: the insured's subsequent reference to the original persons as beneficiaries, and his affection for them, admitted; *McCulloch, C. J.*, diss.; the dissenting opinion correctly points out that the issue is analogous to that of execution of a will, and that the majority opinion seems to go upon the principle of capacity; nevertheless, the result of the decision is sound).

1905, *Lappe v. Gfeller*, 211 Pa. 462, 60 Atl. 1049 (destroyed will, said to have been forged; declarations of the deceased, for some months prior to his death, "inconsistent with the existence and validity of the alleged will," admitted, "as throwing some light on the question of fraud and forgery").

1913, *Jackson v. Hewlett*, 114 Va. 573, 77 S. E. 518 (facts similar to *Sugden v. St. Leonards*; declarations admitted to rebut intention to revoke).

### § 1737. Statements indicating Intent to Revoke.

[Note 1; add:]

Compare also the case cited *post*, § 1777 (declarations of a testator accompanying a delivery of money or chattels).

[Note 3, par. 1; add:]

And compare the cases on *intention* as evidence of a later execution, alteration, or revocation, *ante*, § 112.

1913, *Aldrich v. Aldrich*, 215 Mass. 164, 102 N. E. 487 (statements to counsel in regard to a will, indicative of intent to revoke, held admissible; following *Pickens v. Davis*).

### § 1738. Statements as to Undue Influence or Fraud.

[Note 1, par. 7; add:]

1913, *Gleason's Estate*, *Corbin v. Gleason*, 164 Cal. 756, 130 Pac. 872 (*Calkins' Estate* followed). 1913, *Jones' Estate*, *Baker v. Jones*, 166 Cal. 108, 135 Pac. 288 ("I was talked into making the will," etc., excluded).

[Note 1 — continued]

- 1901, *Vivian's Appeal*, 74 Conn. 257, 261, 50 Atl. 797 (*Comstock v. Hadlyme* followed; good opinion, by Baldwin, J.).  
 1903, *Utermehle v. Norment*, 22 D. C. App. 31 (testator's declarations of intent to leave a share to the caveatee, excluded on the facts; principle obscure).  
 1912, *Norton v. Clark*, 253 Ill. 557, 97 N. E. 1079.  
 1879, *Todd v. Fenton*, 66 Ind. 25, 31 (similar to *Hayes v. West*). 1883, *Vanvalkenberg v. Vanvalkenberg*, 90 Ind. 433, 438 (similar).  
 1909, *Jones v. Thomas*, 218 Mo. 508, 117 S. W. 1177.  
 1906, *Mueller v. Pew*, 127 Wis. 288, 106 N. W. 840 (*Loennecker's Will* approved).

[Note 2; add:]

- 1907, *Shelton's Will*, 143 N. C. 218, 55 S. E. 705 (approving *Reel v. Reel*). 1906, *Linebarger v. Linebarger*, 143 N. C. 229, 55 S. E. 709 (an opinion filed on the same day as the preceding but by a different judge, refers to the rule of *Reel v. Reel* as a "much vexed question").  
 1912, *Fowler's Will*, 159 N. C. 203, 74 S. E. 117 (approving *Howell v. Barden*).

[Note 3; add:]

- 1908, *Rose v. Bouck*, 2 Alta. 263 (subsequent statements of the testator considered; distinguishing the improper use as confirming a will admittedly void for undue influence, etc.).  
 1896, *Calkins' Estate*, 112 Cal. 296, 44 Pac. 577. 1905, *Arnold's Estate*, 147 Cal. 583, 82 Pac. 252. 1910, *Snowball's Estate*, 157 Cal. 301, 107 Pac. 590 (following *Arnold's Estate*).  
 1912, *Piercy v. Piercy*, 18 Cal. App. 751, 124 Pac. 561.  
 1907, *Kultz v. Jaeger*, 29 D. C. 300 (undue influence by husband over wife; wife's statements as to relations with husband exhibiting fear of husband, excluded; following *Throckmorton v. Holt, infra*, n. 4).  
 1905, *Credille v. Credille*, 123 Ga. 673, 51 S. E. 628 (declarations, the day after signing, that he had never made a will, and that if he had signed a certain will, he did not know what he was doing, admitted, with the above discriminations).  
 1911, *Wilkinson v. Service*, 249 Ill. 146, 94 N. E. 50, *semble*. 1913, *Kellan v. Kellan*, 258 Ill. 256, 101 N. E. 614 (undue influence, exercised by L. K., a legate; a postcard, written by L. K. to his sister, and reading, "Had aunt fix things somewhat Monday; cut Ed and Ellen off for one dollar, but they don't know it," was excluded; this shows how the rule suppresses good evidence).  
 1905, *Townsend's Estate*, 128 Ia. 621, 105 N. W. 110 (that "the boys would not hear to his giving E. anything," held, "if competent of slight value"; the opinion might have made a more explicit ruling). 1904, *Wiltsey's Will*, 122 Ia. 423, 98 N. W. 294 (*Muir v. Miller* followed). 1907, *Vannest v. Murphy*, 135 Ia. 123, 112 N. W. 236. 1907 *Kah's Estate*, 136 Ia. 116, 113 N. W. 563.  
 1904, *Powers' Ex'r v. Powers*, — Ky. —, 78 S. W. 152 (*Wall v. Dimmitt* followed). 1910, *Gillispie's Ex'r v. Gillispie*, — Ky. —, 128 S. W. 1064.  
 1908, *O'Dell v. Goff*, 153 Mich. 643, 117 N. W. 59.  
 1908, *Teckenbroeck v. McLaughlin*, 209 Mo. 533, 108 S. W. 46 (prior cases examined; liberal and sensible opinion by Lamm, J.).  
 1883, *Rusling v. Rusling*, 36 N. J. Eq. 603 (quoted *supra* in the text).  
 1912, *Gick v. Sturnpf*, 204 N. Y. 413, 97 N. E. 865 (undue influence; certain subsequent writings of the testatrix, excluded, as not illustrative of mental condition). 1912, *Smith v. Keller*, 205 N. Y. 39, 98 N. E. 214 (inadmissible "as affirmative statements of fraud").  
 1905, *Hobson v. Moorman*, 115 Tenn. 73, 90 S. W. 152 (cited *infra*, n. 4).  
 1914, *Scott v. Townsend*, — Tex. —, 166 S. W. 1138 (that testator said his wife "had been after him to make a will," and "had always wanted him to make a will," excluded; but it seems strange that we can endure a system of trials which sets aside a verdict and remands a case for the exclusion of such evidence).

[Note 4; add:]

1905, *Flowers v. Flowers*, 74 Ark. 212, 85 S. W. 242 (the provisions of an alleged will may be compared with his "fixed purposes and intentions," including declarations that he had made no will; but the opinion erroneously admits this on an issue of "mental capacity").

1904, *McKenna's Estate*, 143 Cal. 580, 77 Pac. 461 (conversations, on the issue of insanity, distinguished from the present question).

1894, *Bevelot v. Lestrade*, 153 Ill. 625, 631, 38 N. E. 1056 (declarations conflicting with the provisions of the will, not admitted). 1906, *Compher v. Browning*, 219 Ill. 429, 76 N. E. 678 (declarations of testamentary plans, admitted so far as harmonious with the will, i.e. in rebuttal of the alleged undue influence; but not so far as they conflict with the will's provisions; like *Kaenders v. Montague*, but not citing it). 1906, *Waters v. Waters*, 222 Ill. 26, 78 N. E. 1 (rule of *Kaenders v. Montague* followed). 1907, *Cheney v. Goldy*, 225 Ill. 394, 80 N. E. 289 (rule of *Compher v. Browning* applied). 1908, *Floto v. Floto*, 233 Ill. 605, 84 N. E. 712 (same). 1908, *Freund v. Becker*, 235 Ill. 513, 85 N. E. 610 (rule of *Kaenders v. Montague* followed). 1910, *Hurley v. Caldwell*, 244 Ill. 448, 91 N. E. 654 (opinion unclear; *Dowie v. Driscoll* and *Compher v. Browning* cited). 1905, *Westfall v. Wait*, 165 Ind. 353, 73 N. E. 1089 (*Goodbar v. Lidikay*, approved).

1904, *Selleck's Will*, 125 Ia. 678, 101 N. W. 453 (terms of a prior will, admitted). 1905, *Glass' Estate*, 127 Ia. 646, 103 N. W. 1013 (a trust deed of three years before, admitted, on an issue of undue influence, as a "written declaration").

1905, *Hagar v. Norton*, 188 Mass. 47, 73 N. E. 1073 (transfer of stock, etc., under undue influence; the deceased transferor's declarations of intent as to the devolution of her property, admitted, following *Shailer v. Bumstead*).

1904, *Roberts v. Bidwell*, 136 Mich. 191, 98 N. W. 1000 (*Bush v. Delano* followed). 1909, *Loree's Estate*, 158 Mich. 372, 122 N. W. 623 (former wills, etc.).

1910, *Lindsey v. Stephens*, 229 Mo. 600, 129 S. W. 641 (former will, admitted).

1905, *Hobson v. Moorman*, 115 Tenn. 73, 90 S. W. 152 (declarations admissible to "illustrate the mental capacity of the testator and his susceptibility to extraneous influence, and also to show his feelings, intentions, and relations to his kindred and friends," but not "as substantive evidence of undue influence"; the opinion specially denies that ante-testamentary declarations are usable for the last-named purpose, i.e. that noticed *supra*, n. 1).

1908, *Young's Estate*, 33 Utah 382, 94 Pac. 731 (former will, admitted).

1907, *Wallen v. Wallen*, 107 W. Va. 131, 57 S. E. 596 (the several uses obscurely merged).

#### § 1739. Intelligent Execution.

[Note 1; add:]

1909, *Thomas' Estate*, 155 Cal. 488, 101 Pac. 798 (forged will; decedent's declarations as to his age and relationships, variant with the recitals of the will, admitted as evidence that the will was a forgery).

1904, *Wheelock's Will*, 76 Vt. 235, 56 Atl. 1013 (testator's letters, showing knowledge of the will, admitted).

*Contra*: 1906, *Lipphard v. Humphrey*, 28 D. C. App. 355, 361 (the opinion oddly asserts that "the proposition is without any foundation either on principle or authority").

#### § 1746. Spontaneous Exclamations; a Genuine Exception to the Hearsay Rule.

[Text, p. 2250, l. 6, at the end; add a new note 1:]

<sup>1</sup> 1908, *People v. Del Vermo*, 192 N. Y. 470, 85 N. E. 690 (approving the above theory of the exception).

§ 1750. **Same: Requirements.**

[Note 2; add:]

1906, *Christopherson v. Chicago M. & St. P. R. Co.*, 135 Ia. 409, 109 N. W. 1077.1904, *State v. Foley*, 113 La. 52, 36 So. 885.1908, *People v. Del Verno*, 192 N. Y., 470, 85 N. E. 690 (approving the above theory of the exception).

[Text, p. 2257, l. 3 from below, after "trial Court," add a new note 2a:]

\* 1907, *Pittsburg C. C. & St. L. R. Co. v. Haislup*, 39 Ind. App. 394, 79 N. E. 1035 (the above passage quoted with approval).

[Note 3; add:]

*England*: 1912, *Thomson's Case*, 7 Cr. App. 276 (abortion on Mar. 21; the woman's statement on Mar. 28 that she had done it herself, excluded).*CANADA*: *Dom.*: 1907, *Gilbert v. The King*, 38 Can. Sup. 284 (murder; deceased's statement when fleeing from the defendant).*Ont.*: 1903, *Garner v. Stamford*, 7 Ont. L. R. 50 (highway injury).*UNITED STATES*: *Ala.*: 1904, *Pitts v. State*, 140 Ala. 70, 37 So. 101 (accused). 1904, *Harbour v. State*, 140 Ala. 103, 37 So. 330 (murder; exclamation of the defendant's daughter, an eye-witness, admitted). 1905, *State v. Stallings*, 142 Ala. 112, 38 So. 261 (accused). 1905, *Nordan v. State*, 143 Ala. 13, 39 So. 406 (deceased). 1912, *Alabama C. G. & A. R. Co. v. Heald*, 178 Ala. 636, 59 So. 461 (injury by a street-car). 1912, *Bessierre v. Alabama C. G. & A. R. Co.*, — Ala. —, 60 So. 82 (motorman).*Ariz.*: 1908, *Soto v. Terr.*, 12 Ariz. 36, 94 Pac. 1104 (boy's complaint after an assault).*Ark.*: 1906, *Kansas C. S. R. Co. v. Morris*, 80 Ark. 528, 98 S. W. 363 (person killed at a railroad).1908, *Beal-Doyle D. G. Co. v. Carr*, 85 Ark. 479, 108 S. W. 1053 (elevator accident).*Cal.*: 1905, *Murphy v. Board*, 2 Cal. App. 468, 83 Pac. 577 (injured person; a glaring instance of illiberal ruling).*Colo.*: 1911, *Salas v. People*, 51 Colo. 461, 118 Pac. 992 (murder).*D. C.*: 1904, *District of Columbia v. Dietrich*, 23 D. C. App. 577 (sidewalk injury). 1905, *Patterson v. Ocean A. & G. Co.*, 25 D. C. App. 46, 66 (injured person). 1906, *Grant v. U. S.*, 28 D. C. App. 169 (deceased in homicide). 1912, *Washington R. & E. Co. v. Wright*, 38 D. C. App. 268 (street-car accident).*Del.*: 1904, *Di Prisco v. Wilmington C. R. Co.*, 4 Del. 527, 57 Atl. 906 (child run over).*Ga.*: 1905, *Goodman v. State*, 122 Ga. 111, 49 S. E. 922 (deceased). 1905, *Kemp v. Central of Ga. R. Co.*, 122 Ga. 559, 50 S. E. 465 (engineer). 1905, *Pool v. Warren Co.*, 123 Ga. 205, 51 S. E. 328 (injury at a bridge). 1905, *White v. Southern R. Co.*, 123 Ga. 353, 51 S. E. 411 (railroad injury). 1906, *Warrick v. State*, 125 Ga. 133, 53 S. E. 1027 (accused), 1906, *McBride v. Georgia R. & E. Co.*, 125 Ga. 515, 54 S. E. 674 (injured person). 1906, *Southern R. Co. v. Brown*, 126 Ga. 1, 54 S. E. 911. 1908, *Herrington v. State*, 130 Ga. 307, 60 S. E. 572 (deceased in homicide). 1908, *Lyles v. State*, 130 Ga. 294, 60 S. E. 578 (defendant in homicide). 1911, *Walker v. State*, 137 Ga. 398, 73 S. E. 368 (murder; deceased's statements).*Haw.*: 1913, *Nawelo v. Hamm-Young Co.*, 21 Haw. 644 (injury by automobile).*Ida.*: 1908, *Anderson v. Great Northern R. Co.*, 15 Ida. 513, 99 Pac. 91 (engineer after an injury). 1909, *Wheeler v. Oregon R. & N. Co.*, 16 Ida. 375, 102 Pac. 347 (here excluded as opinion).*Ill.*: 1904, *Chicago City R. Co. v. Uhter*, 212 Ill. 174, 72 N. E. 195 (arrest of train employees after an accident, excluded). 1910, *Belskis v. Dering Coal Co.*, 246 Ill. 62, 92 N. E. 575 (mine injury).*Ind.*: 1907, *Pittsburg C. C. & St. L. R. Co. v. Haislup*, 39 Ind. App. 394, 79 N. E. 1035 (pas-

[*Note 3 — continued*]

senger ejected). 1908, *O'Connor Co. v. Gillaspay*, 170 Ind. 428, 83 N. E. 738 (elevator). 1909 *Fort Wayne & W. V. T. Co. v. Roudebush*, 173 Ind. 57, 88 N. E. 676 (motorman).  
*Ia.*: 1905, *Rothrock v. Cedar Rapids*, 128 Ia. 252, 103 N. W. 475 (injured person's statement after a fall). 1905, *Hutcheis v. Cedar R. & M. C. R. Co.*, 128 Ia. 279, 103 N. W. 779 (passenger falling from a car; model opinion, by McClain, J.). 1906, *Christopherson v. Chicago M. & St. P. R. Co.*, 135 Ia. 409, 109 N. W. 1077 (injured person). 1907, *Clark v. Van Vleck*, 135 Ia. 1904, 112 N. W. 648. 1908, *Kern v. Des Moines C. R. Co.*, 141 Ia. 620, 118 N. W. 451 (street-car injury).  
*Kan.*: 1910, *Campbell v. Brown*, 81 Kan. 480, 106 Pac. 37 (death by wood alcohol; the deceased's remarks while drinking, as to where he got it, not admitted). 1914, *State v. Powers*, — Kan. —, 139 Pac. 1166 (assault with intent to kill).  
*Ky.*: 1904, *Selby v. Com.*, — Ky. —, 80 S. W. 221 (accused, after a homicide). 1905, *Lexington St. R. Co. v. Strader*, — Ky. —, 89 S. W. 158 (motorman). 1906, *Louisville & N. R. Co. v. Molloy's Adm'x*, — Ky. —, 91 S. W. 685 (railroad injury). 1912, *Cincinnati N. O. & T. P. R. Co. v. Martin*, 146 Ky. 260, 142 S. W. 410 (engineer's statement after accident).  
*La.*: 1904, *State v. Charles*, 111 La. 933, 36 So. 29 (deceased in homicide). 1904, *State v. Foley*, 113 La. 52, 36 So. 885 (murder; prior cases cited and construed).  
*Minn.*: 1905, *State v. Williams*, 96 Minn. 351, 105 N. W. 265 (deceased in a murder). 1913, *State v. Findling*, 123 Minn. 413, 144 N. W. 142 (murder).  
*Mo.*: 1912, *Jewell v. Excelsior P. M. Co.*, 166 Mo. App. 555, 149 S. W. 1045 (injured person fleeing from an explosion).  
*Nebr.*: 1905, *Lexington v. Fleharty*, 74 Nebr. 626, 104 N. W. 1056 (injured person).  
*N. H.*: 1911, *Dorr v. Atlantic S. L. R. Co.*, 76 N. H. 160, 80 Atl. 336 (no fixed period of time is recognized).  
*N. J.*: 1905, *State v. Laster*, 71 N. J. L. 586, 60 Atl. 361 (deceased).  
*N. Y.*: 1904, *Austin v. Bartlett*, 178 N. Y. 310, 70 N. E. 855 (statements after a runaway accident). 1908, *People v. Del Verno*, 192 N. Y. 470, 85 N. E. 690 (murder; deceased's exclamations). 1913, *Greener v. General Electric Co.*, 209 N. Y. 135, 102 N. E. 527 (injured person after a fall; here excluded; but the opinion misunderstands the theory and ignores the element of time).  
*N. D.*: 1905, *Puls v. Grand Lodge*, 13 N. D. 559, 102 N. W. 165 (by one who was ill, as to having taken horse medicine, admitted). 1911, *Gebus v. Minneapolis St. P. & S. S. M. R. Co.*, 22 N. D. 29, 132 N. W. 227.  
*Okl.*: 1905, *Regnier v. Terr.*, 15 Okl. 652, 82 Pac. 509 (victim of a shooting). 1908, *Price v. State*, 1 Okl. Cr. 358, 98 Pac. 447 (homicide). 1910, *Hawkins v. U. S.*, 3 Okl. Cr. 651, 108 Pac. 561 (deceased, after a shooting).  
*R. I.*: 1912, *Champlin v. Pawcatuck V. St. R. Co.*, 33 R. I. 572, 82 Atl. 481.  
*S. C.*: 1904, *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384 (defendant in homicide). 1904, *State v. Lindsey*, 68 S. C. 276, 47 S. E. 389 (wife of the assaulted person). 1904, *Williams v. Southern R. Co.*, 68 S. C. 369, 47 S. E. 706 (person injured on a railroad track). 1904, *Nelson v. Georgia C. & N. R. Co.*, 68 S. C. 462, 47 S. E. 722 (conductor). 1907 *State v. Way*, 76 S. C. 91, 56 S. E. 653 (defendant in homicide).  
*S. D.*: 1904, *Fallon v. Rapid City*, 17 S. D. 570, 97 N. W. 1009 (sidewalk injury). 1909, *Jungworth v. Chicago M. & St. P. R. Co.*, 24 S. D. 342, 123 N. W. 695 (cattle injured on track; conductor's conversation with the stock-tender, excluded; careful opinion, by McCoy, J.).  
*U. S.*: 1904, *Guild v. Pringle*, 130 Fed. 419, 422, 64 C. C. A. 621 (person injured in the highway). 1911, *American Mfg. Co. v. Bigelow*, C. C. A., 188 Fed. 34 (superintendent's statement to injured employee).  
*Ut.*: 1905, *Leach v. Oregon S. L. Co.*, 29 Utah 285, 8 Pac. 90 (brakeman knocked off a car).  
*Va.*: 1904, *Bowles v. Com.*, 103 Va. 816, 48 S. E. 527 (deceased). 1908, *Blue Ridge L. & P. Co. v. Price*, 108 Va. 652, 62 S. E. 938 (motorman after an accident).

[Note 3 — continued]

*Wash.*: 1905, *Dixon v. Northern P. R. Co.*, 37 Wash. 310, 79 Pac. 943 (trespasser ejected from car). 1905, *Starr v. Aetna L. Ins. Co.*, 41 Wash. 199, 83 Pac. 113 (person injured on a railroad track). 1909, *Henry v. Seattle Electric Co.*, 55 Wash. 444, 104 Pac. 776 (conductor, after a collision). 1910, *Swanson v. Pacific Shipping Co.*, 60 Wash. 87, 110 Pac. 795 (injury in a shipyard). 1913, *State v. Hazzard*, 75 Wash. 5, 134 Pac. 514 (murder by starvation; the deceased's statements as to the food she was receiving, admitted).

*W. Va.*: 1904, *Williams v. Belmont C. & C. Co.*, 55 W. Va. 84, 46 S. E. 802 (motor-man). 1905, *State v. Woodrow*, 58 W. Va. 527, 52 S. E. 545 (murder; accused's statement).

*Wis.*: 1905, *Tiborsky v. Chicago M. & St. P. R. Co.*, 124 Wis. 243, 102 N. W. 549 (telegraph operator's reply to the injured person). 1906, *Johnson v. State*, 129 Wis. 146, 108 N. W. 55 (defendant after a homicide).

### § 1751. Knowledge Qualifications.

[Text, p. 2260; add a new paragraph (c) :]

(c) By the general principle applicable to these Exceptions to the Hearsay rule (*ante*, § 1424), the declarant must at least not lack the usual testimonial qualifications (*ante*, § 6256) that would be required of him if testifying on the stand. Which of those qualifications are here to be treated applicable and indispensable?

(1) Does the disqualification of *infancy* (*ante*, §§ 505-509) exclude declarations otherwise admissible? It would seem not; because the principle of the present Exception obviates the usual sources of untrustworthiness (*ante*, § 506) in children's testimony; because, furthermore, the orthodox rules for children's testimony are not in themselves meritorious (*ante*, § 509); and, finally, because the oath-test, which usually underlies the objection to children's testimony, is wholly inapplicable to them (*post*, § 1821, § 1828, notes 3-5).<sup>1</sup>

<sup>1</sup> *Accord*: 1908, *Soto v. Terr.*, 12 Ariz. 36, 94 Pac. 1104 (child of four years; complaint after an assault, admitted).

1908, *Beal-Doyle D. G. Co. v. Carr*, 85 Ark. 479, 108 S. W. 1053 (approving the text above).

1904, *Kenney v. State*, 45 Tex. Cr. 500, 79 S. W. 570, 817 (good opinion by Henderson, J., Davidson, P. J., diss.).

For the cases as to a child's *complaint of rape*, see *post*, § 1761, n. 2.

Distinguish the rule for *dying declarations*, which may well be different (*ante*, § 1445, n. 1).

(2) Does the disqualification of *infamy by conviction of crime* (*ante*, §§ 519-524) here exclude spontaneous exclamations uttered under the influence of the *res gestæ*? Considering the peculiar nature of the present exception, and the now conceded anachronism of the disqualification by infamy, it ought not to be extended to apply here.<sup>2</sup>

<sup>2</sup> *Accord*: 1900, *Neeley v. State*, — Tex. Cr. —, 56 S. W. 625. 1904, *Flores v. State*, — Tex. Cr. —, 79 S. W. 808. 1904, *Kenney v. State*, — Tex. Cr. —, 79 S. W. 817 (approving the foregoing cases, and distinguishing *Long v. State*, 10 Tex. App. 186).

By an analogous principle a *slave's* declarations of this sort were not excluded by his disqualification to testify: 1845, *Yeatman v. Hart*, 6 Humph. 375; 1867, *Rogers v. Crain*, 30 Tex. 284, 288.

[Text, p. 2260 — continued]

(3) For similar reasons, the marital disqualification should not exclude utterances of *husband* or *wife* otherwise receivable for each other;<sup>3</sup> for the

<sup>3</sup> Cases cited *ante*, § 604, n. 3.

present principle is assumed to override any considerations of interest in the declarant, and moreover the marital disqualification (*ante*, § 601) is now an anachronism; though the marital *privilege* rests on different grounds, and would equally exclude extra-judicial utterances.<sup>4</sup>

<sup>4</sup> Cases cited *post*, § 2233.

(4) The disqualification of *insanity* (*ante*, § 492) should probably be treated for the present purpose like that of infancy.<sup>5</sup>

<sup>5</sup> 1905, *Wilson v. State*, 49 Tex. Cr. 50, 90 S. W. 312.

Distinguish, however, the rule for *dying declarations* (*ante*, § 1445, n. 2).

(5) The *oath-capacity* is a purely artificial one (*post*, §§ 1820–1829), and has no inherent relation to testimonial capacity. It has no place in excluding extra-judicial declarations forming exceptions to the Hearsay rule (*ante*, § 1362). The close resemblance of its requirements to those of the Exception for dying declarations (*ante*, § 1443) and for children's testimony (*ante*, § 1505) will account for the supposition, occasionally found, that those requirements have some general application to extra-judicial declarations of the present sort.<sup>6</sup>

<sup>6</sup> *E. g.* the dissenting opinion of Davidson, P. J., in *Kenney v. State*, Tex., *supra*, n. 1, and the treatises therein quoted.

#### § 1754. Declaration must Elucidate the Act.

[Note 1; add:]

1908, *Hyvonen v. Hector Iron Co.*, 103 Minn. 331, 115 N. W. 167 (mining accident).

1914, *Ferance v. Forestdale Mfg. Co.*, — R. I. —, 89 Atl. 339 (factory injury).

#### § 1755. Declaration must be by the Actor himself; Bystander's Utterances.

[Note 1; add:]

1911, *Pope v. State*, 174 Ala. 63, 57 So. 245.

1905, *Indianapolis St. R. Co. v. Taylor*, 164 Ind. 155, 72 N. E. 1045 (railroad injury; excluded on the facts).

1907, *State v. Howard*, 120 La. 311, 45 So. 260 (like *State v. Ballard*).

[Note 2; add:]

1907, *Atlantic C. L. R. Co. v. Crosby*, 53 Fla. 400, 43 So. 318.

1907, *Kennedy v. Com.*, — Ky. —, 100 S. W. 242 (child of murdered man).

1905, *Baysinger v. Terr.*, 15 Okl. 428, 82 Pac. 728 (murder).

1911, *Cooper v. State*, — Tenn. —, 138 S. W. 827 (homicide).

1911, *American Mfg. Co. v. Bigelow*, C. C. A., 188 Fed. 34 (superintendent's statement to injured employee).

1910, *Cromeenes v. San Pedro L. A. & S. L. R. Co.*, 37 Utah 475, 109 Pac. 10 (passenger on a train running over a boy; one judge diss.).

## § 1756. Declaration must be Contemporaneous.

[Note 5; add:]

Chief Justice Cockburn's article was printed in the Law Journal, 1880, p. 5.

## § 1760. Woman's Complaint of Rape; History in England.

[Note 4; add:]

ENGLAND: 1896, *R. v. Lillyman*, 2 Q. B. 167, 170, 177, 18 Cox Cr. 346 (but here the peculiar distinction is taken that "we are bound by no authority to support the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made; . . . when the whole statement is laid before the jury, they are less likely to draw wrong and adverse inferences, and may sometimes come to the conclusion that what the woman said amounted to no real complaint of any offence committed by the accused"; yet "it is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated," i. e. "to judge for themselves whether the conduct of the woman was consistent with her testimony on oath given in the witness-box negating her consent").

1898, *R. v. Kiddle*, 19 Cox Cr. 77 (cited *ante*, § 1136, n. 2; *R. v. Lillyman* followed).

1900, *R. v. Merry*, 19 Cox Cr. 442 (indecent assault upon a child; a complaint not volunteered, but elicited by a question from the mother, held not admissible under *R. v. Lillyman*).

1905, *R. v. Osborne*, 1 K. B. 551 (indecent assault upon a child of twelve; a complaint made in answer to a question by a companion, held admissible on the facts; but "questions of a suggestive or leading nature will indeed . . . render it inadmissible").

1907, *Chesney v. Newsholme*, [1908] P. 301 (immoral acts by a clergyman with a boy; the boy's statement to his mother on the same evening, admitted, but not his statement made the next evening).

1909, *Hedges' Case*, 3 Cr. App. 262 (complaint 8 days afterwards, received).

1910, *Graham's Case*, 4 Cr. App. 218 (complaint a month later, received).

For the question whether the complaint is receivable on charges where the *woman's consent is immaterial*, see *ante*, § 1135, n. 1.

CANADA: 1906, *R. v. Spuzzum*, 12 Br. C. 291 (complaint made on the next day, admitted, in discretion).

1907, *R. v. Clarke*, 38 N. Br. 11 (certain complaint details here admitted on other grounds).

1909, *R. v. Bowes*, 20 Ont. L. R. 111 (carnal knowledge of a child of 7 or 8; statement to the mother, admitted).

1908, *R. v. Dunning*, 1 Sask. 391 (complaints made in answer to leading questions, excluded; following *R. v. Osborne*).

## § 1761. Same: American Doctrine.

[Note 2; add:]

1906, *Terr. v. Schilling*, 17 Haw. 249, 265 ("the entire conversation" admitted).

1904, *Cunningham v. People*, 210 Ill. 410, 71 N. E. 389 ("such complaint is admitted upon the theory that the statement of the prosecutrix represents the spontaneous expression of her outraged feelings"; hence a statement made "in response to questions put to her" — here, three weeks after the alleged offence — may be excluded).

1905, *State v. Andrews*, 130 Ia. 609, 105 N. W. 215 (admissible; but not citing *McMurrin v. Rigby*, and making a distinction between the complaints of a "very young child" and others). 1911, *State v. Novak*, 151 Ia. 536, 132 N. W. 26.

1906, *People v. Harris*, 144 Mich. 12, 107 N. W. 715 (not decided).

1907, *State v. Werner*, 16 N. D. 83, 112 N. W. 60 (when made immediately after the crime;

[*Note 2 — continued*]

but sanctioning also the use under § 1138, n. 2, *ante*, where the limitations would be different). 1913, *State v. Apley*, 25 N. D. 298, 141 N. W. 740.

1904, *Kenney v. State*, — Tex. Cr. —, 79 S. W. 817 (collecting prior cases). 1905, *Wiggins v. State*, — Tex. Cr. —, 84 S. W. 821.

[*Text*, p. 2273, at the end; *add* a new paragraph:]

Where the prosecutrix is a child *to young to be a witness*, the statements should nevertheless be receivable;<sup>3</sup> because, although in general a hearsay declarant must not lack the qualifications of an ordinary witness (*ante*, § 1424), yet the peculiar nature of the present Exception (*ante*, § 1747) renders this principle substantially inapplicable to children; furthermore, the orthodox common-law limitations as to children's testimonial capacity are inherently unsound and impractical (*ante*, § 509) and should not be extended by analogy.

<sup>3</sup> *Accord*: 1779, *Brasier's Case*, *semble* (quoted *ante*, § 1760, and so understood by Parke, B., in *R. v. Guttridge*, 1840, 9 C. & P. 471).

1900, *People v. Marrs*, 125 Mich. 376, 84 N. W. 284 (cited *ante*, § 1136, n. 1).

1899, *Croomes v. State*, 40 Tex. Cr. 672, 51 S. W. 924, 53 S. W. 882.

1904, *Kenney v. State*, — Tex. Cr. —, 79 S. W. 817 (repudiating *Smith v. State*, 41 Tex. 352; Davidson, P. J., diss.).

1905, *Wiggins v. State*, 47 Tex. Cr. 538, 84 S. W. 821.

1888, *Hannon v. State*, 70 Wis. 448, 452, 36 N. W. 1 (cited *ante*, § 1136, n. 1).

*Contra*: 1905, *State v. Andrews*, Ia., *semble* (cited *supra*, n. 2).

1869, *Weldon v. State*, 32 Ind. 81.

1845, *People v. McGee*, 1 Denio 19, 22.

But these last two cases, cited *ante*, § 1138, n. 2, are attributable to the different theory of rape-complaint there applied. In *England*, *R. v. Nicholas*, 2 C. & K. 246 (1846), is *contra*, but in England even an adult's statement was inadmissible (*ante*, § 1750); so that the Court there merely refused to do more for a child's statement than for an adult's.

## § 1770. Verbal Acts; Utterances of Contract, etc.

[*Note 1; add*:]

1911, *Zinsmeister v. Rock Island C. Co.*, 145 Ky. 25, 139 S. W. 1068 (agent's letters, excluded).

1905, *King v. Bynum*, 137 N. C. 491, 49 S. E. 955 (distinguishing testimony directly to the expressions of negotiation at a sale and testimony to subsequent hearsay statements of what occurred at the sale).

[*Note 3; add*:]

1904, *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904 (the woman's preparations, unknown to the defendant, excluded).

1912, *Hay v. State*, 178 Ind. 478, 98 N. E. 712 (seduction; the woman's preparations for marriage, not admissible as corroboration).

1908, *Cooper v. Bower*, 78 Kan. 156, 164, 96 Pac. 59, 794 (the woman's statements that they were engaged to be married, admissible).

But a *seduction* should not be evidence of a prior promise of marriage; the principle of § 268, *ante*, is here out of place.

1906, *Wrynn v. Downey*, 27 R. I. 454, 63 Atl. 401 (citing other authorities).

[*Note 4; add:*]

1904, *Parke & L. Co. v. S. F. Bridge Co.*, 145 Cal. 534, 78 Pac. 1065, 79 Pac. 71 (certain letters admitted, as constituting performance).

[*Note 5; add:*]

1905, *Order of U. C. Travellers v. Barnes*, 72 Kan. 293, 82 Pac. 1099 (admissible for the plaintiff, but only with instruction limiting their use to their effect as performance of the condition precedent).

1906, *Paquette v. Prudential Ins. Co.*, 193 Mass. 215, 79 N. E. 250 ("Having been put in evidence generally, it was within the discretion of the presiding judge either to submit or to withhold them from the consideration of the jury").

[*Text*, p. 2279, l. 11; *add* a new note 5a:]

\* Distinguish the *report* by a *third person* of such utterances of the defendant, which is of course mere extra-judicial assertion.

1909, *Sheppard v. Austin*, 159 Ala. 361, 48 So. 696.

### § 1777. Sundry Applications of the General Principle.

[*Note 2, par. 1; add:*]

1905, *Gearty v. City of New York*, 183 N. Y. 233, 76 N. E. 12 (contract; a certain letter from the defendant's agent, not admitted for the defendant).

1909, *Johnston v. Spoonheim*, 19 N. D. 191, 123 N. W. 830 (conveyance by insolvent parents to son; the parents' statement to the notary, at the time of drafting the deed, that the son had demanded pay for his labor and that this conveyance was made to satisfy him, excluded; *Morgan, C. J., diss.*).

Compare the cases on *agent's admissions* (*ante*, § 1078).

[*Note 3, par. 1; add:*]

1906, *Napier v. Elliott*, 146 Ala. 213, 40 So. 752 (grantor's declaration when signing and acknowledging a deed, admitted on the question of delivery).

1904, *Dawson v. Waggaman*, 23 D. C. App. 428 (*donatio causa mortis*).

1910, *Elliott v. Western Coal & M. Co.*, 243 Ill. 614, 90 N. E. 1104 (gift in 1889, not allowed to be qualified as an advancement by the testator's written statement in 1892).

1905, *Renshaw v. Dignan*, 128 Ia. 722, 105 N. W. 209 (delivery of a deed).

1906, *Hill's Guardian v. Hill*, 122 Ky. 681, 92 S. W. 924 (advancements).

Compare also the cases cited *post*, § 1782 (testator's declarations).

But for an alleged *advancement to a child* (in the usual case, a note from the child to the parent), the parent's declarations, even though made *after* the delivery of the money may be nevertheless receivable as *admissions* (*ante*, § 1081), offered against his estate, and this distinction is emphasized in Missouri.

1904, *Strode v. Beall*, 105 Mo. App. 495, 79 S. W. 1019 (citing cases).

[*Note 5; add:*]

1904, *Quick v. Cotman*, 124 Ia. 102, 99 N. W. 301.

[*Note 6, par. 1; add:*]

1907, *Goyette v. Keenan*, 196 Mass. 416, 82 N. E. 427 (a deed described "land formerly belonging to H. B., now or lately of one W."; declarations of W. "To show the character of his occupation" etc., the dispute being whether the description covered the land in question, were held not improperly excluded because their tenor did not appear).

[Note 8; *add.*]

1903, *Rulofson v. Billings*, 140 Cal. 452, 74 Pac. 35 (action on a contract by defendant to adopt and support plaintiff; defendant's declarations that he was only guardian, excluded, the *res gestæ* not including the whole time of living together).

1905, *Engel v. Conti*, 78 Conn. 351, 62 Atl. 210 (separation of wife and husband; their conversation while in the same room, admitted in explanation of his acts).

1906, *Fitzgerald v. Benner*, 219 Ill. 485, 76 N. E. 709 (delay in performance of a contract; the contractor's agent's expressions of readiness to perform, admitted).

1905, *Chapman v. Pendleton*, 26 R. I. 573, 59 Atl. 928 (surety's agreement; subsequent declarations excluded).

§ 1778. Possessor's Declarations, in Adverse Possession.

[Note 3; *add.*]

1910, *Makekau v. Kane*, 20 Haw. 203, 209 (above requirement applied).

[Note 4; *add.*]

1905, *Henry v. Brown*, 143 Ala. 446, 39 So. 325.

1905, *Seawell v. Young*, 77 Ark. 309, 91 S. W. 544 (ancestor's declarations of claim in possession, admitted, following *Knight v. Knight*, Ill., *infra*). 1912, *Butler v. Hines*, 101 Ark. 409, 142 S. W. 509 (declarations after seven years' occupation, admitted, as evidencing lack of adverseness in prior occupation).

1863, *Draper v. Douglass*, 23 Cal. 347 (location of a mining-claim; the miner's declarations, while working in the vicinity, admitted in his favor). 1866, *Sneed v. Woodward*, 30 Cal. 430, 434 (issue as to the plaintiff's acquiescence in an erroneous location so as to be estopped; their declarations at the time, received in their favor). 1871, *Phelps v. McGloan*, 42 Cal. 298, 302.

1909, *Bowman v. Owens*, 133 Ga. 49, 65 S. E. 156 (admitted, under Code 1895, § 5180).

1911, *Rich v. Naffziger*, 248 Ill. 455, 94 N. E. 1.

1905, *Emmet v. Perry*, 100 Me. 139, 60 Atl. 872 (defendant's grantor's declarations of claim, admitted).

1903, *Whitaker v. Whitaker*, 175 Mo. 1, 74 S. W. 1029. 1905, *Swope v. Ward*, 185 Mo. 316, 84 S. W. 895 (but declarations naming the source of an alleged title are excluded; this seems erroneous). 1906, *Farmers' Bank v. Barbee*, 198 Mo. 465, 95 S. W. 225 (*Martin v. Bonsack* followed). 1914, *Heynbrock v. Hormann*, — Mo. —, 164 S. W. 547 (*Bank v. Barbee* followed).

[Note 5; *add.*]

1906, *Bivings v. Gosnell*, 141 N. C. 341, 53 S. E. 861 (declarations of M., at the time of renting, assented to by the tenant, that he was acting for the plaintiff, admitted).

1904, *Murphy v. Dafee*, 18 S. D. 42, 99 N. W. 86 (declarations of an agent in possession for M., admitted).

1906, *Wade v. McDougle*, 59 W. Va. 113, 52 S. E. 1026 (declarations of C. and L., while cutting, etc., that they were doing so under N. the plaintiff, admitted).

[Note 7; *add.*]

1909, *McMahon v. Chicago City R. Co.*, 239 Ill. 334, 88 N. E. 223 (injury in a scuffle between a car-conductor and plaintiff's husband; the conversation and dispute between the latter two was admitted as part of the *res gestæ*).

1904, *McDonald v. Bayha*, 93 Minn. 139, 100 N. W. 679 (statements of an agent in possession).

[Note 10, under *Accord*; *add.*]

1909, *Hassam v. Safford Lumber Co.*, 82 Vt. 444, 74 Atl. 197.

§ 1779. **Possessor's Declarations, as aiding the Presumption of Ownership, etc.**

[Note 1; *add.*:]

1906, *Farmers' Bank v. Barbee*, 198 Mo. 465, 95 S. W. 225 (plaintiff claiming under A, one of three children and heirs of B; A's assertions of a grant to himself from the other children, not admitted in favor of plaintiff claiming under A; following *Turner v. Belden*, Mo., *infra*, n. 2).

[Note 2; *add.*:]

1905, *Swope v. Ward*, 185 Mo. 316, 84 S. W. 895 (*Turner v. Belden* approved; *Darrett v. Donnelly*, *supra*, n. 1, said not to be in conflict).

[Note 3; *add.*:]

1905, *Vagts v. Utman*, 125 Wis. 265, 104 N. W. 88 (title to a horse; rule held not applicable on the facts).

[Note 4; *add.*:]

1909, *State ex rel. Dykes v. Hencken*, 8th C. C. A., 174 Fed. 624 (property seized by creditors of M., T. being in possession; T.'s declarations of disclaim, not admitted in M.'s favor because T., though plaintiff's agent, was not agent to make admissions; no authority cited).

[Note 5; *add.*:]

*Accord.*: 1905, *Griswold v. Nichols*, 126 Wis. 401, 105 N. W. 815 (sale by a son to a father in fraud of creditors; the father's declarations in possession, admitted in his favor, following *Roebke v. Andrews*, *supra*, n. 1).

*Contra.*: 1906, *Samaha v. Mason*, 27 D. C. App. 470, 477 (replevin for rugs claimed by the defendant by purchase from H. who purchased from plaintiff; the defendant's statements as to the ownership of the rugs at the time of their seizure by replevin writ, excluded, not being merely explanatory of possession).

[Note 6; *add.*:]

1906, *Baker v. Drake*, 148 Ala. 513, 41 So. 845, *semble* (excluded). 1909, *Cohn & Goldberg L. Co. v. Robbins*, 159 Ala. 289, 48 So. 853 (injury caused by defendant's wagon driven by H.; H.'s statement, after the accident, replying to the plaintiff's inquiry whose wagon it was, that it was the defendants', not admitted as evidence of ownership; *McClellan, J.*, diss.; the opinion leaves undissipated the confusion in the decisions of this State).

1905, *Terry v. Clark*, 76 Ark. 435, 88 S. W. 987 (creditor claiming furniture against the debtor's wife; the debtor's declarations of ownership, not admitted for the creditor).

1905, *Smiley v. Padgett*, 123 Ga. 39, 50 S. E. 927 (execution under a lien by P. on goods possessed by H., but now claimed by S.; H.'s declarations of ownership, in possession, admitted for P.).

1913, *Freda v. Tishbein*, 174 Mich. 391, 140 N. W. 502 (creditor replevying goods in T.'s possession, as against T.'s widow; T.'s declarations not admitted for plaintiff, ownership and not possession being the sole issue).

1904, *Vermillion v. Parsons*, 101 Mo. App. 602, 73 S. W. 994, 107 Mo. App. 192, 80 S. W. 916 (husband's declarations of claim, not admitted for the creditor against the wife claiming by prior title).

1905, *Chan v. Slater*, 33 Mont. 155, 82 Pac. 657 (attachment on property of the husband, claimed by the plaintiff wife; the husband's declarations of claim in possession, admitted for the creditor).

1912, *Wipperman Merc. Co. v. Robbins*, 23 N. D. 208, 135 N. W. 785 (vendor suing for goods attached by the creditor of the vendee F.; declarations by B., assented to by F. in possession, admitted for the defendant; citing the above text).

[*Note 6 — continued*]

1904, *McKnight v. U. S.*, 130 Fed. 659, 667, 65 C. C. A. 37 (action for cattle of Josephine H., wife of John H., seized by defendant on attachment against John H.; the latter's declarations of claim in possession, not admitted for the defendant; reasons obscure).

[*Note 8; add:*]

1896, *Linton v. Sutherland*, 40 N. Sc. 149 (judgment debtor's admissions, after date of a deed to defendant, that the deed was meant as a mortgage only, not admitted against defendant).  
1905, *Ard v. Crittenden*, — Ala. —, 39 So. 675 (mortgagor's statements to third persons, at unspecified times, not admitted).

1900, *Produce Exchange T. Co. v. Bieberbach*, 176 Mass. 577, 586, 58 N. E. 162 (ownership of notes by a bank; entries in the bank's books admissible as "acts of ownership competent to prove title in the bank").

Mo.: compare also the cases cited *ante*, § 1779, notes 1 and 2.

1905, *Piedmont Sav. Bank v. Levy*, 138 N. C. 274, 50 S. E. 657 (trustee in bankruptcy, allowed to prove declarations of the debtor in possession but after assignment, to evidence the buyer's knowledge and the character of the debtor's possession; following *Askew v. Reynolds*, *supra*).

[*Note 9; add, under Accord:*]

1906, *Holman v. Clark*, 148 Ala. 286, 41 So. 765 (defendant claiming under a mortgage prior to plaintiff's; debtor's declarations of claim in possession, admitted for defendant).  
1909, *Johnston v. Spoonheim*, 19 N. D. 191, 123 N. W. 830 (cited more fully *ante*, § 1777, n. 2).

Compare with the foregoing cases those cited *ante*, § 1086, n. 3.

#### § 1781. Declarations by Accused found with Stolen Goods.

[*Note 4; add:*]

1902, *R. v. Higgins*, 35 N. Br. 18, 28 (*R. v. Ferguson* cited with approval).

1906, *Lanier v. State*, 126 Ga. 586, 55 S. E. 496 (accused's explanatory statement while in possession, admitted).

1908, *Mason v. State*, 171 Ind. 78, 85 N. E. 776 (accused's efforts to restore the missing property for identification by the owner, excluded).

1905, *State v. Conroy*, 126 Ia. 472, 102 N. W. 417 (statements explaining the possession of a stolen revolver, made before accusation, admitted).

1904, *State v. Simon*, 70 N. J. L. 407, 57 Atl. 1016 (knowing receipt of stolen goods; defendant's conversation with the seller, admitted).

1904, *Smith v. Terr.*, 14 Okl. 518, 79 Pac. 214 (statements on arrest when not in possession, excluded).

1905, *State v. White*, 77 Vt. 241, 59 Atl. 829 (larceny of a team; the defendant's declarations, before knowledge of suspicion or search, that the team was not his own but hired, admitted).

#### § 1782. Declarations affecting Revocation of a Will.

[*Note 1, par. 1; add:*]

1911, *Blackett v. Ziegler*, 153 Ia. 344, 133 N. W. 901.

#### § 1784. Declarations as to Domicil.

[*Note 2; add:*]

1911, *Madison v. Guilford*, 85 Conn. 55, 81 Atl. 1046.

1904, *Knox v. Montville*, 98 Me. 493, 57 Atl. 792 (pauper settlement; declarations, while

[*Note 2 — continued*]

living in M., as to an intent to return to B., excluded; the declarations must "accompany acts which they explain"). 1913, *Holyoke v. Holyoke's Estate*, 110 Me. 469, 87 Atl. 40. (examining prior cases).

1906, *Jericho v. Huntington*, — Vt. —, 65 Atl. 87 (pauper residence).

1908, *Barnard v. U. S.*, 9th C. C. A., 162 Fed. 618 (perjury in homestead land entries; the issue being whether W. resided on the homestead from 1898 to 1904, W.'s declarations of intent while elsewhere in 1901 and 1903 were admitted).

§ 1789. **Knowledge, Belief, etc., evidenced by Receipt of Information, etc.**

[*Text*, p. 2314; at the end of the quotations, *add* a new note 1:]

<sup>1</sup> The following case neatly illustrates the distinction: 1912, *Hurst v. State*, 101 Miss. 402, 58 So. 206 (threats as an excuse for carrying a concealed weapon; is the belief of defendant that M. had threatened defendant's life the material thing under the law? Or the fact that M. had so threatened? In the former solution, the report as made to defendant becomes admissible on the present principle; but not in the latter solution).

§ 1795. **The Res Gestæ Phrase; History.**

[*Text*, p. 2318, l. 10 of the quotation; *add* a note 1:]

An earlier instance than this has been found: 1637, *Ship Money Case*, 3 How. St. Tr. 988 (Mr. Holborne, arguing, refers to the truth of an historian "for *res gestæ* as this").

§ 1800. **Juror having previous Private Knowledge, etc.**

[*Note 2*; *add*.:]

Ind. St. 1905, p. 584, § 262 (re-enacts the foregoing statute, adding: "If the Court deem any such evidence material to the cause," a new jury may be summoned).

1904, *Douglass v. Agne*, 125 Ia. 67, 99 N. W. 550.

§ 1802. **Jurors not to receive Evidence out of Court.**

[*Note 3*, par. 1; *add*.:]

1913, *People v. Auerbach*, 176 Mich. 23, 141 N. W. 869 (following *People v. Hull*; in the defendant's absence, no testimony can be given).

1903, *State v. Landry*, 29 Mont. 218, 74 Pac. 418 (verdict set aside because certain spectators laughed and demonstrated their opinion of the success of an experiment; this is absurd).

[*Note 3*, par. 2; *add*.:]

1905, *Underwood v. Com.*, 119 Ky. 384, 84 S. W. 310.

Of course the present principle does not apply where it is the *defendant* himself who voluntarily testifies and afterwards objects: *Underwood v. Com.*, *supra*.

[*Note 5*; *add*.:]

1903, *State v. Mortensen*, 26 Utah 310, 73 Pac. 562, 633 (shower pointing out the places mentioned in the evidence; the dissenting opinion exhibits a morbid regard for petty technicalities irrespective of justice).

[*Note 6*, par. 1; *add*.:]

*Accord*: 1904, *Wilson v. Harnette*, 32 Colo. 172, 175 Pac. 395 (good opinion by Steele, J.).  
*Contra*: 1904, *O'Berry v. State*, 47 Fla. 75, 36 So. 440 (larceny of cattle; a view of the

[*Note 6 — continued*]

cattle was ordered and witnesses allowed to identify them on the view as the cattle referred to in their testimony; the Court on appeal doubted the propriety of this; but the doubt is ill-founded, for the witnesses acted virtually as showers, and their pointing out was indispensable to the efficiency of the view).

### § 1803. Defendant's Presence at a View in a Criminal Case.

[*Note 2; add:*]

1904, *Elias v. Terr.*, 9 Ariz. 1, 76 Pac. 605 (view had on motion of defendant, without a claim of his desire to be present, held proper).

1911, *Starr v. State*, 5 Okl. Cr. 440, 115 Pac. 356 (defendant's request for a view is a waiver of the right to be present; whether he has such a right in other cases, not decided, but "the safe practice is to permit it"; the right may be waived).

1903, *State v. Landry*, 29 Mont. 218, 74 Pac. 418 (view at defendant's request; "the defendant must be present").

1903, *State v. Mortensen*, 27 Utah 16, 74 Pac. 120, 350 (supplementary opinions on motion for new trial).

### § 1807. Counsel; Improper Statements of Fact in Argument; Applications of the Principle, etc.

[*Note 1, par. 1; add:*]

1910, *Gaston v. State*, 95 Ark. 233, 128 S. W. 1033.

1912, *Pelham & H. R. Co. v. Elliott*, 11 Ga. App. 621, 75 S. E. 1062 (quoting and emphasizing the opinion of Nisbet, J., in *Mitchum v. State*, quoted *supra*, § 1806).

1910, *People v. McMahon*, 224 Ill. 45, 91 N. E. 104 (explanation of the lack of certain testimony). 1913, *Appel v. Chicago City R. Co.*, 259 Ill. 561, 102 N. E. 1021.

1905, *Smith v. State*, 165 Ind. 180, 74 N. E. 983.

1913, *State v. Wilson*, — Ia. —, 141 N. W. 337, 347.

1910, *Turpin v. Com.*, 140 Ky. 294, 130 S. W. 1086 (counsel's statement that "one man on this jury has been fixed," held improper).

1909, *People v. Nichols*, 159 Mich. 355, 124 N. W. 25.

1906, *State v. Wigger*, 196 Mo. 90, 93 S. W. 390.

1913, *Kambour v. Boston & Maine R. Co.*, — N. H. —, 86 Atl. 624.

1907, *Burns v. State*, 75 Oh. 407, 79 N. E. 929.

1909, *O'Barr v. U. S.*, 3 Okl. Cr. 319, 105 Pac. 988.

1904, *Robbins v. State*, 47 Tex. Cr. 312, 83 S. W. 690.

1905, *Union Pacific R. Co. v. Field*, 137 Fed. 14, 69 C. C. A. 536 (here the rule is pushed to a ludicrous extreme of technicality).

1914, *Fadden v. McKinney*, — Vt. —, 89 Atl. 351.

As to the *opening statement* by counsel, see *post*, § 1808, n. 1.

[*Note 3; add:*]

1914, *Frank v. State*, 141 Ga. 243, 80 S. E. 1016 (a curious case, in which the question arose over the citation in argument of the Durrant and the Oscar Wilde cases).

1913, *In re Boston Elevated R. Co.*, — Mass. —, 101 N. E. 365 (counsel allowed to argue as to possible explanations of a conviction of crime used to discredit a witness).

1907, *State v. Blodgett*, 50 Or. 329, 92 Pac. 820 (allusions to other recent murders).

1910, *State v. Duncan*, 86 S. C. 370, 68 S. E. 684 (prevalence of homicide in the neighborhood).

1908, *State v. Pirkey*, 22 S. D. 550, 118 N. W. 1042.

[*Note 4, par. 1; add:*]

- 1905, *Chicago Union T. Co. v. O'Brien*, 219 Ill. 303, 76 N. E. 341.  
 1905, *Osburn v. State*, 164 Ind. 262, 73 N. E. 601. 1911, *Wilson v. State*, 175 Ind. 458, 93 N. E. 609.  
 1905, *Seely v. Manhattan L. Ins. Co.*, 73 N. H. 339, 61 Atl. 585, 587.

#### § 1808. Improper Statements in Offering Evidence, etc.

[*Note 1, par. 1; add:*]

- 1906, *Holland v. Williams*, 126 Ga. 617, 55 S. E. 1023.  
 1909, *Gossett v. State*, 6 Ga. App. 439, 65 S. E. 162 (opening address).  
 1904, *Henrietta Coal Co. v. Campbell*, 211 Ill. 216, 71 N. E. 863 (the jury's withdrawal is in the trial Court's discretion). 1906, *Chicago & S. L. R. Co. v. Mines*, 221 Ill. 448, 77 N. E. 898. 1906, *Chicago C. R. Co. v. Gregory*, 221 Ill. 591, 77 N. E. 1112.

[*Note 1, par. 2; add:*]

See further example of treatment in the following: 1910, *Com. v. Howard*, 205 Mass. 128, 91 N. E. 397.

In this part of a counsel's address, the rule of § 1807, *ante*, has little application; the situation should rather be treated from the point of view of the rule for conditional relevancy (*post*, § 1871). In the following case the dissenting opinion of Haight, J., expresses a just indignation at the over-strict application of the present rule to such a case, and exposes the abuses to which it leads: 1906, *People v. Wolf*, 183 N. Y. 464, 76 N. E. 592.

[*Note 2, par. 1; add:*]

- 1904, *Burks v. State*, 72 Ark. 461, 82 S. W. 490.  
 1904, *People v. Wright*, 144 Cal. 161, 77 Pac. 877. 1904, *People v. Perry*, 144 Cal. 748, 78 Pac. 284.  
 1904, *Streeter v. Marshalltown*, 123 Ia. 449, 99 N. W. 114.  
 1909, *Louisville & N. R. Co. v. Payne*, 133 Ky. 539, 118 S. W. 352.  
 1912, *Thomas v. Byron Tp.*, 168 Mich. 593, 134 N. W. 1021.  
 1909, *State v. Rhys*, 40 Mont. 131, 105 Pac. 494.  
 1905, *Nickolizack v. State*, 75 Nebr. 27, 105 N. W. 895.  
 1903, *Batchelder v. Manchester R. Co.*, 72 N. H. 329, 56 Atl. 752 (good opinion, by Chase, J.).  
 1909, *Connecticut Power Co. v. Dickinson*, 75 N. H. 353, 74 Atl. 585 (careful opinion, by Walker, J., drawing the line).  
 1904, *People v. Davey*, 179 N. Y. 345, 72 N. E. 244.  
 1908, *New York Life Ins. Co. v. Rankin*, 8th C. C. A., 162 Fed. 103, 109.  
 1908, *Dungan v. State*, 135 Wis. 151, 115 N. W. 350 (good opinion by Dodge, J.).

#### § 1810. Hearsay Rule applicable to Interpreter.

[*Note 1, par. 1; add:*]

- 1904, *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467 (official certified transcript of testimony delivered through an interpreter, and taken according to P. C. § 686, cited *ante*, § 1411, admitted).  
 1904, *People v. Jan John*, 144 Cal. 284, 77 Pac. 950 (former ruling *supra* in this case affirmed).  
 1905, *State v. Williams*, 28 Nev. 395, 82 Pac. 353.  
 1906, *State v. Banusik*, — N. J. L. —, 64 Atl. 994 (interpreter called to state the correctness of his interpretation of a confession written out and signed before a magistrate; held sufficient).  
 1909, *Ching Lum v. Lam Man Ben*, 19 Haw. 363 (interpreter out of the jurisdiction; held not admissible without a showing that no other person qualified to report the testimony was available; is the learned Court correct in stating that there is at the first trial no

[*Note 1 — continued*]

opportunity to cross-examine the interpreter as to the correctness of his translation? In *Terr. v. Kawano*, 20 Haw. 469, cited *ante*, § 1393, the same Court declared that the right is equally applicable to the interpreter when on the stand).

1911, *Terr. v. Kawano*, 20 Haw. 469 (transcript of former interpreted testimony, excluded, the interpreter being available).

[*Note 2, par. 1; add:*]

1869, *State v. Noyes*, 36 Conn. 80 (a witness not allowed to be contradicted by L., who had had a conversation with him through an interpreter, without calling the interpreter, who was here the agent of L. only).

1908, *Spencer v. Com.*, — Ky. —, 107 S. W. 342.

1904, *State v. Rogers*, 31 Mont. 1, 77 Pac. 293.

Conversely, if the interpreter himself testifies on the stand, it is immaterial whether the party made him agent to interpret:

1909, *People v. Randazzio*, 194 N. Y. 147, 87 N. E. 112.

On the same principle, an interpreted statement may be used against a witness (not a party-opponent) as a self-contradiction, without calling the interpreter, where the witness, by selecting his interpreter, virtually made him his agent to speak, or otherwise adopted the interpreter's statement.

1905, *Davis v. First Nat'l Bank*, 6 Ind. T. 124, 89 S. W. 1015 (affidavit made through an interpreter out of court, used to contradict the witness without calling the interpreter).

### § 1815. The Oath; History.

[*Note 1, l. 3 from the end; add:*]

1903, T. R. White, *Oaths in Judicial Proceedings*, American Law Register, New Series. XLII, 372.

Bateson, *Borough Customs*, II, Introduction, pp. 32-34 (Selden Society's Pub., XXI, 1908).

[*Note 2; add:*]

An example of the survival of this conclusive purgatorial oath of the party is probably seen in the traditional rule, observed still by some Courts, for making the respondent's sworn answers *conclusive in contempt proceedings*; this rule has been repudiated by the Federal Supreme Court: 1906, *U. S. v. Shipp*, 203 U. S. 563, 27 Sup. 165 (interesting opinion by Holmes, J.).

1906, Municipal Court of Chicago, Memorandum of Cottrell, J. (privately printed; collecting the authorities; now printed in 9 Illinois Law Review).

Note in 22 Harvard Law Review, 379.

[*Text, p. 2348, l. 3 from below; add a new note 3:*]

A full examination of this period is made in Professor White's learned article, cited *supra*, n. 1.

### § 1816. Theory of the Oath.

[*Text, p. 2349, after the quotations; add:*]

1825, *Christopher North*, *Noctes Ambrosianæ*, XXII: "*English Opium-Eater*: Mr. Hogg, I never could see any sufficient reason why, in a civilized and Christian country, an oath should be administered even to a witness in a court of justice. Without any formula, Truth is felt to be sacred; nor will any words weigh — *Shepherd*: You're for upsettin' the haill frame o' ceevil society, sir, and bringing back on this kintra a' the horrors o' the French Revolution. The power o' an oath lies, no in the Reason, but in the Imagination.

[Text, p. 2349 — continued]

Reason tells that simple affirmation or denial should be enouch atween man and man. But Reason canna bind; or, if she do, Passion snaps the chain. But Imagination can bind; for she calls on her Flamin' Ministers, — the Fears; — they palsy-strike the arm that would disobey the pledged lips; — and thus oaths are as dreadfu' as Erebus and the gates o' hell."

### § 1817. Nature of the Belief.

[Note 2; add:]

1909, *Pumphrey v. State*, 84 Nebr. 636, 122 N. W. 19.

[Note 3; add:]

1914, *State v. Pitt*, — N. C. —, 80 S. E. 1060.

### § 1818. Form of the Oath.

[Note 2; add:]

Therefore, *any form* suffices which actually binds the particular witness, even if it varies from the orthodox form: 1913, *R. v. Curry*, N. Sc. S. C., 12 D. L. R. 13 (perjury; the defendant had been sworn "by holding up his right hand without being asked whether he had any objection to being sworn in the regular way," and no Bible was used; held by two judges, that "a good and valid oath could only be taken by the witness touching or kissing the Book," that no statute had changed this, and that for a Christian the form actually used was not valid; *Graham, E. J.*, in an elaborate opinion learnedly examines the history of oaths; it is a pity that neither of these opinions offers any words of criticism for the effete and nonsensical law which punishes judicial perjury only when it is committed according to narrow formalities; herein our law remains grossly and disgracefully inept for its purposes; *Russell, J.*, dissenting, mildly terms the result "the extreme of drollery"; *Drysdale, J.*, also dissenting, the Court was equally divided, and the perjurer was punished after all).

[Note 3, par. 1, as to an *interpreter's* oath; add:]

The following statutes belong here:

Conn. St. 1909, c. 49, p. 962, May 13 (form of oath for interpreter, prescribed).

Mo. St. 1913, p. 225, Mar. 25 (grand jury interpreter shall be sworn "to correctly interpret all questions to the witness into his language and all the witnesses' answers into English").  
N. Y. St. 1909, c. 65, p. 24, Feb. 19 (interpreter's oath of office in Kings Co. Surrogate court; to be C. C. P. § 2513a).

[Note 3, par. 1, as to *kissing the book*; add:]

England has by statute abolished the practice (Oaths Act, 1909, quoted *post*, § 1828).

[Note 3, par. 2; add:]

1904, *R. v. Lai Ping*, 11 Br. C. 102 (oath to Chinese by burning a piece of paper on which the witness had written his name, etc., held to be the established practice).

1905, *State v. Davis*, 186 Mo. 533, 85 S. W. 354 (Chinese).

[Text, p. 2353, l. 2 from below; after "subjectively," add a new note 3a:]

<sup>3a</sup> The witness therefore *must not be forced* to take an inapplicable form of oath after the propriety of another form appears; here his own declaration as to his belief and the binding form will usually suffice, but the trial judge should determine.

1912, *R. v. Lee Tuck*, 4 Alta. 388 (the witness, a Chinese, declared that he was a Christian

[Text, p. 2353 — *continued*]

and wished to be sworn upon the Bible; but the trial judge ordered the ceremony of burning the paper to be used; held, error, on the facts).

[Note 4; *add*, under *Contra*:]

1911, *State v. Browning*, 153 Ia. 37, 133 N. W. 330 (Jew).

### § 1819. Time of Administration and Objection.

[Note 2; *add*, under *Accord*:]

1852, *Birch v. Somerville*, 2 Ir. C. L. R. 243 (a peer having testified without a legal oath, the party calling him and not objecting was held to have waived).

1882, *Richards v. Hugh*, 51 L. J. Q. B. 361 (witness deposing on affirmation, without oath; a party not objecting at the time, held to have waived).

1888, *Smith v. State*, 81 Ga. 480, 8 S. E. 187. 1905, *Rhodes v. State*, 122 Ga. 568, 50 S. E. 361 (after verdict). 1905, *Southern R. Co. v. Ellis*, 123 Ga. 614, 51 S. E. 594.

1859, *Slaute v. Whitelock*, 12 Ind. 338 ("If it was known before the jury retired, the mistake could have been corrected by swearing the witness and rehearing the evidence"; failure to make a motion on discovery "would amount to an acquiescence").

1904, *State v. Smith*, 124 Ia. 334, 100 N. W. 40, *semble* (a failure to object to an inadvertent omission of the oath is a waiver).

1833, *Cady v. Norton*, 14 Pick. 236 ("The defendant, knowing that the witness had not been sworn, before the cause went to the jury, without giving notice thereof to the Court or taking an exception, has waived his right to except, after a verdict").

1889, *State v. Hope*, 100 Mo. 347, 13 S. W. 490 ("An oath may be waived . . . either expressly, or by going forward in the matter without inquiry or objection").

1906, *People v. McAdoo*, 184 N. Y. 304, 77 N. E. 260 (police-commissioner's hearing, upon three charges; a witness having inadvertently failed to take oath on a recall to speak to one of the charges, the defendant's knowing failure to object, and his cross-examination of the witness, held a waiver).

1895, *Moore v. State*, 96 Tenn. 209, 33 S. W. 1046 (after counsel has cross-examined, "having thus gone forward without inquiry or objection," there is an implied waiver).

1893, *Goldsmith v. State*, 32 Tex. Cr. 112, 22 S. W. 405 (on a motion for new trial it is too late to raise the question).

[Note 2; *add*, under *Contra*:]

1904, *Lo Toon v. Terr.*, 16 Haw. 351, 356, *semble* (but here the presumption of an interpreter having been duly sworn was applied).

1829, *Hawks v. Baker*, 6 Greenl. 72 (omission not discovered till after verdict; held, no waiver, and a new trial granted; leading opinion, by Mellen, C. J.; its fallacy lies in the assumption that in administering the oath "the counsel for the opposite party has no concern with the transaction"; this is contrary to the fundamental principle, *ante*, § 18, by which the opponent must watch for all violations of the rules of evidence if he cares to take advantage of them).

1905, *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247 (even after verdict; this is absurd and pernicious).

[Note 3, par. 1; *add*:]

*Accord*: 1905, *Curtis v. Lehmann*, 115 La. 40, 38 So. 887 (where the oath is taken in the usual form without objection, that form will be presumed to be the binding one).

[Note 4; *add*:]

1898, *People v. Board of Police Com'rs*, 155 N. Y. 40, 49 N. E. 257 (hearing before a police commissioner; the commissioner intentionally omitted to swear any of the witnesses, erro-

[*Note 4 — continued*]

neously believing that his power to act needed not to be based on sworn testimony; the omission was held to invalidate the decision).

[*Note 4; add a new paragraph:*]

Swearing the witness, and causing him to re-testify before close of testimony, cures the irregularity: 1905, *Southern R. Co. v. Ellis*, 123 Ga. 614, 51 S. E. 594 (on being sworn, to cure the error, the witness may merely state that what he had testified was true). 1905, *State v. Exum*, 138 N. C. 599, 50 S. E. 283.

### § 1820. Mode of Ascertaining Capacity.

[*Note 1; add:*]

1909, *Pumphrey v. State*, 84 Nebr. 636, 122 N. W. 19 (a Japanese).

[*Note 2, par. 1, at the end; add:*]

and in *Young v. State*, 122 Ga. 725, 50 S. E. 946 (1905), it is held that the judge *cannot decline* to examine a child, on demand by the party objecting; but this seems a pedantic interference with the trial Court's discretion.

*Contra*: 1909, *Simmons v. State*, 158 Ala. 8, 48 So. 606 (the trial judge's discretion controls, as to conducting the examination himself, or letting counsel conduct it).

[*Note 10, l. 7; add:*]

Compare also § 2214, *post* (privilege as to theological belief).

### § 1821. Capacity of Infants.

[*Note 2; add:*]

1905, *Freasier v. State*, — Tex. Cr. —, 84 S. W. 360.

[*Note 3; add:*]

1904, *Landthrift v. State*, 140 Ala. 114, 37 So. 287 (rape; a child of eleven held qualified on the facts).

1912, *Lassiter v. State*, 64 Fla. 337, 59 So. 894.

1907, *State v. Labriola*, 75 N. J. L. 483, 67 Atl. 386.

[*Note 4; add:*]

1907, *R. v. Armstrong*, 15 Ont. L. R. 47 (child of 12).

[*Note 6, par. 1; add:*]

1906, *Jones v. State*, 145 Ala. 51, 40 So. 947 (a girl who had been to church and Sunday school, and thought that, if she lied, God could put her in jail, excluded).

1906, *Gordon v. State*, 147 Ala. 42, 41 So. 847 (child of twelve, admitted, though she did not "know the nature of a judicial oath").

1910, *Hart v. State*, — Ark. —, 124 S. W. 781 ("Do you know what you mean when you hold up your hand and take the oath?" "Yes, sir; tell the truth." "If you was not to tell the truth, what would be done to you?" "I don't know, sir." "Would it be wrong?" "Yes, sir"; this was held not to have enough theology in it; *McCulloch, J.*, diss., justly terms the decision "a backward step").

1906, *Young v. State*, 125 Ga. 584, 54 S. E. 82 (a child of twelve, who did not know what is "the sanctity of an oath," but otherwise was theologically fit, admitted). 1911, *Berry v. State*, 9 Ga. App. 868, 72 S. E. 433 (sensible opinion by *Russell, J.*).

1907, *State v. Meyer*, 135 Ia. 507, 113 N. W. 322.

1905, *Com. v. Furman*, 211 Pa. 549, 60 Atl. 1089 (good example of a liberal ruling).

[Text, p. 2359; after par. (b) add:]

An example of the sound and sensible way to ascertain a child's capacity is found in the following judicial anecdote:

1908, Hon. *E. J. Sherman*, Justice of the Superior Court of Massachusetts, in "Recollections of a Long Life," p. 160: "A case was being tried before me against the Boston Elevated Railroad, and a little boy, perhaps seven years old, was called as a witness. The counsel for the defence objected to his being used as a witness, as he was too young to understand and appreciate an oath, and asked the court to examine him and ascertain that fact. The boy looked frightened and as if he was about to cry. He took the witness stand close beside the bench. His name was John ——. I said to him in a low voice, as if talking confidentially, 'John, do you play base-ball?' He replied, 'Yes, Judge.' He was a little short fellow, and I said, 'I guess you play short stop.' 'You are right, Judge,' replied Johnnie.

"By this time all disposition to be frightened or cry had disappeared. I then asked him about his school, etc., and he showed unusual brightness. I remarked, 'This boy will do, he is all right.'

"He made one of the best witnesses called in the case. If I had said to him in a stern voice, 'Do you understand the nature of an oath? What will happen to you if you tell a lie?' as is sometimes asked in like cases, the boy would have broken down in a crying spell."

[Note 9; add:]

1904, *North Texas C. Co. v. Bostick*, 98 Tex. 239, 83 S. W. 12 (a boy nine years old was instructed by counsel; but this the Court disparaged; moreover, "it ought to appear that the answers . . . are not a parrot-like repetition of what he has been told to say").

#### § 1822. Capacity of Idiots and Lunatics.

[Note 2; add:]

1909, *People v. Washor*, 196 N. Y. 104, 89 N. E. 441 (trial Court's discretion).

#### § 1824. Oath required, etc.; Interpreters.

[Note 2; add:]

1911, *People v. Kelly*, 17 Cal. App. 447, 120 Pac. 46 (under P. C. §§ 686, 869, the transcript of a deposition taken through an interpreter need not show that the interpreter was sworn).

1908, *People v. Western*, 236 Ill. 104, 86 N. E. 188 (the oath need not be administered during the questions necessary for ascertaining his competency; but the jury should be removed at that time, on demand).

#### § 1825. Infants, Peers, Accused Persons.

[Note 2; add:]

1907, *Hodd v. Tacoma*, 45 Wash. 436, 88 Pac. 842.

#### § 1827. Abolition or Optional Dispensation of the Oath.

[Note 1; add:]

1903, T. R. White, Oaths in Judicial Proceedings, *American Law Register*, N. S., XLII, 372 (the best consideration of the subject).

[Note 4; add:]

The history of the legislation is fully given in Professor White's article, cited *supra*, n. 1.

**§ 1828. Same: State of the Law in the Various Jurisdictions.**

[*Note 1; add, under ENGLAND, at the end:*]

1889, St. 52-3 Vict. c. 44, § 8 (similar to St. 48-9 Vict. c. 69, § 4, for offences of cruelty to children; oath unnecessary, if the child "does not understand the nature of an oath"). 1904, St. 4 Edw. VII, c. 15, § 15 (Prevention of Cruelty to Children Act; similar to St. 52 & 53 Vict. c. 44, *supra*, for offences under this act).

St. 1908, 8 Edw. VII, c. 67, § 30 (Children Act; like St. 48-9 Vict. c. 69, § 4, for offences against children; corroboration required; see *post*, § 2066).

St. 1909, 9 Edw. VII, c. 39, Oaths Act, § 2 ("Any oath may be administered and taken in the form and manner following: The person taking the oath shall hold the New Testament, or, in the case of a Jew, the old Testament, in his uplifted hand, and shall say or repeat after the officer administering the oath the words: 'I swear by Almighty God that . . . ' followed by the words prescribed by law. The officer shall (unless the person about to take the oath voluntarily objects thereto or is physically incapable of so taking the oath) administer the oath in the form and manner aforesaid without question"; provided that a person neither Christian nor Jew may take oath in any other now lawful manner).

[*Note 1; add, under CANADA:*]

*Alta.*: St. 1910, 2d sess., c. 3, Evidence Act, § 14 (par. (1), like Eng. St. 1838, c. 105; par. (2), like Eng. St. 1888, c. 46, § 3); § 15 (like Can. Evid. Act 1893, c. 31, § 23, but adding the proviso "and if the presiding judge . . . is satisfied that such person objects to be sworn from conscientious scruples, or on the ground of his religious belief or on the ground that the taking of an oath would have no binding effect on his conscience"). § 16 (like Eng. St. 1888, c. 46, § 5); § 17 (like Can. St. 1893, c. 31, § 25).

*Ont.*: St. 1909, c. 43, § 14 (like Eng. St. 1838, c. 105); § 15 (like *Alta.* St. 1910, c. 3, § 15).

*Sask.*: St. 1907, c. 12, Evidence Act, § 31 (like Can. St. 1893, c. 31, § 25).

*ib.* § 35 (like Can. St. 1893, c. 31, § 23).

*Yukon*: St. 1904, c. 5, § 44 (like Eng. St. 51 & 52 Vict., c. 46, § 1).

[*Note 1; under UNITED STATES, add:*]

*Nebraska*: Comp. St. 1899, § 5902 (Indians and negroes; cited *ante*, § 516, n. 15).

1909, *Pumphrey v. State*, 84 Nebr. 636, 122 N. W. 19 (a Japanese presumed competent).

*New Jersey*: St. 1911, c. 207, p. 438 (form of oath in district court; amending Rev. St. 1898, District Courts, Apr. 14, § 158).

*New York*: C. Cr. P. 1881, § 392, as amended by St. 1892, c. 279 (in criminal proceedings, when a child "actually or apparently" under twelve "does not in the opinion of the Court or magistrate understand the nature of an oath, the evidence of such child may be received though not given under oath, if in the opinion of the Court or magistrate such child is possessed of sufficient intelligence to justify the reception of the evidence. But no person shall be held or convicted of an offence upon such testimony unsupported by other evidence"). 1906, *People v. Johnson*, 185 N. Y. 219, 77 N. E. 1164 (St. 1892, c. 279, applied; the presumption is that a child thus admitted without oath was duly found by the trial Court not to understand its nature). 1907, *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396 (C. Cr. P. § 392 is constitutional).

*North Carolina*: Rev. 1905, §§ 2354, 2355, 2356 (like Code 1883, §§ 3309, 3310, 3311). Rev. 1905, § 2360 (under "Oaths of Office" are given forms of oath for witnesses, which are in the usual phrases of the common-law custom, and not in those of the foregoing sections).

*Pennsylvania*: St. 1909, No. 90, p. 140, § 2 ("The capacity of any person who shall testify in any judicial proceeding shall be in no wise affected by his opinions on matters of religion"); § 3 ("No witness shall be questioned in any judicial proceeding concerning his religious belief, nor shall any evidence be heard upon the subject for the purpose of affecting either his competency or credibility"); § 4 (affirmation may be used by "any witness who desires to affirm").

[*Note 1 — continued*]

*United States*: St. 1911, Mar. 3, c. 231, Judicial Code, § 170 (oath or affirmation of witnesses in the Court of Claims; superseding Rev. St. § 1084).  
Equity Rules 1912, No. 78 (re-enacts No. 91).

[*Text, par. (a), l. 5, after "scruples"; insert a new note 2a:*]

\* Under such statutes the witness must first explicitly state that the scruple exists. 1892, *R. v. Moore*, 17 Cox. Cr. 458 (under St. 1860, 32-33 Vict., c. 68, § 4).  
1911, *R. v. Deakin*, 16 Br. C. 271 (under Can. Evid. Act, § 14).

[*Note 4; add:*]

as well as New York (*supra*, § 1828, n. 1).

[*Note 5; add:*]

In *Pennsylvania* such an exception has been virtually read into the law, without statute: 1905, *Com. v. Furman*, 211 Pa. 549, 60 Atl. 1089.

[*Note 7, par. 1; add:*]

1905, *Freasier v. State*, — Tex. Cr. —, 84 S. W. 360 (to know that "it is wrong to tell a lie" suffices, for a child).  
1907, *Clinton v. State*, 53 Fla. 98, 43 So. 312 ("Neither belief in a Supreme Being nor in divine punishment is requisite to the competency of a witness" under the statute and Constitution; here applied to a child).  
1905, *Clark v. Finnegan*, 127 Ia. 644, 103 N. W. 970 ("If a child has the necessary intelligence, and appreciates the moral duty to tell the truth, he need not fully understand the nature of an oath, or have any particular religious belief or training"; here, a child of seven, who "understood that he was to tell the truth," was admitted).  
1905, *Bright v. Com.*, 120 Ky. 298, 86 S. W. 527 (like *White v. Com.*, which however is not cited, the judge being new in office).  
1914, *State v. Pitt*, — N. C. —, 80 S. E. 1060 (a witness who didn't know what would happen to a liar except be put in the lockup, held competent under Revisal, §§ 1496, 2360).

### § 1831. Perjury-Penalty; Nature of the Security.

[*Text, p. 2373, at end; add a note 1:*]

Mr. Wm. A. Purrington has forcefully commented on the practical inefficiency of the modern perjury-penalty ("The Frequency of Perjury," *Columbia Law Review*, VIII, 67, 1908).

### § 1832. Perjury-Penalty; Rules of Exclusion, etc.

[*Note 2; add:*]

*Contra*: 1905, *Freasier v. State*, — Tex. Cr. —, 84 S. W. 360 (here proceeding on the words of the Constitution that oaths "shall be taken subject to the pains and penalties of perjury," and upon a statute making children of under nine years incapable of perjury; none of the above cases are cited; Brooks, J., dissenting, forcibly points out "the monstrosity of the result"). But a Texas statute of 1905 (c. 59, § 1), doubtless passed in response to the recommendation in this case, has made an infant below nine years capable of perjury "when it shall appear by proof that he had sufficient discretion to understand the nature and obligation of an oath"; so that the foregoing decision is presumably no longer law.

### § 1834. Publicity; General Nature of the Security.

[*Note 2; add:*]

A good instance is dramatically told in Mr. Ashton Hilliers' romance, "Fanshawe of the Fifth" (1907, p. 336), a story laid in England in the early 1880 s.

§ 1835. **Publicity; Exceptions to the Rule.**

[*Note 1; add, under Accord:*]

- 1908, *Tilton v. State*, 5 Ga. App. 59, 62 S. E. 651 (with limitations; collecting the cases).  
 1904, *State v. Worthen*, 124 Ia. 408, 100 N. W. 330.  
 1907, *State v. Callahan*, 100 Minn. 63, 110 N. W. 342 (assault of rape; exclusion of spectators held proper on the facts; Elliott, J., diss.).  
 1909, *State v. Nyhus*, 19 N. D. 326, 124 N. W. 71 (rape; exclusion of general public, held proper on the facts).  
 1906, *State v. Hensley*, 75 Oh. 255, 79 N. E. 462 (rape under age; order of exclusion of the public held too general in its terms; here the ruling is reprehensible, because it gave no effect to the defendant's practical waiver of objection; it is an indignity to the Constitution to enforce its rights for a party who does not care enough about them to claim them at its trial).

[*Note 1; add, under Contra:*]

- 1909, *State v. Osborne*, 54 Or. 289, 103 Pac. 62 (rape; order of exclusion held improper; good opinion by King, J.).

§ 1837. **Sequestration of Witnesses; History, Statutes.**

[*Note 5; add:*]

- Ante* 1340, *Norwich Customal*, quoted in Bateson's "Borough Customs," I, 203, *Selden Society*, XVIII, 1904.

[*Note 10; add:*]

- Cal.*: St. 1907, c. 394, p. 734, Mar. 20 (re-enacting the Commissioners' amendment of 1901).  
*N. C.*: Rev. 1905, § 3195 (like Code 1883, § 1149).

§ 1839. **Demandable as of Right.**

[*Note 4; add:*]

- 1904, *Parrish v. State*, 139 Ala. 16, 36 So. 1012.  
 1904, *Coolman v. State*, 163 Ind. 503, 72 N. E. 568.  
 1904, *State v. Worthen*, 124 Ia. 408, 100 N. W. 330, *semble*.  
 1910, *Johns v. State*, 88 Nebr. 145, 129 N. W. 247.  
 1904, *Bromberger v. U. S.*, 128 Fed. 346, C. C. A. (one witness).  
 1906, *State v. Dalton*, Wash., 86 Pac. 590 (murder).  
 1903, *Loose v. State*, 120 Wis. 115, 97 N. W. 526.

§ 1840. **Mode of Procedure.**

[*Note 2; add:*]

- 1907, *Joseph v. Com.*, — Ky. —, 99 S. W. 311 (in the trial Court's discretion; but not as of rule under Civ. C. Pr. § 601).

[*Note 9; add:*]

- A similar expedient is used in *patent-interference proceedings*, by requiring separate preliminary statements: 1912, *Thomas v. Weintraub*, 38 D. C. App. 281.

[*Note 11; add:*]

- 1906, *State v. Goodson*, 116 La. 388, 40 So. 771 (co-defendants not allowed as of right to consult a co-indictee in jail and about to be used as a witness for the State).  
 1906, *State v. James Co.*, 117 La. —, 41 So. 702 (prosecuting attorney may consult the witnesses in the trial Court's discretion).

**§ 1841 PERJURY—PENALTY; PUBLICITY; SEQUESTRATION**

**§ 1841. Persons to be included in the Order.**

[*Note 1; add:*]

1905, *City Electric R. Co. v. Smith*, 121 Ga. 663, 49 S. E. 724.

1904, *Cookman v. State*, 163 Ind. 503, 72 N. E. 568 (prosecuting witness allowed to remain to aid the State's attorney).

1909, *State v. Pell*, 140 Ia. 655, 119 N. W. 154 (family of murdered man).

1910, *Druin v. Com.*, — Ky. —, 124 S. W. 856 (rape under age; father of prosecutrix allowed to remain).

1904, *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085.

1904, *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586 (prosecutor). 1912, *Hughes v. State*, 126 Tenn. 40, 148 S. W. 543 (detective assisting in preparing the case for trial).

[*Note 3; add:*]

1907, *Atlantic & B. R. Co. v. Johnson*, 127 Ga. 392, 56 S. E. 482 (physician).

[*Note 4; add:*]

1906, *State v. High*, 122 La. 521, 47 So. 878 (police officer).

[*Note 8, par. 1; add:*]

It has now been so decided:

1904, *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586.

[*Note 9; add:*]

1905, *Greer v. Com.*, — Ky. —, 85 S. W. 166 (the trial Court may in discretion allow one witness to remain, here a prosecuting witness).

**§ 1842. Disqualification as a Consequence of Disobedience.**

[*Note 3; add:*]

1905, *Braham v. State*, 143 Ala. 28, 38 So. 919.

1904, *Davis v. State*, 120 Ga. 843, 48 S. E. 305. 1904, *Phillips v. State*, 121 Ga. 358, 49 S. E. 290. 1905, *Sharpton v. Augusta & A. R. Co.*, — Ga. —, 51 S. E. 553. 1906, *Green v. State*, 125 Ga. 742, 54 S. E. 724.

1904, *State v. Pray*, 126 Ia. 249, 99 N. W. 1065.

1906, *State v. Hogan*, 117 La. 863, 42 So. 352. 1908, *State v. High*, 122 La. 521, 47 So. 878 (discretion).

1904, *People v. McGarry*, 136 Mich. 316, 99 N. W. 147.

1906, *Luck v. State*, — Tex. Cr. —, 98 S. W. 1059.

1903, *Loose v. State*, 120 Wis. 115, 97 N. W. 526.

[*Note 4; add:*]

1907, *Degg v. State*, 150 Ala. 3, 43 So. 484 (for an accused's witness).

1905, *State v. Ilomaki*, 40 Wash. 629, 82 Pac. 873 (*State v. Lee Doon*, followed). 1906, *Hendelman v. Kahan*, 50 Wash. 247, 97 Pac. 109 (may be excluded in discretion, if the party is in fault).

**§ 1850. List of Witnesses; Criminal Cases, etc.; I. Common-Law Rule.**

[*Note 1, l. 4; correct:*]

For "§ 138," read "§ 1378."

[*Note 1, at the end; add:*]

But under these American statutes the accused (except perhaps in New York) obtains no right to inspect before trial the *contents* of the testimony given before the grand jury: Cases cited *infra*, n. 4.

[Note 3, par. 1, l. 5; *add.*:]

1895, *Thiede v. Utah*, 159 U. S. 510, 515, 16 Sup. 62 (murder; quoted *post*, § 1852, n. 4).  
 1904, *Balliet v. U. S.*, 129 Fed. 689, 692, 64 C. C. A. 201 (fraud in the mails).  
 1906, *Ball v. U. S.*, 147 Fed. 32, 36, C. C. A.

[Note 4, l. 9; *add.*:]

1906, *Baker v. State*, 51 Fla. 1, 40 So. 673 (neither under Rev. St. 1892, § 2901, allowing a copy of the indictment, nor otherwise, is the accused entitled to a list of witnesses before trial). 1907, *Barrington v. Missouri*, 205 U. S. 483, 27 Sup. 582 ("The right of the accused to the indorsement of names of witnesses does not rest on the common law, but is statutory").

1910, *Porter v. State*, 173 Ind. 694, 91 N. E. 340.

Much less may the defendant obtain before trial the *notes of testimony* taken before the *grand jury*: 1898, *Franklin v. Com.*, 105 Ky. 237, 48 S. W. 986.

1904, *Howard v. Com.*, 118 Ky. 1, 80 S. W. 211, 81 S. W. 704.

1910, *State v. Rhoads*, 81 Oh. 397, 91 N. E. 186 (accused held not entitled to inspect minutes of evidence taken before the grand jury and in possession of prosecutor; cases collected).

1905, *Havenor v. State*, 125 Wis. 444, 104 N. W. 116 (here applied to a defendant desiring to peruse the grand jury's record of testimony in order to plead immunity for testimony there given by him). Compare *Farnham v. Colman*, S. D., cited *post*, § 1858, n. 16. This would also perhaps be a consequence of the privilege rule (*post*, § 2363, n. 8).

Nor is the accused entitled to a disclosure of *any other evidence*, except so far as the ensuing statutes have so provided: 1910, *Porter v. State*, 173 Ind. 694, 91 N. E. 340 (accused's own testimony before the grand jury).

1912, *State v. Steele*, 117 Minn. 384, 135 N. W. 1128 (copy of the accused's preliminary examination).

## § 1851. Same: II. Statutory Rule of Procedure, etc.

[Note 1; *add.*:]

Note that (on the principle of § 6, *ante*) in trials in *Federal courts* the Federal statute (*post*, § 1854) applies, and not the statute of the State where the trial is held: 1908, *Jones v. U. S.*, 9th C. C. A., 162 Fed. 417 (collecting prior cases); and Federal cases cited *supra*, § 1850, n. 3.

[Note 2; *add.*:]

*Ida. Rev. St.* 1887, § 7668 (similar to N. D. Rev. Code, 1899, § 8034, including depositions).  
*Ind. St.* 1905, p. 584, § 112 (re-enacts the foregoing Rev. St. 1887, § 1763).

*Ia. St.* 1911, c. 188, p. 201, Apr. 4, § 4 (the county attorney on filing an information shall indorse "the names of the witnesses whose evidence he expects to introduce and use on the trial," and also "a minute of the evidence" to be given by each; if on the trial "witnesses in addition to those whose names are so indorsed" are desired, the procedure is to be the same as for indictments).

*Ky. C. Cr. P.* 1895, § 120 ("When an indictment is found, the names of all the witnesses who were examined must be written at the foot of or on the indictment").

*Md. Pub. Gen. L.* 1904, art. 27, § 440 (false pretences; the defendant before trial "shall be entitled to the names of the witnesses and a statement of the false pretences intended to be given in evidence").

*N. C. Rev.* 1905, § 3241 (like Code 1883, § 1176).

[Note 3; *add.*:]

*Ida. St.* 1899, Feb. 6, § 2, p. 125 (the information shall be indorsed, etc., substantially as in Mich. Comp. L. § 1193, *infra*).

[*Note 3 — continued*]

*Ind. St.* 1905, p. 584, § 119 (on an information shall be indorsed "the names of all the material witnesses"; with a proviso for other witnesses as in the case of indictments).  
*Okl. Snyder's Comp. L.* 1909, § 6691.

[*Note 4; add:*]

*Md. Pub. Gen. L.* 1904, Art. 27, § 440 (false pretences; the State's attorney upon request shall furnish "the names of the witnesses and a statement of the false pretences intended to be given in evidence").

§ 1852. **Same: (1) List of Grand-Jury Witnesses.**

[*Note 2, par 1; add:*]

1907, *State v. Barber*, 13 *Ida.* 65, 88 *Pac.* 418 (unindorsed witness, called in rebuttal, excluded, for lack of a proper showing; but it does not here appear whether the witness had been examined before the grand jury).

1895, *Sutton v. Com.*, 97 *Ky.* 308, 30 *S. W.* 661 (motion to quash, not made in season).

1905, *Thompkins v. Com.*, — *Ky.* —, 90 *S. W.* 221 (a motion to quash is the proper remedy).

1906, *State v. Barrington*, 198 *Mo.* 23, 95 *S. W.* 235 (if some names are purposely omitted, to obtain undue advantage, the remedy is quashing or postponement).

1913, *Herrell v. State*, — *Okl. Cr. App.* —, 134 *Pac.* 1139.

[*Note 3; add:*]

1906, *State v. Barrington*, 198 *Mo.* 23, 95 *S. W.* 235.

[*Note 4; add:*]

1906, *Leftridge v. U. S.*, 6 *Ind. Terr.* 305, 97 *S. W.* 1018 (Arkansas statute applied).

1905, *Underwood v. Com.*, 119 *Ky.* 384, 84 *S. W.* 310.

1905, *State v. Henderson*, 186 *Mo.* 473, 85 *S. W.* 576 (but here the Court intimates an exception for cases of surprise). 1905, *State v. Bailey*, 190 *Mo.* 257, 88 *S. W.* 733 (similar). 1906, *State v. Myers*, 198 *Mo.* 225, 94 *S. W.* 242 (similar; reviewing the cases). 1906, *State v. Barrington*, 198 *Mo.* 23, 95 *S. W.* 235. 1912, *State v. Lawson*, 239 *Mo.* 591, 145 *S. W.* 92 (but here a flexibility is provided for).

1904, *Cochran v. U. S.*, 14 *Okl.* 108, 76 *Pac.* 672.

[*Note 5; add, under Illinois:*]

1904, *Hauser v. People*, 210 *Ill.* 253, 71 *N. E.* 416. 1909, *People v. Lutzow*, 240 *Ill.* 612, 88 *N. E.* 1049 (same). 1909, *People v. Williams*, 240 *Ill.* 633, 88 *N. E.* 1053 (same). 1910, *People v. Steinhauer*, 248 *Ill.* 46, 93 *N. E.* 299 (same).

1905, *Thompkins v. Com.*, — *Ky.* —, 90 *S. W.* 221, *semble*.

1906, *Schaumloeffel v. State*, 102 *Md.* 470, 62 *Atl.* 803 (rule of *Gardner v. People*, *Ill.*, *supra*, approved).

1905, *State v. Cambron*, 20 *S. D.* 282, 105 *N. W.* 241 (foregoing cases approved).

[*Text*, p. 2421; at the end of the §, *add* a new note 6:]

But the right to have a list of the names does not include the right to *inspect the testimony*:  
*Cases cited ante*, § 1850, n. 4.

§ 1853. **Same: (2) List of Witnesses Known to Prosecuting Attorney.**

[*Note 1; add:*]

*Ia.*: 1904, *State v. Crea*, 10 *Ida.* 88, 76 *Pac.* 1013.

*Okl.*: see the citations in the next note.

## [Note 2; add:]

*Colo.*: 1912, *Hardesty v. People*, 52 *Colo.* 450, 121 *Pac.* 1023 (the opinion does not inquire at all whether the defendant was surprised, and cites no authority; why was not *Askew v. People*, *supra*, § 1852, n. 5, considered?).

*Nebr.*: 1906, *Reed v. State*, 75 *Nebr.* 509, 106 *N. W.* 649 (like *Carroll v. State*, *supra*).

*Okl.*: 1910, *Steen v. State*, 4 *Okl. Cr.* 309, 111 *Pac.* 1097. 1911, *Hawkins v. State*, 6 *Okl. Cr.* 308, 118 *Pac.* 607 ("Steen's case is based on an arbitrary statute"); but the foregoing cases apply to misdemeanors only, under Snyder's Comp. L. 1909, § 6644; for felonies, the rule is that other witnesses may be indorsed in the trial Court's discretion under Snyder's Comp. L. 1909, § 6691; 1909, *Vance v. Terr.*, 3 *Okl. Cr.* 208, 105 *Pac.* 307. 1911, *Stockton v. State*, 5 *Okl. Cr.* 510, 114 *Pac.* 626.

## [Note 4; add:]

*Ida.*: 1902, *State v. Wilmbusse*, 8 *Ida.* 608, 70 *Pac.* 849. 1904, *State v. Crea*, 10 *Ida.* 88, 76 *Pac.* 1013 (but such an indorsement made at the time of trial, without showing any reason for the tardy indorsement, is insufficient). 1904, *State v. Rooke*, 10 *Ida.* 388, 79 *Pac.* 82 (indorsement before trial, held proper on the facts).

*Mont.*: 1912, *State v. Biggs*, 45 *Mont.* 400, 123 *Pac.* 410. 1912, *State v. Lawson*, 44 *Mont.* 488, 120 *Pac.* 808 (following *Kelly v. State*, *Nebr.*; one judge diss.).

*Nebr.*: 1910, *Ossenkop v. State*, 86 *Nebr.* 539, 126 *N. W.* 72 (trial Court's discretion approved). 1910, *Wilson v. State*, 87 *Nebr.* 638, 128 *N. W.* 38 (on the facts, excluded).

*Okl.*: 1910, *Steen v. State*, 4 *Okl. Cr.* 309, 111 *Pac.* 1097 (the prosecutor must show that the witness was not known).

*N. D.*: 1908, *State v. Matejousky*, 22 *S. D.* 30, 115 *N. W.* 96.

*Wash.*: 1904, *State v. Van Waters*, 36 *Wash.* 358, 78 *Pac.* 897.

## § 1854. Same: (3) List of All Prospective Witnesses.

## [Note 2; add:]

*Accord.*: 1904, *Shaffer v. U. S.*, 24 *D. C. App.* 417, 432 (accused held not to have been misled on the facts by an ambiguous description). 1895, *Thiede v. Utah*, 159 *U. S.* 510, 515, 16 *Sup.* 62 (murder; quoted *ante*, § 1852, n. 4). 1904, *Balliet v. U. S.*, 129 *Fed.* 689, 692, 64 *C. C. A.* 201 (fraud in the mails; the *U. S.* statute held not applicable).

*Contra*: 1906, *Schaumloeffel v. State*, 102 *Md.* 470, 62 *Atl.* 603. 1906, *Cairnes v. Pelton*, 103 *Md.* 40, 63 *Atl.* 105 (*Schaumloeffel v. State* approved).

Note that in *Illinois* the statute of this form is treated by the Courts as one of the first sort (*ante*, § 1852).

## [Note 3; add:]

1906, *Cairnes v. Pelton*, 103 *Md.* 40, 63 *Atl.* 105.

## [Note 5; add:]

1906, *Ball v. U. S.*, 147 *Fed.* 32, 36, *C. C. A.* (U. S. Rev. St. 1878, § 1033, does not apply to territorial courts; here in Alaska).

1908, *Jones v. U. S.*, 9th *C. C. A.*, 162 *Fed.* 417 (conspiracy to defraud).

## § 1855. Same: III. Statutory Rule of Evidence, etc.

## [Note 1; add:]

1907, *State v. Johnson*, 133 *Ia.* 38, 110 *N. W.* 170.

## [Note 5; add:]

1907, *State v. Bennett*, 137 *Ia.* 427, 110 *N. W.* 150.

[*Note 6; add:*]

1904, *State v. Trusty*, 122 Ia. 82, 97 N. W. 989.

[*Text*, p. 2425, l. 15; *add* a new § 1855a:]

§ 1855a. **Same:** (IV), **Statutory Rule of Procedure allowing Discovery of Witnesses' Testimony.** The foregoing methods provide merely for a *list* of witnesses, to be furnished to the defendant. But may he obtain also the *tenor of their testimony*; *i. e.* supposing them not to tell him their story voluntarily on request, is there any legal rule enabling him to get it from them? There are two such rules.

(1) In a few jurisdictions (England, Minnesota), the statute providing for a list of witnesses gives also the right to inspect the reported testimony of the witnesses before the grand jury.<sup>1</sup>

<sup>1</sup> Statutes cited *ante*, § 1851; note 4 to § 1850.

(2) In jurisdictions allowing depositions to be taken unconditionally by an accused (*ante*, § 1401), such a deposition is virtually also a discovery before trial.<sup>2</sup>

<sup>2</sup> 1911, *Welborn v. Faulconer*, 237 Mo. 297, 141 S. W. 31 (applying Rev. St. 1909, § 5173; *able opinion* by Blair, C.).

## § 1856. Civil Cases (Discovery in Equity, etc.).

[*Note 5; add:*]

1906, *Union Coll. Co. v. Superior Court*, 149 Cal. 790, 87 Pac. 1035, *semble* (discovery from a third person as to the whereabouts of certain defendants, so as to be enabled to serve them with process, refused; but the ruling is absurd as regards the ground stated in the opinion, that the parties' whereabouts "cannot be said to be material"; such reasoning is not fit logic for judicial officers having responsibilities to the life and property of the community; the opinion, moreover, refers to the question of compelling "the defendant or a stranger" to make discovery as if there were no distinction between the two, and it does not appear what was the precise status of the person summoned).

1906, *Ex parte Schoepf*, 74 Oh. 1, 77 N. E. 276, 279 (street-car injury).

1906, *International Coal M. Co. v. Pennsylvania R. Co.*, 214 Pa. 469, 63 Atl. 877.

1907, *Kurtz v. Brown*, 152 Fed. 372, C. C. A. 1908, *Brown v. Huey*, C. C. E. D. Pa., 166 Fed. 483 (stockbroker purchasing for another's account, here held not a third person). 1909, *Griess v. Mutual Life Ins. Co.*, 8th C. C. A., 169 Fed. 509 (discovery held allowable, in litigation between an insurance company and legatees, against the widow as legal custodian of the insured's body, the issue being as to suicide).

[*Note 6*, par. 2; *add:*]

*Alta.* St. 1910, 2d sess. c. 3, Evidence Act, § 6.

*Br. C.* St. 1905, 5 Edw. VII, c. 14, § 87 (discovery in county courts).

*Man.* St., 1906, 5 & 6 Edw. VII, c. 17, § 2 (amends Rev. St. 1902, c. 40, by adding further details as Rules 402 A, 402 B, 407 B).

*Newf.* St. 1904, c. 3, Rules of Court 28.

*Ont.*: 1912, *Brown v. Orde*, Ont. H. C. J., 2 D. L. R. 562 (annotated case).

*Yukon*: Consol. Ord. 1902, c. 17 (Judicature), Ord. XXI, R. R. 200-224.

[*Note 7*, par. 1; *add:*]

*Conn.* St. 1889, c. 22; Gen. St. 1902, §§ 732-737.

*Ill.* St. 1905, May 18 (Municipal Court), § 32.

[*Note 7 — continued*]

*Ind. St.* 1907, c. 243, p. 490, Mar. 11, § 6 (civil remedies for monopoly injuries).

*Ia. Code* 1897, §§ 3610, 3611.

*Kan. St.* 1907, c. 259, p. 410, Mar. 9 (anti-trust law); *St.* 1909, c. 113, p. 213, Mar. 12 (non-resident party).

*Mass. St.* 1909, c. 225 (amending *Rev. L. c.* 173, § 57; "either party may file interrogatories to the adverse party for the discovery of any facts and documents admissible in evidence at the trial, except as hereinafter provided"). *St.* 1913, c. 815 (re-casting the whole subject, and superseding *Rev. L. c.* 173, §§ 57-67 and later acts); § 1, Interrogatories. ("Any party, after the entry of an action at law or the filing of a bill in equity, may interrogate an adverse party for the discovery of facts and documents admissible in evidence at the trial of the case"; word "party" defined); § 2 (answers to be in writing, etc.); § 3 (filing, etc.; "No party interrogated shall be obliged to answer a question or produce a document which would tend to criminate him or to disclose his title to any property the title whereof is not material to an issue in the proceeding in the course of which he is interrogated, nor to disclose the names of witnesses, except that the court may compel the party interrogated to disclose the names of witnesses and their addresses if justice seems to require it, upon such terms and conditions as the court may deem expedient. . ."); § 4 (refusal to answer); § 5 (examination of corporate and municipal officers); § 6 (costs); § 7 (protection of immaterial matter); § 8 (land and probate courts included); § 9 (repealing *Rev. L. c.* 173, §§ 57-67, c. 159, §§ 15, 16, *St.* 1909, cc. 206, 225, *St.* 1911, c. 593, *St.* 1912, c. 276).

*N. J. St.* 1911, c. 279, p. 491 (rules for interrogatories in the district court).

*N. Y. St.* 1909, c. 65, § 3, p. 34 (C. C. P. §§ 870, 871 amended). *St.* 1911, c. 781, p. 2087 (amending C. C. P. § 872, by providing for the introduction of the documents in evidence "in addition to the use thereof by the witness to refresh his memory").

*N. C. Rev.* 1905, §§ 864-872 (like *Code* 1883, §§ 579-587).

*U. S. Equity Rules* 1912, Rule 58.

*Wis. St.* 1907, c. 369 (amending *Stats.* § 4096, subd. 3). *St.* 1911, c. 231, p. 237, c. 232, p. 237 (amending *Stats.* § 4096, subd. 6 and 7, and § 4097, as to officers of foreign corporations).

[*Note 7*, par. 2, at the end; *add.*]

compare the following: 1904, *Olmsted v. Edson*, 71 *Nebr.* 17, 98 *N. W.* 415 (parties compelled to give depositions before trial; "taking the deposition of a party is the only substitute we have for a bill of discovery under our practice").

[*Note 8*, par. 1, under *Accord*; *add.*]

*England*: *Nash v. Layton*, [1911] 2 *Ch.* 71 (*Marriott v. Chamberlain* approved, and its apparent contradictions explained).

*Wootton v. Sevier*, [1913] 3 *K. B.* 499 (names of witnesses to be given, on the facts).

*Canada*: 1903, *Gibbins v. Metcalfe*, 14 *Man.* 364 (names of witnesses).

1904, *Wood v. Dominion L. Co.*, 37 *N. Sc.* 250.

1905, *Garland v. Clarkson*, 9 *Ont. L. R.* 281 (range of discovery discussed; discovery from a beneficial party; powers of a referee).

*United States*: 1906, *Cairnes v. Pelton*, 103 *Md.* 40, 63 *Atl.* 105 (a bill of particulars need not include the names of witnesses).

1909, *Ex parte Button*, *Ex parte Hammond*, 83 *Nebr.* 636, 120 *N. W.* 203 (not decided).

1906, *Noyes v. Thorpe*, 73 *N. H.* 481, 62 *Atl.* 786, 787 (cases collected, but the point not decided).

1913, *Watkins v. Cope*, 84 *N. J. L.* 143, 86 *Atl.* 545.

1906, *Ex parte Schoepf*, 74 *Oh.* 1, 77 *N. E.* 279 (street-car injury).

1908, *Armstrong v. Portland R. Co.*, 52 *Or.* 437, 97 *Pac.* 715 (here the Court refused to strike

[Note 8 — continued]

out the defendant's answer where its secretary had refused to obey a subpoena calling for disclosure of the names of defendant's witnesses).

*Contra*: 1887, *Meier v. Paulus*, 70 Wis. 165, 35 N. W. 301.

1913, *Horlick's Malted Milk Co. v. Spiegel Co.*, 155 Wis. 201, 144 N. W. 272; and Wisconsin cases cited *infra*, n. 10.

Compare the rule for names and testimony of witnesses as disclosed to the attorney under a privilege (*post*, § 2319).

[Note 8, par. 4; *add*.:]

*England*: 1900, *Welsbach Incand. G. L. Co. v. New Sunlight I. Co.*, 2 Ch. 1.

*Canada*: 1912, *Nichols & S. Co. v. Skedanuk*, Alta. S. C., 6 D. L. R. 115 (member of an agency firm, as "officer").

1904, *Kircher v. Imperial L. & I. Co.*, 7 Ont. L. R. 295 (discovery granted against a manager who had resigned). 1904, *Cantin v. News Pub. Co.*, 8 id. 531 (discovery against a "former servant of the defendants," not granted). 1905, *Clarkson v. Bank of Hamilton*, 9 Ont. L. R. 317 (the corporation should suggest the officer or agent best qualified to give the due information). 1904, *McWilliams v. Dickson Co.*, 10 Ont. L. R. 639 (whether the answer of a party corporation may be struck out, for refusal of its officer to give discovery). 1906, *Davies v. Sovereign Bank*, 12 Ont. L. R. 557 (a member of a municipal council, not being its head, is not examinable as an officer or servant of the corporation). 1912, *Ontario & W. C. F. Co. v. Hamilton G. & B. R. Co.*, Ont. H. C. J., 1 D. L. R. 485 (former employee).

1912, *Toronto G. T. Co. v. Municipal C. Co.*, Sask. S. C., 1 D. L. R. 552 (former employee). For the earlier English cases, there is a good collection and a careful study of them in an article by Mr. Alex. McGregor, "What Persons in the Service of a litigating Corporation are examinable for Discovery on its behalf," *Canadian Law Review*, II, 254 (1902).

As to discovery from *infants* and their *next friends*: 1907, *Vano v. Canadian C. C. Mills Co.*, 13 Ont. L. R. 421.

[Note 9; *add*.:]

1905, *Spinney v. Boston Elev. R. Co.*, 188 Mass. 30, 73 N. E. 1021 (the demandant is entitled to the opponent's oath that the matters asked for are within the statute; here a report of the conductor upon a railroad accident, giving the names of persons present, etc.).

1909, *Carroll v. Boston Elev. R. Co.*, 200 Mass. 527, 86 N. E. 793 (names not disclosable).

1912, *Looney v. Saltonstall*, 212 Mass. 69, 98 N. E. 698 (*semble*, under St. 1909, c. 225, quoted *supra*, n. 7, this limitation is not abolished).

[Text, p. 2429, in l. 7, after "progress"; insert a new note 9a:]

<sup>9a</sup> In *Massachusetts* the progressive step has now been taken of removing this limitation as to names of witnesses.

Mass. St. 1911, c. 593 (the Court may compel either party, upon terms, to disclose the names and addresses of his witnesses "if justice seems to require it, . . . where the names of witnesses are in the exclusive possession of one party to the action").

1913, *Delaney v. Berkshire St. R. Co.*, 215 Mass. 591, 102 N. E. 901 (St. 1911, c. 593, incidentally referred to, in suppressing improper argument by counsel). St. 1913, c. 815 (quoted *supra*, n. 7), which recasts the whole chapter, Rev. L. c. 173, on discovery, retains this advance.

[Note 10, par. 1; *add*.:]

1910, *Grebenstein v. Stone & Webster Eng. Co.*, 205 Mass. 431, 91 N. E. 411 (Rev. L. 1902, c. 173, § 57, construed to limit the discovery to matters supporting the applicant's own case). 1912, *Looney v. Saltonstall*, 212 Mass. 69, 98 N. E. 698 (under St. 1909, c. 225, quoted *supra*, note 7, the discovery is not limited to the party's own case).

[Note 10, par. 2; *add*.:]

1903, *Hanks Dental Ass'n v. Tooth Crown Co.*, 194 U. S. 303, 24 Sup. 700 (the defendant took the deposition of the plaintiff's president before trial, under N. Y. C. C. P. 1877, § 870; held (1) that it was inadmissible under U. S. Rev. St. 1878, §§ 861, 863, 866, 867, following *Ex parte Fisk*, *supra*; (2) that under St. 1892, Mar. 9, c. 14, quoted *ante*, § 1381, n. 3, providing that in Federal courts an additional "mode of taking the depositions of witnesses" may be "the mode prescribed by the laws of the State," etc., the deposition was equally inadmissible, since the word "mode" in St. 1892 does not have "a broader significance" than in Rev. St. § 861; yet it would seem that if the Court in *Ex parte Fisk* held the word "mode" in Rev. St. § 861 to include discovery before trial and thus to conflict with N. Y. C. C. P. § 870, it is inconsistent here to hold that the word "mode" in St. 1892 does *not* include discovery before trial). 1905, *Blood v. Morrin*, 140 Fed. 918, C. C. (under U. S. Rev. St. §§ 863, 876, providing for depositions *de bene* of witnesses residing more than one hundred miles away, a party may take the deposition of his opponent, so residing, before trial; *Ex parte Fisk* distinguished). 1907, *Smith v. International Mercantile Co.*, C. C. N. J., 154 Fed. 786 (*Hanks Dental Ass'n v. Tooth Crown Co.*, followed, refusing to allow interrogatories to opponent under N. J. Pub. L. 1903, § 140, p. 537). 1909, *Frost v. Barber*, C. C. S. D. N. Y., 173 Fed. 847 (following *Hanks Dental Ass'n v. Tooth Crown Co.*).

[Note 10, after par. 1; *add*.:]

In *England* and *Canada*, the rule for discovery in *libel* seems to give special difficulty: 1905, *White v. Credit Reform Ass'n*, 1 K. B. 653 (*libel* by a mercantile agency; certain inquiries as to the source of information, etc., passed upon). 1905, *Edmondson v. Birch*, 2 K. B. 523 (similar). 1906, *Plymouth M. C. & I. Soc'y v. Traders' P. Ass'n*, 1 K. B. 403 (similar). 1906, *Massey-Harris Co. v. DeLaval S. Co.*, 11 Ont. L. R. 227, 591 (*libel*; discovery of information concerning defendant's plea of privilege). 1906, *McKergow v. Comstock*, 11 Ont. L. R. 637 (*libel*; discovery of matters relevant to defendant's good faith in exercising a qualified privilege).

The statutes often provide that *judgment may be taken* against a party improperly refusing to answer such interrogatories; compare *post*, § 2218, n. 6, par. 3, and *ante*, § 1210, n. 2; 1907, *Free v. Western U. Tel. Co.*, 135 Ia. 69, 110 N. W. 143 (method of penalizing a refusal by entering judgment, etc., considered). The following article may be consulted: Raymond D. Thurber, "Examinations before Trial," XXV, *Bench & Bar*, 62.

[Text, p. 2431, after par. (3); *add* a new par. (4):]

(4) *Discovery from witnesses*. The traditional chancery rule did not permit discovery to be obtained from witnesses, *i. e.* third persons not parties (*supra*, par. 1, p. 2427, n. 5). But under the modern deposition statutes (*ante*, § 1411) permitting parties more or less freely to take depositions before trial, may not such discovery be effectually sought? It would be a sound extension of the principle to permit it; the chancery practice was too cautious; modern policy tends to acknowledge this.

The obstacle, however, is that the statutes, aiming merely to preserve for the trial testimony in danger of being lost, impose usually as a condition that the witness shall be ill or about to leave the State, etc. This restricts the opportunity of getting discovery to a narrow class of witnesses.

But where the statute does not expressly impose such a condition for *taking* the deposition (but only for *using* it), may not the trial Court in discretion decline to impose these traditional limits, and grant an order to take where he deems it wise? It would seem so. The contrary has been laid

[Text, p. 2431 — continued]

down, in an opinion which deserves notice for the inadequacy of the reasons put forward :

1906, *International Coal Mining Company v. Pennsylvania Railroad Co.*, 214 Pa. 469, 63 Atl. 877.

Assumpsit to recover rebates; from the record it appeared that while an action was pending, plaintiff entered a rule to take depositions on John Lloyd on eight days' notice. At a meeting held in pursuance of the rule, Lloyd was asked whether any officer or director of the Pennsylvania Railroad Company was a stockholder in the Columbia Coal Company. The witness refused to answer the question. The Court subsequently made an order directing him to answer the question propounded to him.

*Brown, J.*: "For cause existing, courts of equity permit testimony to be taken for its perpetuation. . . . When, in view of the condition, circumstances or conduct of a witness, his testimony may be lost to the party needing it, if not taken in advance of the trial, it ought to be so taken, but as courts of equity have not gone beyond this, it is the limit for courts of law. By the rule in the court below, under which the appellee insists that it has a right to examine the appellant outside of court and in advance of the trial, either party to a pending action may at any time, as a matter of course, with no cause existing for doing so, proceed to examine any witness in advance of the trial, though he be neither aged, infirm nor going, and there be no reason for supposing that he will not appear in court when subpoenaed to do so. The rule is: 'A rule may in like manner be entered by either party to take the depositions of witnesses without regard to the circumstances of their being aged, infirm or going witnesses, stipulating, however, eight days' notice to the adverse party; subject, nevertheless, in all other respects to the existing rules and regulations.'"

"In the regular and orderly trial of a cause witnesses appear in open court, and jurors, from seeing, as well as hearing them, pass upon their credibility. Exception to this wise rule of the common law must be based upon some necessity requiring it to be disregarded in the interest of justice. But under the rule in the court below, for no reason and with no necessity for taking the deposition of a witness in advance of a trial, either party to the action, upon a mere whim or caprice, may compel the examination of every one of his witnesses before a magistrate or notary public in advance of the trial, and require the opposite party, with his counsel, to appear as often as such an examination takes place. In this disorderly innovation upon trial before a jury, licensed by the rule below, the rights of witnesses are not to be overlooked. As a rule, it is inconvenient for anyone to be interrupted in his business or vocation in life by being compelled, in obedience to a subpoena, to appear in court to testify on the trial of a cause; but every member of society must expect at times to be subjected to this inconvenience, because the administration of justice and his duty as a citizen require him to submit to it. This, however, is not the case when he is compelled to appear before a commissioner to testify in advance of the trial upon the mere whim or caprice of a plaintiff or defendant, and in the absence of any necessity requiring him to so appear. There having been no reason shown why the appellant should have been subjected to the inconvenience and annoyance of being called before a notary public to testify as a witness for the plaintiff in advance of the trial, he has a right to complain of the unwarranted calling of him away from his business, especially as he is liable to be called into court by the very party taking his deposition, to testify on the trial of the cause. It is of this that he complains, and his complaint is just. . . . We are informed that the learned court below has indicated its own view in this regard by rescinding the rule and adopting in its place one by which, 'upon notice and cause shown,' witnesses may be examined without regard to their being aged, infirm or going."

Now the real ground of opposition here was the witness' dislike to disclose the fact as to the holding of stock. It was not an annoyance at being summoned from his business. It seldom is. The learned Court's labored expo-

[Text, p. 2431 — *continued*]

sition of this annoyance to witnesses puts forward a conventional ground which is not the real ground. There is no propriety in shielding thus the true controversy over the policy of this kind of discovery. Cant reasons had better be abandoned. The real issue is, Can not discovery be properly extended, leaving to the trial Court to control the possibilities of abuse? <sup>1</sup>

<sup>1</sup> The following case further illustrates this question :

1910, *Boston & Maine R. Co. v. State*, 75 N. H. 513, 77 Atl. 996.

In these cases the problems that arise concern often the magistrate's or notary's power to rule on the relevancy of the questions (*post*, §§ 2195, 2210).

### § 1857. Documents ; Inspection by Discovery in Equity.

[Note 1 ; *add*:]

1905, *Ormerod v. St. George's Ironworks*, 1 Ch. 505 (earlier practice as to taking copies, considered).

### § 1858. Inspection at Common Law, etc.

[Note 2 ; *add* a new paragraph:]

For the right of a citizen to inspect *public records*, see the following :

1905, *State v. McMillan*, 49 Fla. 243, 38 So. 666 (records of deeds, etc.).

1903, *Marsh v. Sanders*, 110 La. 726, 34 So. 752 (poll-tax books).

1906, *State v. Grimes*, 29 Nev. 50, 84 Pac. 1061 (collecting the cases).

1906, *Clement v. Graham*, 78 Vt. 290, 63 Atl. 146 (State auditor's vouchers).

1904, *Payne v. Staunton*, 55 W. Va. 202, 46 S. E. 927.

[Note 4 ; *add*:]

1903, *Merritt v. Copper Crown Co.*, 36 N. Sc. 383.

1910, *Venner v. Chicago City R. Co.*, 246 Ill. 170, 92 N. E. 643.

1912, *White v. Manter*, 109 Me. 408, 84 Atl. 890.

1907, *Hub Construction Co. v. New England B. Club*, 74 N. H. 282, 67 Atl. 574.

1905, *Guthrie v. Harkness*, 199 U. S. 148, 26 Sup. 4.

[Note 11 ; *add*:]

1904, *Alabama G. I. School v. Reynolds*, 143 Ala. 579, 42 So. 114 (books kept by a party in a fiduciary relation are subject to inspection for pending litigation, irrespective of the general limitations of discovery in equity).

[Note 14 ; *add*:]

1904, *Boulton v. Houlder*, 1 K. B. 784 (action to recover insurance money paid in excess; the plaintiff was allowed discovery of certain ship's papers; practice in insurance cases reviewed).

[Note 16 ; *add*:]

1911, *Com. v. Jordan*, 207 Mass. 259, 93 N. E. 809 (cited *post*, § 1862, n. 8).

In *Farnham v. Colman*, 19 S. D. 342, 103 N. W. 161 (1905), where the defendant, charged with murder, asked mandamus against the committing magistrate to compel the State's attorney to produce a written dying declaration, which he had refused to produce on subpoena, the refusal of the writ was placed on other grounds. Compare § 1850, n. 4, *ante*.

§ 1859. **Inspection under Statutes.**

[*Note 4, par. 1; add.:*]

Ill. St. 1907, June 3, p. 443, § 34 (re-enacts the foregoing c. 110, § 20).

In West Virginia, the common-law practice may still be invoked: 1905, *Riley v. Yost*, 58 W. Va. 213, 52 S. E. 40.

[*Note 5, par. 2; add.:*]

*Alberta:* the method prescribed by St. 1910, 2d sess., Evidence Act, c. 3, § 50 (quoted *ante*, § 1223), is applicable also to documents in the opponent's possession, being larger in scope.

*Br. C. St.* 1905, 5 Edw. VII, c. 14, § 87 (county courts).

*Man. St.* 1906, 5 & 6 Edw. VII, c. 17, § 4 (amends Rev. St. 1902, c. 40, Rule 392, as to mode of service, and amends Rule 421, as to penalty for refusal to produce).

*St.* 1909, 9 Edw. VII, c. 14, § 3 (amending Rule 414 of the King's Bench Act, so as to forbid the subsequent use of a document by one refusing without excuse to make discovery).

*Newf. St.* 1904, c. 3, Rules of Court 28.

*Yukon Consol. Ord.* 1902, c. 17 (Judicature), Ord. XX, RR. 190-199 (similar to N. W. Terr.)

[*Note 6; add.:*]

*Colo. St.* 1903, c. 181, § 160 ("the books and accounts of any deceased person or mental incompetent shall be subject to the inspection of all persons interested therein").

*Conn. St.* 1889, c. 22, Gen. St. 1902, §§ 732-737.

*Ga.:* 1904, *Branan v. Nashville C. & St. L. R. Co.*, 119 Ga. 738, 46 S. E. 882 (Code applied).

*Ill.:* 1904, *Swedish-American Tel. Co. v. Fidelity & C. Co.*, 208 Ill. 562, 70 N. E. 768 (provided the terms of the order require the exhibition of relevant documents and entries only, the statute is not unconstitutional; here, the books of an insured, in an action by a liability-insurer, were produced to show the date on which the premium was agreed to be based; but there is no occasion for invoking the Constitution to limit such statutes).

*Ind. St.* 1907, c. 243, p. 490, Mar. 11, § 6 (civil remedies for monopoly injuries);

*Kan. St.* 1907, c. 259, p. 410, Mar. 9 (anti-trust law); *St.* 1909, c. 113, p. 213, Mar. 12 (non-resident party).

*Mass. St.* 1913, c. 815 (quoted *ante*, § 1856, n.); re-casting and superseding Rev. L. c. 173, §§ 57-67, c. 159, §§ 15, 16, and later acts).

*N. J. St.* 1912, c. 231 (Practice Act Supplement), Schedule A, Rules of Court No. 66 ("Any party may without affidavit apply for an order directing any other party to make discovery on oath of the books, papers, or other documents, which are or have been in his possession or under his control relating to any matter in question in the cause. The granting of the order shall be discretionary, as to the whole or any part of the discovery applied for").

*N. Y. St.* 1913, c. 86, p. 152 (amending C. C. P. § 803, by providing for photographs).

*N. C. Rev.* 1905, § 1656 (like Code 1883, § 578); 1905, *Mills v. Biscoe L. Co.*, 139 N. C. 524, 52 S. E. 200 (procedure of inspection considered).

*S. D.:* 1909, *McGeary v. Brown*, 23 S. D. 573, 122 N. W. 605 (statute applied).

*U. S.:* 1909 *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 29 Sup. 370 (an order under the Arkansas Anti-Trust Act of 1905, striking out an answer of refusal and entering judgment by default, held not a violation of the 14th Federal Amendment). Equity Rules 1912, Rule 58.

*Wash.:* 1906, *Lawson v. Black Diamond C. M. Co.*, 44 Wash. 26, 86 Pac. 1120 (Codes & Stats. 1897, § 6047, construed in relation to ib. §§ 6009, 6113, providing for giving judgment against a party refusing to answer interrogatories discovering documents).

[*Note 8; add.:*]

1907, *Cassatt v. Mitchell C. & C. Co.*, C. C. A. 150 Fed. 32, 39 (careful but unconvincing opinion by Lanning, J.; Buffington, J., partly dissenting).

[Note 8 — *continued*]

1907, *Webster Coal & C. Co. v. Cassatt*, 207 U. S. 181, 28 Sup. 108 (reversing *Cassatt v. Mitchell C. & C. Co.*, *supra*, but on another point).

1911, *Carpenter v. Winn*, 221 U. S. 533, 31 Sup. 683 (commented on in Ill. L. Rev. VI, 266).

[Note 10, par. 1; *add*, under *Accord*.:]

1904, *Swedish-American Tel. Co. v. Fidelity & C. Co.*, 208 Ill. 562, 70 N. E. 768 (*Lester v. People*, *infra*, repudiated; the power is to require production, "whether before the trial, for the purpose of preparing for the same, or at the trial, to be used as evidence"; "Sect. 9 was intended in actions at law to be a substitute for the bill of discovery").

[Note 10; *add* a new paragraph:]

In the Federal practice, the applicant is allowed to take a copy of the document produced and inspected; and a photographic copy where useful may equally be allowed:

1907, *Newcomb v. Burbank*, C. C. S. D. N. Y., 159 Fed. 568 (forgery of a grant of securities).

[Note 12; *add*.:]

So, too, now in Massachusetts:

1912, *Looney v. Saltonstall*, 212 Mass. 69, 98 N. E. 698 (*semble*, under St. 1909, c. 225, quoted *ante*, § 1856, N. 7, the discovery is not limited to the party's own case).

[Note 14, par. 1; *add*.:]

1906, *Nelson & Sons v. Nelson Line*, 2 K. B. 217 (discovery from a nominal plaintiff).

1910, *Von Ferber v. Enright*, 19 Man. 383 (a party is still "not entitled to discovery of the evidence which relates exclusively to the case of the opposite party").

[Note 14, par. 2, l. 7; *add*.:]

British Ass'n of Glass Bottle Mfrs. v. Nettlefold, [1912] A. C. 709.

1912, *Stapley v. Canadian P. R. Co.*, Alta. S. C., 6 D. L. R. 97, 180.

1912, *MacMahon v. Railway P. Ass. Co.*, Ont. H. C. J., 5 D. L. R. 423 (cross-examination of the opponent; learned opinion by Riddell, J.).

[Note 14, par. 2, l. 9: *add*.:]

1906, *Nelson v. U. S.*, 201 U. S. 92, 26 Sup. 358.

[Note 14, par. 2, at the end; *add*.:]

Another question arising under these statutes is the *burden of proof* where the opponent denies possession:

1908, *Schlesinger v. Ellinger*, 134 Wis. 397, 114 N. W. 825.

Whether the *applicant* party may *himself make the copy* from the document at the office of the producing party, or whether he is obliged to be satisfied with a copy made and furnished by the latter, is an interesting and often important point of practice: 1905, *Ormerod v. St. George's Ironworks*, 1 Ch. 505 (approving the former alternative).

[Note 14; at the end, *add* a new paragraph:]

The *relevancy* of the documents shown must be as fully shown, under the statutory rule, as under the former Chancery practice:

1908, *Oro W. L. & P. Co. v. Oroville*, C. C. N. D. Cal., 162 Fed. 975.

But this ruling seems an unfortunate loss of an opportunity for progress; the old Chancery practice of discovery was a stench on the threshold of justice; why keep any of its nauseous elements? Compare the simple practice under a subpoena *d. t.* against a third person (*post*, § 2200, n. 6).

The primitive and childish technicality with which some Courts still handle this part of procedure may be seen in the following ruling, dated not 1414, nor 1814, but 1914: *State v.*

[Note 14 — *continued*]

Trimble, — Mo. — , 163 S. W. 860 (appeal from an order granting discovery to plaintiff; the action was for the death of a track-watchman, said to have been killed by train No. 6 running with no headlight; the discovery asked for covered all train sheets, etc., as to all trains on that night at that place, but the discovery conceded by defendant covered only train sheets, etc., for No. 6; held that the order of the trial judge granting the plaintiff's request was "absolutely null and void," unamendable and incurable, by reason of its excessive scope; any the slightest excess in discovery-orders beyond the exact limits of the legislative authority being a Violation of the Constitution; the opinion must be read to be appreciated; here may be noted that its doctrine not only commits the absurdity of declaring civil discovery protectible under the Constitution, but humiliates the Judiciary by announcing that the Legislature in its statute on this subject "limits the authority of the Courts of this State"; if Courts had assumed more of their legitimate authority in the machinery of justice, and less of their improper interference in economic matters, the nation would be better off).

[Note 15; *add*.:]

1907, *L'Amie v. Wilson*, 2 Ir. R. 130 (applying St. 1879, 42 Vict., Bankers' Books' Evidence Act, c. 11, § 7, as to the mode of obtaining inspection of a third person's account in a bank). The following ruling holds such a statute to be *constitutional*: 1906, *Washington Nat'l Bank v. Daily*, 166 Ind. 631, 77 N. E. 53 (cited *post*, § 2193, n. 3).

[Note 17; *add*.:]

*Alta.* St. 1910, 2d sess., c. 3, § 50 (cited *ante*, § 1223).  
*Br. C. St.* 1903-4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 2 (repeals § 20 of Rev. St. 1897, c. 71, and substitutes another requirement, as quoted *ante*, § 1639, n. 2).  
*N. Se. Rev. St.* 1900, c. 163, § 22 (probated wills; cited *ante*, § 1681).  
*Sask.* St. 1907, c. 12, § 21 (cited *ante*, § 1223).  
*Yukon* St. 1904, c. 5, § 23 (probated wills; cited *ante*, § 1681).

[Text, p. 2450; at the end, *add* a new par. (5) :]

(5) In *criminal cases* some States have by statute made applicable the discovery and inspection rules of par. (a) and (b) *supra*.<sup>18</sup>

<sup>18</sup> 1910, *State v. Hinkley*, 81 Kan. 838, 106 Pac. 1088 (applying Cr. C. § 209, Gen. St. 1901, § 5651).

#### § 1860. Same: Other Principles discriminated.

[Text, par. (3), at the end; *add* a new note 2 :]

<sup>2</sup> For rulings applying these statutes, see *ante*, § 1210, n. 2.

#### § 1861. Document shown to Opponent at Trial.

[Note 1, par. 1; *add*, under *Accord*.:]

1905, *State v. Rogers*, 115 La. 164, 38 So. 952 (here the ruling, that the opponent is entitled to see a contradictory letter before the witness answers whether it is his, seems over-strict).

1913, *Eckels & S. I. M. Co. v. Cornell E. Co.*, 119 Md. 107, 86 Atl. 38 (rule held not applicable to a printed article used improperly on cross-examination of an expert under § 1700, *ante*).

[Note 1, par. 1; *add*, under *Contra*.:]

1914, *Com. v. Dorr*, 216 Mass. 314, 103 N. E. 902; (in the trial Court's discretion).

**§ 1862. Premises, Chattels, etc.; Inspection before Trial.**

[Note 6; add:]

1907, *Mutual Life Ins. Co. v. Griesa*, C. C. Kansas, 156 Fed. 398 (bill in equity to cancel a policy of life insurance; the deceased was killed by falling from the roof of his house; the issue was whether he had taken morphine, just previously, with intent to suicide thereby, and had deliberately thrown himself from the roof to conceal the suicide; the insurer applied for an order to exhume the body of the deceased; granted, in a scholarly and sensible opinion by Smith McPherson, J.; the order directed the appointment of a pathologist to examine for the effect of the fall, and a chemist to examine for morphine; the opinion repudiates a privilege protecting from such disclosure).

1909, *Griesa v. Mutual Life Ins. Co.*, 8th C. C. A., 169 Fed. 509 (same case on appeal; point not decided).

Compare also the cases cited *ante*, § 2194, and *post*, § 2220.

[Note 7; add:]

1910, *Danahy v. Kellogg*, 126 N. Y. Suppl. 444 (action for death in an automobile collision; the defendant asked for an order to permit exhumation of the body and examination by the microscope to discover whether death resulted from heart disease independently existing; denied; "we base our decision squarely on the absence of any right or authority in the court to grant the inspection asked," *i.e.* under the Code of Civil Procedure).

[Note 8; add:]

1911, *Com. v. Jordan*, 207 Mass. 259, 93 N. E. 809 (defendant not entitled to a copy of the autopsy report or to an opportunity to inspect weapons etc. in the prosecutor's possession, apart from his right to a bill of particulars to enable him to prepare his defence; the rule thus announced is needlessly harsh on defendants, and should not be accepted elsewhere; to lay down such a rule at the present day shocks one's sense of reasonableness).

[Note 9; add:]

*Newf. St.* 1904, c. 3, Rules of Court 46, par. 4 (like Eng. Rules of 1883, Ord. 50, rule 3).

*Mont.*: 1903, *Heinze (State ex rel.) v. District Court*, 29 Mont. 105, 74 Pac. 132 (*Parrot S. & C. Co. v. District Court*, *supra*, followed; *Hollaway, J.*, diss.). 1904, *Mendenhall (State ex rel.) v. District Court*, 29 Mont. 363, 74 Pac. 1078 (preliminary conditions for an order determined). 1904, *Boston & M. C. C. & S. M. Co. (State ex rel.) v. District Court*, 30 Mont. 206, 76 Pac. 206 (preliminary conditions for an order, determined).

*Wis.*: 1913, *Horlick's Malted Milk Co. v. Spiegel Co.*, 155 Wis. 201, 144 N. W. 272 (action for unfair competition; the plaintiff had obtained some evidence of the defendant's methods by buying at the defendant's store bottles in which the defendant was selling its product under the defendant's name, and the defendant asked for inspection of these bottles, etc.; allowed).

**§ 1867. Order of Evidence; Trial Court's Discretion.**

[Note 2; add:]

1912, *Baltimore C. & A. R. Co. v. Moon*, 118, Md. 380, 84 Atl. 536.

1906, *People v. Tollefson*, 145 Mich. 449, 108 N. W. 751 (forgery).

1907, *State v. Taylor*, 202 Mo. 1, 100 S. W. 41.

1907, *State v. Werner*, 16 N. D. 83, 112 N. W. 60.

1909, *Crosby v. Portland R. Co.*, 53 Or. 496, 101 Pac. 204.

**§ 1869. Proponent's Case in Chief, etc.**

[Note 2; add:]

1908, *Decatur v. Vaughan*, 233 Ill. 50, 84 N. E. 50.

1912, *Knight v. State*, 64 Tex. Cr. 541, 144 S. W. 967 (the woman's chastity, in seduction)

[Note 4, l. 12; *add.*:]

1903, *Savage v. Bulger*, — Ky. —, 77 S. W. 717 (party admitted in rebuttal).  
 1906, *Burkhardt v. Loughridge*, 124 Ky. 48, 98 S. W. 291 (rule applied to depositions).  
 1910, *Continental Ins. Co. v. Ford*, 140 Ky. 406, 131 S. W. 189 (rule held not to prohibit the party's testimony where already his counsel had on cross-examination entered upon new matter).  
 In England, the same rule is now applied, under St. 1898 (quoted *ante*, § 488) to the *accused*:  
 1911, *Morrison's Case*, 6 Cr. App. 159, 165 (L. C. J. Alverstone: "In all cases I consider it most important for the prisoner to be called before any of his witnesses").

§ 1871. **Same: Conditional Relevancy, etc.**

[Note 1, par. 1; *add.*:]

1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127.

[Note 2, par. 2, at the end; *add.*:]

Compare the rule for counsel *making offers* which they know will not be sustained, and *stating in argument* matters of which no evidence has been introduced (*ante*, § 1810).

[Note 3, par. 1; *add.*:]

1908, *Putnal v. State*, 56 Fla. 86, 47 So. 864. 1909, *Atlantic Coast Line R. Co. v. Partridge*, 58 Fla. 153, 50 So. 634.  
 1905, *Campbell v. Railway Transfer Co.*, 95 Minn. 375, 104 N. W. 547.  
 1907, *State v. Arnold*, 206 Mo. 589, 105 S. W. 641.  
 1904, *Earnhardt v. Clement*, 137 N. C. 91, 49 S. E. 49.

[Note 4; *add.*:]

1906, *State v. Green*, 115 La. 1041, 40 So. 451 (identifying a pistol).

[Note 5; *add.*:]

1907, *Ross v. State*, 169 Ind. 388, 82 N. E. 781.

[Note 6, par. 2, at the end; *add.*:]

1906, *Hix v. Guley*, 124 Ga. 547, 52 S. E. 890. 1907, *Sasser v. State*, 129 Ga. 541, 59 S. E. 255.  
 1906, *Tinkle v. Wallace*, 167 Ind. 382, 79 N. E. 355 (bribery). 1908, *Dorn & McGinty v. Cooper*, 139 Ia. 742, 117 N. W. 1.  
 1906, *Putnam v. Harris*, 193 Mass. 58, 78 N. E. 747 ("It is more correct to say that the exception will not be sustained unless the fact that the evidence admitted *de bene* had not been properly connected afterwards was brought to the attention of the Court and a further ruling on that ground asked for"). 1908, *Com. v. Johnson*, 199 Mass. 55, 85 N. E. 188 (narrative of conversations held proper on the facts).  
 1903, *Jones v. Peterson*, 44 Or. 161, 74 Pac. 661.  
*Contra*: 1906, *Root v. Kansas C. S. R. Co.*, 195 Mo. 348, 92 S. W. 621.  
*Not clear*: 1906, *Pittman v. State*, 51 Fla. 94, 41 So. 385 (opinion reading both ways).  
 Examples of the striking out of evidence where the promise to connect has not been fulfilled:  
 1912, *People v. Smith*, 254 Ill. 167, 98 N. E. 281 (purchase of a pistol not connected with the one in issue).

[Note 8; *add.*:]

1906, *Brown v. State*, 88 Miss. 166, 40 So. 737.

§ 1872. *Opponent's Case in Reply, etc.*[Note 3; *add.*:]1904, *Conant v. Jones*, 120 Ga. 568, 48 S. E. 234.§ 1873. *Proponent's Case in Rebuttal.*[Note 1; *add.*:]1911, *R. v. Crippen*, 1 K. B. 149 (careful statement; but unfortunately not discriminating between this case and that of § 1877, *post*).1904, *R. v. Wong On*, 10 Br. C. 555 (*alibi*).1902, *R. v. Higgins*, 35 N. Br. 18, 30.1907, *Nicholson v. State*, 149 Ala. 61, 42 So. 1015.1904, *Vincent v. Mutual R. F. L. Ass'n*, 77 Conn. 281, 58 Atl. 963 (age, in an insurance policy). 1904, *McAllin v. McAllin*, 77 Conn. 398, 59 Atl. 413.1909, *Jenkins v. State*, 58 Fla. 62, 50 So. 582. 1911, *Johnson v. Rhodes*, 62 Fla. 220, 56 So. 439.1904, *Lo Toon v. Terr.*, 16 Haw. 351, 357 (*alibi*).1905, *State v. Waln*, 14 Ida. 1, 80 Pac. 221.1908, *Floto v. Floto*, 233 Ill. 605, 84 N. E. 712. 1910, *Albrecht v. Hittle*, 248 Ill. 72, 93 N. E. 351 (the proponent of a will must offer his expert witnesses on the case in chief, but in rebuttal he may offer expert opinion on the contestant's evidence).Ind. St. 1905, p. 584, § 260 (Rev. St. 1897, § 1914, re-enacted). 1906, *Tinkle v. Wallace*, 167 Ind. 382, 79 N. E. 355.1905, *State v. Seligman*, 127 Ia. 415, 103 N. W. 357. 1906, *State v. Thomas*, 135 Ia. 177, 109 N. W. 900.1890, *Williams v. Com.*, 90 Ky. 596, 14 S. W. 595 (here the Court disparages too easily the trial Court's ruling, on the theory that no discretion was actually exercised). 1904, *Fletcher v. Com.*, — Ky., — 83 S. W. 588 (*Williams v. Com.* approved). 1905, *Tetterton v. Com.*, — Ky., — 89 S. W. 8. 1912, *Bennett v. Com.*, 150 Ky. 604, 150 S. W. 806. 1913, *Smith v. Com.*, 154 Ky. 613, 157 S. W. 1089.1905, *State v. Boice*, 114 La. 856, 38 So. 584. 1906, *State v. Johnson*, 116 La. 30, 40 So. 521.1906, *State v. Douglas*, 116 La. 524, 40 So. 860. 1907, *State v. Heidelberg*, 120 La. 300, 45 So. 256. 1913, *State v. Ballard*, 132 La. 491, 61 So. 537.1904, *Burnside v. Everett*, 186 Mass. 4, 71 N. E. 82.1906, *People v. Harper*, 145 Mich. 402, 108 N. W. 688 (*corpus delicti* and eye witnesses; here, in a technical and ill-advised opinion, citing no authority, the Supreme Court unjustifiably interferes with the trial Court's discretion).1904, *Flowers v. State*, 85 Miss. 591, 37 So. 814.1904, *Maloney v. King*, 30 Mont. 158, 76 Pac. 4.1906, *State v. Miles*, 199 Mo. 530, 98 S. W. 25. 1910, *Seibel-Suessdorf C. & I. M. Co. v. Manufacturers' R. Co.*, 230 Mo. 59, 130 S. W. 288.1905, *Willett v. Morse*, — N. J. L. —, 60 Atl. 362.1905, *Petersburg School Dist. v. Peterson*, 14 N. D. 344, 103 N. W. 756.1904, *Cochran v. U. S.*, 14 Okl. 108, 76 Pac. 672.1843, *Smith v. Britton*, 4 Humph. 201.1905, *Union R. Co. v. Hunton*, 114 Tenn. 609, 88 S. W. 182.1904, *Wilmoth v. Hamilton*, 127 Fed. 48, 61 C. C. A. 584.1904, *Schissler v. State*, 122 Wis. 365, 99 N. W. 593 (*sanity*). 1905, *Steward v. State*, 124 Wis. 623, 102 N. W. 1079 (*sanity*).1911, *Russell v. State*, 19 Wyo. 272, 116 Pac. 451.[Note 6, par. 1; *add.*:]1911, *Roberts v. State*, 25 Del. Boyce 385, 79 Atl. 396.

**§ 1874. Opponent's Case in Surrebuttal.**

[Note 1; add:]

1905, *State v. Forsha*, 190 Mo. 296, 88 S. W. 746 (the rule applies equally to a defendant who did not testify in chief for the defence but offers himself in surrebuttal).

**§ 1876. Case Closed: (1) Offeror's Case alone Closed.**

[Note 1; add:]

1911, *Foster's Case*, 6 Cr. App. 196.

1908, *Central National Bank v. National Metropolitan Bank*, 31 D. C. App. 391.

1905, *Brooke v. Lowe*, 122 Ga. 358, 50 S. E. 146. 1908, *Ellenberg v. Southern R. Co.*, 5 Ga. App. 389, 63 S. E. 240. 1911, *Wickham v. Torley*, 136 Ga. 594, 71 S. E. 881.

1904, *Hauser v. People*, 210 Ill. 253, 71 N. E. 416.

1904, *Hill v. Glenwood*, 124 Ia. 479, 100 N. W. 522.

1906, *State v. Rodriguez*, 115 La. 1004, 40 So. 438. 1906, *State v. Goodson*, 116 La. 388, 40 So. 771.

1904, *Schilling v. Curran*, 30 Mont. 370, 76 Pac. 998.

1904, *Davis v. Collins*, 69 S. C. 460, 48 S. E. 469.

1906, *Pocahontas C. Co. v. Williams*, 105 Va. 708, 54 S. E. 868.

**§ 1877. Same: (2) Case of Both Parties Closed.**

[Note 1; add:]

1904, *Alling v. Weissman*, 77 Conn. 394, 59 Atl. 419.

1906, *Bridger v. Exchange Bank*, 126 Ga. 821, 56 S. E. 97 (during argument on a motion to direct a verdict).

1887, *Tucker v. People*, 122 Ill. 583, 593, 13 N. E. 809.

1906, *People v. Wiemers*, 225 Ill. 17, 80 N. E. 45 (trial without a jury).

1905, *State v. Sexton*, 37 Wash. 110, 79 Pac. 634.

**§ 1878. After Argument Begun.**

[Note 1; add:]

1905, *Robinson v. State*, 50 Fla. 115, 39 So. 465. 1909, *Charles v. State*, 58 Fla. 17, 50 So. 419.

1905, *Roberts v. State*, 123 Ga. 146, 51 S. E. 374. 1906, *Bundrick v. State*, 125 Ga. 753, 54 S. E. 683.

1909, *People v. Blake*, 157 Mich. 533, 122 N. W. 113.

1904, *Blair v. State*, 72 Nebr. 501, 101 N. W. 17.

1901, *Harvey v. Terr.*, 11 Okl. 156, 65 Pac. 837.

1906, *Jones v. State*, 50 Tex. Cr. 194, 95 S. W. 1044.

1906, *Cincinnati N. O. & T. R. Co. v. Cox*, 143 Fed. 110, C. C. A.

**§ 1879. After Judge's Charge Given.**

[Note 1, par. 1; add:]

1906, *Todd v. Crail*, 167 Ind. 48, 77 N. E. 402 (judge sitting without a jury).

1905, *Parker v. Ricks*, 114 La. 942, 38 So. 687 (after cause submitted to judge).

**§ 1880. After Jury Retired.**

[Note 1; add:]

1910, *Garner v. State*, 97 Ark. 63, 132 S. W. 1010.

1906, *Watson v. Barnes*, 125 Ga. 733, 54 S. E. 723.

1912, *People v. Ferrone*, 204 N. Y. 551, 98 N. E. 8.

**§ 1884. Cross-Examination in General, etc.**[Note 1; *add*, as *Accord*.:]1905, *Miller v. Carnes*, 95 Minn. 179, 103 N. W. 877.

But where the *party opponent* is called, under the statutes (*ante*, § 916) permitting him to be treated as if on cross-examination, this is perhaps to be regarded as a stage in itself, so that the opponent cannot thereupon as of right testify further for himself, as if on redirect examination; the trial Court may therefore require him to wait till his own case is put in: 1900, *Jones v. Bradford*, 79 Minn. 396, 82 N. W. 651. 1904, *Olson v. Aubolee*, 92 Minn. 312, 99 N. W. 1128.

[Note 6, par. 1; *add*, under *Contra*.:]

1905, *Armour Packing Co. v. V. Y. Produce Co.*, — Ala. —, 39 So. 680, *semble* (the document cannot be put in until the cross-examiner's own case is opened).

[Note 6, after par. 2; *add*.:]

Otherwise, naturally, in Courts which do not accept the orthodox rule for cross-examination: 1903, *Kroetch v. Empire M. Co.*, 9 Ida. 277, 74 Pac. 868 ("The practice of allowing a party to identify and introduce exhibits on cross-examination of his adversary's witness . . . should seldom be permitted").

**§ 1890. Cross-Examining to One's Own Case; Law in Various Jurisdictions.**[Note 3; *add*.:]

CANADA: *B. C. St.* 1903-4, 3 & 4 Edw. VII, c. 18, Evidence Act Amendment Act, § 4 (repeals *St.* 1902, c. 22, § 6); this part of the repeal is an unfortunate step backwards, and should be reconsidered.

*Man. St.* 1906, 5 & 6 Edw. VII, c. 17, § 2 (amends *Rev. St.* 1902, c. 40, by adding Rule 460 A, that a party, etc. to a civil action "may be examined upon the trial thereof as if under cross-examination at the instance of the adverse party or parties, or any of them, and for that purpose may be compelled in the same manner, and subject to the same rules for examination, as any other witness to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter-testimony").

UNITED STATES: *Ark.*: 1909, *St. Louis I. M. & S. R. Co. v. Raines*, 90 Ark. 398, 119 S. W. 665 (*Austin v. State* cited; but the trial Court's discretion is conceded).

*Cal.* (rule for an accused): 1904, *People v. Teshara*, 141 Cal. 633, 75 Pac. 338 (like *People v. McMullings*, with qualifications). 1904, *People v. Podilla*, 143 Cal. 158, 76 Pac. 889 (rule applied in a bigoted fashion to prevent the impeachment of witnesses of the defendant). 1904, *People v. Buckley*, 143 Cal. 375, 77 Pac. 169. 1906, *People v. Soeder*, 150 Cal. 12, 87 Pac. 1016 (similar to *People v. Mullings*).

1908, *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407 (an example of the senselessness of the Federal rule, and the litigious gambling which it encourages).

*Conn.*: 1905, *Nichols v. Wentz*, 78 Com. 429, 62 Atl. 610 (rule applied to testimony to the execution of a will).

*Fla.*: 1905, *Hampton v. State*, 50 Fla. 55, 39 So. 421 (rule applied). 1912, *Padgett v. State*, 64 Fla. 389, 59 So. 947 (discretion of trial Court emphasized).

*Haw.*: 1904, *Ahmi v. Waller*, 15 Haw. 497, 501 (*Booth v. Buckley*, approved). 1904, *Flint v. Flint*, *ib.* 313 (similar).

*Ida.*: *St.* 1909, p. 334, Mar. 13 (quoted *ante*, § 916, n. 2).

*Ill.*: 1903, *Spohr v. Chicago*, 206 Ill. 441, 69 N. E. 515 (but the trial Court has a "large discretion"). 1904, *Dick v. Zimmermann*, 207 id. 636, 69 N. E. 754. 1904, *Chicago City R. Co. v. Creech*, 207 Ill. 37, 69 N. E. 919 (the cross-examiner may "elicit suppressed facts which weaken or qualify the case of the party introducing the witness or supporting the case of the party cross-examining"; no precedents cited). 1909, *Schmidt v. Chicago City*

## [Note 3 — continued]

R. Co., 239 Ill. 494, 88 N. E. 275 (after direct examination to a custom of intersecting street-railroads to give the right of way to the car which first arrived within 200 feet, a cross-examination as to the length of time required to run 200 feet, etc., would be improper; this illustrates the quibbling unpracticalness of the rule).

Ind.: 1905, *Osburn v. State*, 164 Ind. 262, 73 N. E. 601 ("When the direct examination opens on a general subject, the cross-examination may go into any phase of that subject"; said of the accused's conversations). 1905, *Westfall v. Wait*, 165 Ind. 353, 73 N. E. 1089 (same rule, applied to testimony to a testator's sanity). 1907, *Eacock v. State*, 169 Ind. 488, 82 N. E. 1039 (the trial Court's discretion controls). 1912, *Crawfordsville Trust Co. v. Ramsay*, 178 Ind. 258, 98 N. E. 177 (probate of a will; the testator's physician being examined by the plaintiffs on matters not involving sanity, the opponents on cross-examination asked the physician's opinion as to the testator's sanity; the trial Court's discretion in excluding this was held correctly exercised; it was right to leave the matter to the trial Court's discretion; but the ruling of the trial Court shows the absurdity of the present rule in practice).

Ind. Terr.: 1905, *Miller v. Springfield W. Co.*, 6 Ind. T. 115, 89 S. W. 1011 (under Annot. St. 1899, § 2012, the trial Court may allow cross-examination on matters not touched on in the direct examination).

La.: 1912, *State v. Oden*, 130 La. 598, 58 So. 351 (illegal liquor-selling; here the startling result was reached that unless the accused does on direct examination say something about having a Federal revenue liquor license — and would he mention it, unless he went gae daft on the stand? — he cannot be asked about it on cross-examination; this ruling effectually removes from the defendant's mind a really disagreeable dilemma — perjury or discovery — in taking the witness stand). 1913, *State v. Ballard*, 132 La. 491, 61 So. 537 (opinion not entirely clear).

Mich.: St. 1909, No. 307, p. 753, June 2 (quoted *ante*, § 916, n. 2).

Miss.: 1905, *Walton v. State*, 87 Miss. 296, 39 So. 689 (rule applied).

Mo.: For the *general rule*: 1905, *Ayers v. Wabash R. Co.*, 190 Mo. 228, 88 S. W. 608 ("What is called the 'orthodox rule' has always been the rule in this State"); for an *accused*: 1905, *State v. Wertz*, 191 Mo. 569, 90 S. W. 838 (*State v. Avery* approved). 1906, *State v. Feeley*, 194 Mo. 300, 92 S. W. 663 (rule applied). 1906, *State v. Barrington*, 198 Mo. 23, 95 S. W. 235 (rule applied). The following statute has now intervened: St. 1905, Apr. 6, p. 307 (inserting a new § 4655a into Rev. St. 1899, as follows: "A party to a cause, civil or criminal, against whom a witness has been called and given some evidence, shall be entitled to cross-examine said witness (except where a defendant in a criminal case is testifying in his own behalf) on the entire case; but this shall not be construed to entitle a defendant who has pleaded a counterclaim or set-off in a civil case to cross-examine a plaintiff's witness in respect thereto, but as to said counterclaim or set-off such witness (if examined by defendant in relation thereto) shall be deemed defendant's witness and be so examined in the course of the trial"; of this statute, only the second part has anything that could be construed as a change in the law; and such petty tinkering is impolitic, especially when it is based on the erroneous theory noted *ante*, § 1887, par. d). 1911, *State v. McDonough*, 232 Mo. 219, 134 S. W. 545 (wife of defendant; choking off cross-examination to character by means of the present rule). 1913, *State v. Foley*, 247 Mo. 607, 153 S. W. 1010 (accused).

Mont.: 1904, *State v. Howard*, 30 Mont. 518, 77 Pac. 50. 1906, *Borden v. Lynch*, 34 Mont. 503, 87 Pac. 609 (consideration of a note; the rule applies equally to a party-opponent). 1912, *State v. Biggs*, 45 Mont. 400, 123 Pac. 410 (liberal rule, leaving much to the trial Court's discretion).

N. J.: 1907, *Crosby v. Wells*, 73 N. J. L. 790, 67 Atl. 295 (cross-examination not restricted to matters of the direct examination, in case of a deposition taken out of the State under P. L. 1900, p. 375, formerly § 38 of St. 1874, Mar. 27, on Evidence). 1908, *Axel v. Kraemer*, 75 N. J. L. 688, 70 Atl. 367 (*Crosby v. Wells* followed). 1909, *Prout v. Bernards L. & S.*

## [Note 3 — continued]

Co., 77 N. J. L. 719, 73 Atl. 486 ("As to matters directly in issue or directly relevant to the issue, there is no discretionary power"; this goes too far; the preceding cases are not cited, and the distinction between other rules and the present rule is apparently not perceived).

N. D.: 1899, *Kaeppler v. Red R. V. N. Bank*, 8 N. D. 406, 410, 79 N. W. 869 (strict rule applied, though "much discretion should be given"). 1904, *Hogen v. Klabo*, 13 N. D. 319, 100 N. W. 847 (rule applied to an issue of payment on notes in a suit for a balance due; foregoing case not cited). 1905, *Schwobel v. Fugina*, 14 N. D. 375, 104 N. W. 848 (trial Court's discretion controls; moreover, "any fact in issue within the knowledge of the adverse party may be proved by cross-examination of him").

1909, *Leistikow v. Zuelsdorf*, 18 N. D. 511, 122 N. W. 340 (the original unamended pleading of the opponent, not admitted on cross-examination as an admission).

Okl.: 1904, *Woods v. Faurot*, 14 Okl. 171, 77 Pac. 346 (Federal rule illiberally applied).

Or.: 1904, *Goltra v. Pentland*, 45 Or. 254, 77 Pac. 129 (a good example of how the rule helps to suppress truth and reduce a trial to a game).

Pa.: 1905, *Quigley v. Thompson*, 211 Pa. 107, 60 Atl. 506 (negligence; rule applied).

S. D.: 1895, *State v. Bunker*, 7 S. D. 639, 642, 65 N. W. 33 (trial Court's discretion controls; here the complaining witness in bastardy). 1911, *Luick v. Arends*, — N. D. —, 132 N. W. 353 (on plaintiff's calling an opponent for cross-examination, his own counsel should ordinarily reserve his re-direct examination until his own case is put in).

U. S.: 1899, *Davis v. Coblenz*, 174 U. S. 719, 726, 19 Sup. 832 (rule of discretion applied). 1904, *Resurrection G. M. Co. v. Fortune G. M. Co.*, 129 Fed. 668, 674, 681, 685, 64 C. C. A. 180 ("In the Courts of the United States, the party on whose behalf a witness is called has the right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error," per Sanborn, J. To speak here of "reversible error" is to bow to the most bigoted fetish-like form of the rule; in view of *Wills v. Russell*, 100 U. S., *supra*, such a doctrine in the Federal Circuit Court of Appeals is an anachronism, as well as a reproach to the name of Justice. It is justly dissented from by Hook, J., who declares for the pristine rule leaving this subject "generally a matter within the sound discretion of the trial Court"; and by Thayer, J., who expressed the view that it was "over-technical, unnecessary, and unwise" to invoke the rule of "reversible error"; it is to be hoped that the opinion of these two judges will prevail in the practice of the Circuit Courts of Appeals). 1904, *Balliet v. U. S.*, 129 Fed. 689, 695, 64 C. C. A. 201 (rule applied to an accused taking the stand). 1904, *Garlich v. Northern P. R. Co.*, 131 Fed. 837, 67 C. C. A. 237 (cross-examination held proper on the facts). 1909, *Harrold v. Terr.*, 8th C. C. A., 169 Fed. 47 ("a violation of the right restricting cross-examination is reversible error," per Sanborn, J.; this utterly reprehensible rule is justly protested against by Adams, J., who points out that it was expressly repudiated by a majority of the judges in this circuit in *Resurrection Gold M. Co. v. Fortune Gold M. Co.*, and in *Balliet v. U. S.*, *supra*; the persistent attempt to fix this bigoted rule on the circuit should be discountenanced). 1909, *St. Louis & S. F. R. Co. v. Cundieff*, 8th C. C. A., 170 Fed. 319 (rule applied to a witness to a railroad-crossing accident). 1910, *Æolian Co. v. Standard M. R. Co.*, C. C. N. J., 176 Fed. 811 (rule applied). 1910, *Ferry-Hallock Co. v. Orange H. B. Co.*, C. C. N. J., 185 Fed. 816 (rule applied to patent-infringement cases; its absurdity is here illustrated).

Wash.: 1909, *Kinnane v. Conroy*, 52 Wash. 651, 101 Pac. 223 (trial Court's discretion).

Wis.: 1905, *Winn v. Itzel*, 125 Wis. 19, 103 N. W. 220 ("In case the witness is also a party to the action, a somewhat broader range is allowed"). 1912, *Guse v. Power M. & M. Co.*, 151 Wis. 400, 138 N. W. 195 (when an opponent is called for cross-examination as an adverse witness, under Stats. 1898, § 4068, his counsel may then immediately re-examine him, but not as to new matter forming his own case; explaining *O'Day v. Meyers*, 147 Wis. 549, 133 N. W. 605).

§ 1891. **Same: Qualifications of Each Rule.**

[*Note 7; add:*]

1907, *Isaac v. U. S.*, 7 Ind. Terr. 196, 104 S. W. 588.

§ 1893. **Same: What Constitutes Calling a Witness, etc., on Ordinary Subpoena, etc.**

[*Note 2; add, under Accord:*]

1906, *Harris v. Quincy O. & K. C. R. Co.*, 115 Mo. App. 527, 91 S. W. 1010.

[*Note 6; add:*]

1891, *Achilles v. Achilles*, 137 Ill. 589, 594, 28 N. E. 45 (party examined and cross-examined, and the deposition excluded because of interest; the cross-examination was then also held inadmissible for the party).

1904, *Bentley v. Bentley's Estate*, 72 Nebr. 803, 101 N. W. 976.

[*Note 7, l. 1; add, under Accord:*]

1905, *McDonald v. Smith*, 139 Mich. 211, 102 N. W. 668, *semble*.

1904, *Gussner v. Hawks*, 13 N. D. 453, 101 N. W. 898, *semble*.

§ 1895. **Same: Other Principles of Evidence discriminated, etc.**

[*Text, l. 5, after "stage"; add a new note a:*]

1905, *Ayers v. Wabash R. Co.*, 190 Mo. 228, 88 S. W. 608 (*Valliant, J.*, quoting this sentence, adds, "That is really the only essential difference in effect between the two rules").

§ 1896. **Re-Direct Examination.**

[*Note 1; add:*]

*Can.*: 1903, *R. v. Noel*, 6 Ont. L. R. 385 (*Blewett v. Tregonning*, followed).

*Georgia*: where the defendant in a criminal case merely makes a "statement" not under oath, he may by consent be cross-examined (*post*, § 2276, n. 5), but he may not then be re-examined by his own counsel, unless the trial Court in discretion so rules:

1877, *Brown v. State*, 58 Ga. 212. 1902, *Walker v. State*, 116 Ga. 539, 42 S. E. 787. 1912, *Lindsay, v. State*, 138 Ga. 818, 76 S. E. 369.

*Me.*: 1904, *Caven v. Bodwell G. Co.*, 99 Me. 278, 59 Atl. 285.

*N. J.*: 1911, *Brown v. Harriot*, 81 N. J. L. 484, 80 Atl. 479.

§ 1897. **Re-Cross-Examination, and Later Stages.**

[*Note 1, par. 1; add:*]

1909, *Lapointe v. Berlin Mills Co.*, 75 N. H. 294, 73 Atl., 406 (here applied to plaintiff's offer to exhibit his injured hand).

§ 1899. **Recall for Re-Cross-Examination.**

[*Note 1; add:*]

1904, *Howard v. Com.*, 118 Ky. 1, 80 S. W. 211, 81 S. W. 704.

1904, *People v. Hossler*, 135 Mich. 384, 97 N. W. 754.

1913, *State v. Fogleman*, 164 N. C. 458, 79 S. E. 879.

## § 1908. Witnesses merely Cumulative, etc.

[Note 1; add:]

*Dom.*: 1906, *Dodge v. The King*, 38 Can. Sup. 149, 152 (statute noted; but the strange doubt is expressed whether if more are improperly called the Court above may consider their testimony).

*Man.* St. 1908, 7-8 Edw. VII, c. 18, § 1 (adding § 61 to Rev. St. c. 57, Evidence Act; not more than three expert witnesses to be called on either side without leave of the judge; such leave to be applied for before examination of any experts).

*Ont.* St. 1909, c. 43, § 10 (like St. 1902, c. 15, § 1). 1912, *Rice v. Sockett*, Ont. D. C., 8 D. L. R. 84 (contract to build a silo; certain persons held experts, under the above statute, now 9 Edw. VII, c. 43, § 10, though not having a special technical education).

*Sask.* St. 1907, c. 12, Evidence Act, § 37 (like Can. St. 1902, c. 9).

*Mass.*: 1904, *White v. Boston*, 186 Mass. 65, 71 N. E. 75 (the limited number having been used, a lay witness of the opponent cannot be used as an expert on cross-examination).

*Mich.* St. 1905, No. 175 (limits the number to three on each side; quoted in full *ante*, § 562, n. 1).

1910, *People v. Dickerson*, 164 Mich. 148, 129 N. W. 199 (St. 1905, No. 175, held unconstitutional, but not as to the present point; see the case more fully cited *post*, § 2484, n. 1).

*Mo.*: 1906, *St. Louis M. & S. E. R. Co. v. Aubuchon*, 199 Mo. 352, 97 S. W. 867 (land damages; a ruling restricting the witnesses to four on each side, held unreasonable on the facts; but the opinion, though citing nine cases from other jurisdictions and two cases from an inferior court of Missouri, wholly ignores the four rulings in its own court, cited *infra*, notes 2 and 3; the Court's remark that "we are cited to no case by respondent that sustains such rule" will not properly account for such inattention to its own rulings, even on the part of a Minos so recently enthroned and so brilliant and sensible as the one who writes the opinion).

*Wash.*: 1904, *Swope v. Seattle*, 36 Wash. 113, 78 Pac. 607 (limitation to three witnesses to real estate value, held proper in discretion).

[Note 2; add:]

1912, *People v. Burke*, 18 Cal. App. 72, 122 Pac. 435.

1911, *People v. Arnold*, 248 Ill. 169, 93 N. E. 786 (number limited to twenty-five on each side).

1906, *State v. Rodriguez*, 115 La. 1004, 40 So. 438 (under St. 1894, No. 67, a limitation of defendant's character-witnesses to six, with liberty to have process for more at his own cost, held proper).

1909, *State v. Madison*, 23 S. D. 584, 122 N. W. 647 (impeaching witnesses here limited to four on a side).

[Note 3; add:]

1907, *State v. Uzzo*, 6 Pen. Del. 212, 65 Atl. 775 (rule of Court limiting to six witnesses on the same fact, held applicable in capital cases).

1909, *Trometer v. District*, 24 D. C. App. 242, 247 (wife's testimony on a certain point, excluded as cumulative).

1909, *West Skokie Drainage District v. Dawson*, 243 Ill. 175, 90 N. E. 377 (obscure and rambling opinion; apparently the rule accepted is that the trial Court's ruling cannot be made before testimony begun and cannot be made to include rebuttal testimony; unsound on both points).

1861, *Calvert v. Carter*, 18 Md. 73, 109 (obscure; but *semble contra*).

1909, *Campbell v. Campbell*, 30 R. I. 63, 73 Atl. 354 (limitation of the number of witnesses to those specified by counsel as a condition of getting an adjournment, held unfair on the facts; *Blodgett, J., diss.*; elaborate opinions, criticizing the various precedents).

[*Note 3 — continued*]

1905, *Carrara P. A. Co. v. Carrara P. Co.*, 137 Fed. 319, C. C. (depositions of 250 witnesses were allowed, no special reason for limitation of number being shown).

[*Note 4; add:*]

For the argument as to a constitutional *right to process*, see *post*, § 2191.

### § 1909. Judge as Witness.

[*Note, 5; add:*]

*Okl.*: 1911, *State ex rel. Nowakowski v. Lockridge*, 6 *Okl. Cr.* 208, 118 *Pac.* 152 (that a judge conducted the preliminary examination does not disqualify him from presiding at the trial with the possibility of becoming a witness; the above text approved).

*Or.*: *Codes & Gen. L.* 1892, § 856 (like *Cal. C. C. P.* § 1883, substituting "former case" for "such case"). 1904, *State v. Houghton*, 45 *Or.* 110, 75 *Pac.* 887 (judge allowed to testify on the question of a witness' self-contradiction on the former trial). 1909, *State v. Finch*, 54 *Or.* 482, 103 *Pac.* 505 (judge's testimony on a trivial matter at the defendant's instance, held not to require substitution of another judge).

*Wash.*: 1896, *Maitland v. Zanga* (quoted *supra*). 1905, *State v. Bringgold*, 40 *Wash.* 12, 82 *Pac.* 132 (justice of the peace, allowed to testify to the proceedings on arraignment of the now defendant).

### § 1910. Juror as Witness.

[*Note 1, par. 1; add:*]

*Or.*: *Codes & Gen. L.* 1892, § 856 (like *C. C. P.* § 1883, substituting "former case" for "such case").

[*Note 1, par. 4; add:*]

Distinguish also the question whether a juror may at a *subsequent trial* disclose knowledge obtained by him at a *view of premises* on a former trial (*post*, § 2346).

### § 1911. Counsel or Attorney as Witness.

[*Note 9; add:*]

*Del.*: 1910, *Real Estate Trust Co. v. Wilmington & N. C. E. R. Co.*, 9 *Del. Ch.* 99, 77 *Atl.* 756 (counsel allowed to testify to service of notice on an opponent; *Pritchard v. Henderson* cited as if discredited; the opinion seems unaware of the radical distinction between the present question and that of § 2312, *post*).

*Ill.*: 1907, *Wilkinson v. People*, 226 *Ill.* 135, 80 *N. E.* 699 (prior rulings approved, and "the unenviable attitude of a willing witness and a zealous attorney" commented on). 1907, *Bishop v. Hilliard*, 227 *Ill.* 382, 81 *N. E.* 403. 1908, *Onstott v. Edel*, 232 *Ill.* 201, 83 *N. E.* 806; 1908, *McConnell v. Brown*, 232 *Ill.* 336, 83 *N. E.* 854. 1908, *Glanz v. Zinbek*, 233 *Ill.* 22, 84 *N. E.* 36 (attorney admitted, but practice disparaged). 1909, *Reavely v. Harris*, 239 *Ill.* 526, 88 *N. E.* 238 (allowed on the facts). 1909, *Fitzgerald v. Allen*, 240 *Ill.* 80, 88 *N. E.* 240. 1909, *Nix v. Thackaberry*, 240 *Ill.* 352, 88 *N. E.* 811 ("We have been compelled too frequently of late to comment on counsel testifying in cases which they are themselves conducting"). 1911, *Wetzel v. Firebaugh*, 251 *Ill.* 190, 95 *N. E.* 1085 ("it is not proper" for a solicitor in the case to testify to the testatrix' competency). 1911, *Bailey v. Beall*, 251 *Ill.* 577, 96 *N. E.* 567 (and the fact of a witness having been attorney in the cause may be ascertained, for the purpose of affecting his credit). 1913, *Mithen v. Jeffery*, 259 *Ill.* 372, 102 *N. E.* 778 (attorney testifying to conversation with the opponent). 1914, *Judy v. Judy*, 261 *Ill.* 470, 104 *N. E.* 256. (Does this series of recent rulings indicate that attorneys in Illinois are more callous in disregard of this rule of ethics,

[*Note 9 — continued*]

or that trial Courts are more ignorant of it, or that the Supreme Court is more tender of it, than elsewhere? In any event, it is not fitting that the Supreme Court should content itself with empty comment.)

*Ia.*: 1908, *Ross v. Ross*, 140 *Ia.* 51, 117 *N. W.* 1105 (admissible, but open to reflection).

*Utah*: 1911, *State v. Greene*, 38 *Utah* 389, 115 *Pac.* 181 (an attorney participating in a trial is competent, but it is improper for him to testify; *McCarty, J.*, diss. on the ground that the attorney in this case should have been excluded from one or the other capacity; the dissenting judge's condemnation of the practice merits wider acceptance; courts are too lax in enforcing this rule of moral decency).

§ 1918. **Theory of the Opinion Rule.**

[*Note 1; add.*]

1905, *State v. Miller*, 71 *N. J. L.* 527, 60 *Atl.* 202 (accused's clothing; comparison between spots on it now and spots on portions cut off and destroyed, allowed).

§ 1919. **Erroneous Theories; (2) "Opinion" and "Fact."**

[*Text*, p. 2555, at end of quoted passages; *add* a new note *a.*]

*Accord*: *Atwood v. Atwood*, 84 *Conn.* 169, 79 *Atl.* 59 (opinion by *Wheeler, J.*).

§ 1920. **Erroneous Theories; (2) Usurping the Function of the Jury.**

[*Note 2; add.*]

1904, *State v. McGruder*, 125 *Ia.* 741, 101 *N. W.* 646.

[*Note 3; add.*]

1907, *Dunn, J., in Chicago Union Traction Co. v. Roberts*, 229 *Ill.* 481, 82 *N. E.* 401 (allowing a question whether a certain injury was the cause of the plaintiff's present condition): "It is not the province of the expert to act as judge or jury. He cannot be called upon to decide a question of fact. . . . It was a question for the jury to determine. But it was impossible for them to answer without hearing the opinions of physicians. These opinions did not invade the province of the jury. . . . In any event the testimony was merely the opinion of the witness given as such, upon a state of facts assumed to be true. It still remained for the jury to determine the facts; and the opinion was nevertheless an opinion only."

§ 1921. **Same: (3) Opinions on the Very Issue, etc.**

[*Note 1; add.*]

1905, *Sun Ins. Office v. Western W. M. Co.*, 72 *Kan.* 41, 82 *Pac.* 513 (whether there was a "fire"; the issue being as to the spontaneous combustion of wool).

[*Note 2; add.*]

1906, *Goddard v.ENZLER*, 222 *Ill.* 462, 78 *N. E.* 805 (citing *Chicago & A. R. Co. v. R. Co.*, *supra*, n. 1, and qualifying it by saying that "it is not always a good objection to such a question that it calls for an opinion upon a question to be decided by the jury," provided it is not "the ultimate question to be found by the jury").

1911, *State v. Lindsay*, 85 *Kan.* 192, 116 *Pac.* 209, *semble*.

§ 1922. **Same: (4) Opinion admissible, etc.**

[*Note 1; add.*]

1904, *Morrow v. National Mas. Acc. Ass'n*, 125 *Ia.* 633, 101 *N. W.* 468 (experts excepted).

§ 1928. **Form of the Opinion Rule, etc.**

[*Text*, p. 2562, at the end of par. 1; *add* a note 1:]

<sup>1</sup> Approved by Keith, P., in *Hot Springs L. & M. Co. v. Revercomb*, 110 Va. 240, 65 S. E. 557 (1909).

§ 1929. **Future of the Opinion Rule.**

[*Text*, p. 2563, last line; *add* a new note 1a:]

<sup>1a</sup> Approved in *Pope v. State*, 174 Ala. 63, 57 So. 245.

§ 1935. **Sanity ; Facts Observed need not Precede Statement of Opinion.**

[*Note*, 1 par. 1; *add*.:]

1909, *State v. Rumble*, 81 Kan. 16, 105 Pac. 1.

§ 1938. **Laymen's Opinions as to Sanity ; State of the Law, etc.**

[*Note* 1; *add*.:]

*Ala.*: 1904, *Parrish v. State*, 139 Ala. 16, 36 So. 1012 (an opinion to insanity must be preceded by a statement of observed facts; but an opinion to sanity need only negative generally any data of insanity). 1904, *Porter v. State*, 140 Ala. 87, 37 So. 81. 1905, *Braham v. State*, 143 Ala. 28, 38 So. 919 (rule followed; but the addition of "State any other peculiarities about him" will make the question objectionable; this sort of quiddity may seem to our Courts to be worth enunciating; but they may be assured that from the standpoint of clear-minded and efficient justice it is a senseless mumbling; here its absurdity of quibbling is further shown by the allowance in the same case of a question to another witness, "Did you observe anything unusual, peculiar, or unnatural?").

*Ark.*: 1905, *Byrd v. State*, 76 Ark. 286, 88 S. W. 956.

*Cal.*: the prior decisions are now harmonized by the rule that a person who is an "intimate acquaintance," under C. C. P. § 1870, *supra* (cited and construed *ante*, § 689), may testify to the condition of sanity or insanity in general, while a person who is not an "intimate acquaintance," but has still observed the party's conduct, may state whether his conduct or appearance as observed was rational or irrational: 1904, *People v. Manoogian*, 141 Cal. 592, 75 Pac. 177.

*Conn.*: 1905, *Nichols v. Wentz*, 78 Conn. 429, 62 Atl. 610.

*Fla.*: 1906, *Leaptrot v. State*, 51 Fla. 57, 40 So. 616 (specific facts must be stated).

*Ga.*: 1911, *Strickland v. State*, 137 Ga. 115, 72 S. E. 922 (lay opinion admitted; virtually repudiating the doctrine that the observed data must be stated by the witness beforehand, as laid down in *Welch v. Stipe*).

*Ill.*: 1904, *Chicago U. T. Co. v. Lawrence*, 211 Ill. 373, 71 N. E. 1024 ("If a non-expert witness gives an opinion without sufficient knowledge of facts to support it, opposing counsel may upon cross-examination show that it is of little value"). 1906, *Compber v. Browning*, 219 Ill. 429, 76 N. E. 678 (whether a testatrix was "easily influenced or susceptible to flattery," excluded). 1909, *Snell v. Wilson*, 239 Ill. 279, 87 N. E. 1022 (importance of latitude on cross-examination, emphasized). 1910, *Graham v. Deuterman*, 244 Ill. 124, 91 N. E. 61. 1913, *Brainard v. Brainard*, 259 Ill. 613, 103 N. E. 45 ("It is only after he has detailed the facts and circumstances . . . that the opinion becomes of any value"). *Ind.*: 1906, *Heaston v. Krieg*, 167 Ind. 101, 77 N. E. 805. 1906, *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755 (rule applied). 1908, *Lawson v. State*, 171 Ind. 431, 84 N. E. 974 (the facts must be stated).

*Ia.*: 1904, *Stutsman v. Sharpless*, 125 Ia. 335, 101 N. W. 105. 1905, *Lucas v. McDonald*, 126 Ia. 678, 102 N. W. 532 (precedent statement of data not required for witness to sanity). 1906, *State v. Hayden*, 131 Ia. 1, 107 N. W. 929 (a witness to sanity need not limit his opinion

[*Note 1 — continued*]

to data expressly detailed by him). 1909, *McBride v. McBride*, 142 Ia. 169, 120 N. W. 709 (witness to mental unsoundness must speak only as to the period of observation; in this State, there is much petty and futile learning about the details of the present rule). 1909, *Spiers v. Hendershott*, 142 Ia. 446, 120 N. W. 1058 (non-expert must first detail all circumstances observed).

*Kan.*: 1905, *Howard v. Carter*, 71 Kan. 85, 80 Pac. 61. 1909, *State v. Rumble*, 81 Kan. 16, 105 Pac. 1 (the witness may first state the observed data, or he need not if opportunity to cross-examine is given; prior rulings examined).

*Ky.*: but the qualification referred to is now once more dallied with: 1906, *Stafford v. Tarter*, — Ky. —, 96 S. W. 1127. 1911, *Banks v. Com.*, 145 Ky. 800, 141 S. W. 380.

*La.*: 1904, *State v. Lyons*, 113 La. 959, 37 So. 890 (an opinion to sanity need not be preceded by a recital of the facts and reasons; as to insanity, the question is left open).

*Md.*: 1904, *Watts v. State*, 99 Md. 30, 57 Atl. 542 (rule applied to exclude and admit certain opinions). 1905, *Struth v. Decker*, 100 Md. 368, 59 Atl. 727 (some opinions admitted and some excluded on the facts; opinion obscure). 1914, *Whisner v. Whisner*, — Md. —, 89 Atl. 393 (the witness must first state the data for his opinion).

*Mass.*: 1904, *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358 ("From these facts . . . what do you infer in your own mind as to Mr. J.'s mental capacity?" excluded; but "Did you ever notice anything to indicate that he was not of sound mind?" admitted; this local rule of logomachy, unworthy though it is of the dignity of justice, seems to be consistently and skilfully applied by bench and bar). 1908, *Gorham v. Moor*, 197 Mass. 522, 84 N. E. 436 (whether they ever saw or heard anything that indicated anything singular or unusual respecting her mental condition, allowed). 1909, *Jenkins v. Weston*, 200 Mass. 488, 86 N. E. 955. 1911, *Leary v. Webber Co.*, 210 Mass. 68, 96 N. E. 136 (rule applied to testimony about a half-witted employee). 1912, *Com. v. Spencer*, 212 Mass. 438, 99 N. E. 266 (noting that a physician's opinion is an exception to the general rule).

*Mich.*: 1904, *Roberts v. Bidwell*, 136 Mich. 191, 98 N. W. 1000 (rule of *O'Connor v. Madison* applied). 1905, *Hibbard v. Baker*, 141 Mich. 124, 104 N. W. 399 (rule of *Prentis v. Bates* applied, in an instance which glaringly exhibits the fallacy of that rule).

*Minn.*: 1903, *Scott v. Hay*, 90 Minn. 304, 97 N. W. 106 (and even experts must first detail the facts observed).

*Mo.*: 1906, *State v. Speyer*, 194 Mo. 459, 91 S. W. 1075 (exclusion of the reasons for the opinion of insanity, held erroneous).

*Nebr.*: 1904, *Bothwell v. State*, 70 Nebr. 747, 99 N. W. 669. 1906, *Issac's Estate*, — Nebr. —, 107 N. W. 1016. 1907, *Wilson's Estate*, 78 Nebr. 758, 111 N. W. 788 (where the witnesses testify to sanity, the particular data need not first be stated; prior cases reviewed).

*N. H.*: 1903, *Pattee v. Whitcomb*, 72 N. H. 249, 56 Atl. 459 (discretion of the trial Court controls as to the witness' qualification).

*N. Mex.*: 1911, *Terr. v. McNab*, 16 N. M. 625, 120 Pac. 907 (admitting lay opinion; following *Com. M. L. Ins. Co. v. Lathrop*, U. S., but ignoring *Terr. v. Padilla*).

*N. Y.*: 1904, *People v. Spencer*, 179 N. Y. 408, 72 N. E. 461 (rule applied). 1906, *Myer's Will*, 184 N. Y. 54, 76 N. E. 920 ("What was the impression these acts and conversations made on you as to whether they were rational or irrational?" "She was irrational"; the answer held improper). 1906, *People v. Pekarz*, 185 N. Y. 470, 78 N. E. 294 (a sweetened morsel of quibbling; the Court also complacently declares that the modern tweedledee rule has "run through the cases from an early day"!). 1909, *People v. Hill*, 195 N. Y. 16, 87 N. E. 813 (quibbles applied).

*Or.*: 1906, *Lassas v. McCarty*, 47 Or. 474, 84 Pac. 76 (statute applied).

*S. D.*: Lay opinion is admitted: 1903, *Halde v. Schultz*, 17 S. D. 465, 97 N. W. 369.

*Tenn.*: 1907, *Atkins v. State*, 119 Tenn. 458, 105 S. W. 353.

*Tex.*: 1911, *Turner v. State*, 61 Tex. Cr. 97, 133 S. W. 1052 (the witness must first state the conduct which he has observed; but if his opinion is that the person is sane, it is sufficient to state that he has never noticed conduct indicating insanity; prior cases reviewed).

[*Note 1 — continued*]

U. S.: 1909, *Turner v. American Security & T. Co.*, 213 U. S. 257, 29 Sup. 420. 1910, *Waller v. U. S.*, 8th C. C. A., 179 Fed. 810.

W. Va.: 1912, *Freeman v. Freeman*, 71 W. Va. 303, 76 S. E. 657.

Wis.: 1907, *Duthey v. State*, 131 Wis. 178, 111 N. W. 222 (proper form of question stated).

### § 1943. Opinion as to Value; (1) Property-Value.

[*Note 2; add:*]

Ala.: 1905, *Alabama C. C. & I. Co. v. Turner*, 145 Ala. 639, 39 So. 603 (mill site). 1906, *Central of Ga. R. Co. v. Keyton*, 148 Ala. 675, 41 So. 918 ("State if your property was damaged by the overflow," held improper, but "State the effect of the overflow on your houses and lot," held proper; if Justice is to be regarded as a machine for splitting hairs, then the machine works very delicately in this State).

Ga.: 1909, *Miller v. Luckey*, 132 Ga. 581, 64 S. E. 658 (land-trespass; value before and value after must be stated).

Ill.: 1911, *Springfield & N. E. Traction Co. v. Warrick*, 249 Ill. 470, 94 N. E. 933 (railroad fence; opinion that the amount of damage to the plaintiff by reason of stock trespass would be \$10 a year, etc., held improper).

Ind.: 1906, *Schmoe v. Cotton*, 167 Ind. 364, 79 N. E. 184 (moreover, "a judgment should not be reversed merely because a part or all of the witnesses have stated the damages, instead of the value, where the damages depend wholly on the value before and after the injury").

Ia.: 1905, *Parrott v. Chicago G. W. R. Co.*, 127 Ia. 419, 103 N. W. 352 (damage under eminent domain taking, excluded). 1907, *Iowa-Minn. Land Co. v. Conner*, 136 Ia. 674, 112 N. W. 820 (contract for sale of land).

Md.: 1905, *Baltimore B. R. Co. v. Sattler*, 100 Md. 306, 59 Atl. 654 (smoke-nuisance; expert testimony to the amount of damage and the diminution of land value, excluded). 1906, *Western Union T. Co. v. Ring*, 102 Md. 677, 62 Atl. 801 (value of trees cut, excluded).

Mich.: 1905, *Withey v. Pere Marquette R. Co.*, 141 Mich. 412, 104 N. W. 773 (personalty injured in a railroad collision; testimony to the damage, allowed); and cases cited *ante*, § 716.

Minn.: 1908, *Mandery v. Mississippi & R. R. B. Co.*, 105 Minn. 3, 116 N. W. 1027 ("What was the damage, or how much less was the land worth, etc.?" allowed).

Mo.: 1906, *Southern Mo. & A. R. Co. v. Woodard*, 193 Mo. 656, 92 S. W. 470.

Mont.: 1905, *Watson v. Colusa P. M. & S. Co.*, 31 Mont. 513, 79 Pac. 14 (land injured by smelting works; value before and after, admitted; opinion obscure).

Nebr.: 1906, *McCook v. McAdams*, 76 Nebr. 1, 106 N. W. 988 (damage by flooding).

N. Y.: 1907, *Shaw v. N. Y. Elev. R. Co.*, 187 N. Y. 186, 79 N. E. 984 (rule of *Roberts v. R. Co.* held not to exclude certain opinions to value).

N. C.: 1908, *Wade v. Carolina T. & T. Co.*, 147 N. C. 219, 60 S. E. 987 (decrease in land-value by telegraph structure, allowed).

Or.: 1904, *Pacific L. S. Co. v. Murray*, 45 Or. 103, 76 Pac. 1079 (trespass by sheep; amount of damages, excluded; citing prior cases in this jurisdiction).

1913, *Portland v. Tigard*, 64 Or. 404, 129 Pac. 755 (street benefits; expert testimony to the amount of benefit and damage, allowed).

Pa.: as to eminent-domain taking: *Contra, semble*: 1908, *Byrne v. Cambria & C. R. Co.*, 219 Pa. 217, 68 Atl. 672.

Tenn.: 1904, *Wray v. Knoxville L. F. & J. R. Co.*, 113 Tenn. 544, 82 S. W. 471 (damage by taking land, allowed; settling a prior conflict of rulings).

Wash.: 1904, *Ingram v. Wishkah Boom Co.*, 35 Wash. 191, 77 Pac. 34 (value of realty before and after injury, and value of personalty destroyed; allowed). 1905, *Johnson v. Tacoma*, 41 Wash. 51, 82 Pac. 1092 (value of benefits to realty; *S. & M. R. Co. v. Gilchrist*, followed).

**§ 1944. Same : (2) Other Values, etc.**

[*Note 1; add, under Services:*]

- 1908, *Ferry v. Henderson*, 32 D. C. App. 41 (building superintendent's services).  
 1906, *Croft v. Chicago R. I. & P. R. Co.*, 134 Ia. 411, 109 N. W. 723 (wife's services).  
 1907, *Morehead's Trustee v. Anderson*, 125 Ky. 77, 100 S. W. 340 (attorney's services).

[*Note 1; add, under Personal Injuries:*]

- 1906, *Cincinnati Traction Co. v. Stephens*, 75 Oh. 171, 79 N. E. 235 (father's opinion of value of child's services, excluded).  
*Contra*: 1905, *Roundtree v. Charleston & W. C. R. Co.*, 72 S. C. 474, 52 S. E. 231 (plaintiff allowed to testify to the money amount of injury to her health).

[*Note 1; add, under Sundries:*]

- 1904, *McCrary v. Pritchard*, 119 Ga. 876, 47 S. E. 341 (amount of damages by false representations, excluded).  
 1911, *Jenkins v. Commercial Nat'l Bank*, 19 Ida. 290, 113 Pac. 463 (wrongful foreclosure of a mortgage, excluded).  
 1909, *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364 (libel on the plaintiff by publishing a forged testimonial for pills; physicians' testimony that a testimonial of this sort was damaging to the person's reputation, held improper; on the record, one of the most unjust of quibbles).  
 1913, *Nelson Theatre Co. v. Nelson*, 216 Mass. 30, 102 N. E. 926 (value of a theatre leasehold, based on gross receipts and net profits, held not improperly admitted in discretion).  
 1912, *Easley Light & P. Co. v. Commonwealth P. Co.*, 172 Mich. 78, 137 N. W. 663 (estimate of proportion of cost of coal used, due to obstruction of water-power, admitted; liberal opinion by Stone, J.).  
 1907, *Crosby v. Wells*, 73 N. J. L. 790, 67 Atl. 295 (whether oil lands were profitable territory or not, allowed).

**§ 1947. Opinion as to Insurance Risk; State of the Law, etc.**

[*Note 3, part 2; add:*]

- 1904, *Hanna v. Orient Ins. Co.*, 109 Mo. App. 152, 82 S. W. 115, *semble* (fire).

[*Note 4, part 2; add:*]

- 1905, *Prudential F. Ins. Co. v. Alley*, 104 Va. 356, 51 S. E. 812 (fire; erection of adjoining building).

[*Note 10; add:*]

- 1906, *Provident S. L. Assur. Soc'y v. Wayne's Adm'r*, — Ky. —, 93 S. W. 1049, *semble* (life; following *Penn M. L. Ins. Co. v. M. S. B. & T. Co.*, Fed., *infra*).

**§ 1951. Opinion as to Conduct (Care, Safety, etc.); State of the Law, etc.**

[*Note 1; add:*]

- Ala.*: 1904, *Sloss-Sheffield S. & I. Co. v. Mobley*, 139 Ala. 425, 36 So. 181 (whether a mode of coupling was safe, allowed). 1904, *Davis v. Kornman*, 141 Ala. 479, 37 So. 789 (the proper precaution to guard a dangerous machine, allowed). 1904, *Northern Ala. R. Co. v. Shea*, 142 Ala. 119, 37 So. 796 (that a certain speed was dangerous, allowed). 1905, *Western U. Tel. Co. v. Merrill*, 144 Ala. 618, 39 So. 121 (that everything was done to send a message, etc., excluded). 1905, *Wallace v. North Ala. T. Co.*, 145 Ala. 682, 40 So. 89 (whether it was impossible to stop a car, allowed). 1906, *Williamson I. Co. v. McQueen*, 144 Ala.

[*Note 1 — continued*]

265, 40 So. 306 (whether a furnace was in good condition, etc., allowed). 1906, Birmingham R. L. & P. Co. v. Martin, 148 Ala. 8, 42 So. 618 (to an engineer, whether he handled the engine carefully, not allowed). 1907, Southern Coal & C. Co. v. Swinney, 149 Ala. 405, 42 So. 808 (whether a latch was safe, allowed). 1912, Alabama C. G. & A. R. Co. v. Heald, 178 Ala. 636, 59 So. 461 ("The motorman had no time to stop the car," excluded). *Ariz.*: 1904, Huachuca W. Co. v. Swain, 4 *Ariz.* 113, 77 *Pac.* 619 (whether a person could "fail to perceive" a ditch, excluded; with a disquisition on the tweedledum and tweedledee of this subject).

*Ark.*: 1910, Dardanelle P. B. & T. Co. v. Croom, 95 *Ark.* 284, 129 *S. W.* 280 (that a guard rail was built "in an improper manner" and was not "safe," allowed).

*Cal.*: 1903, Luman v. Golden A. C. M. Co., 140 *Cal.* 700, 74 *Pac.* 307 (whether a hoisting-machine was safe, excluded). 1906, Bundy v. Sierra L. Co., 149 *Cal.* 772, 87 *Pac.* 622 (safe mode of constructing a trestle, not decided).

*Colo.*: 1904, Wilson v. Harnette, 32 *Colo.* 172, 75 *Pac.* 395 (whether an ore lead would justify expense in following, allowed). 1913, Meeker v. Fairfield, — *Colo.* —, 136 *Pac.* 471 (whether a crosswalk was safe, excluded).

*Conn.*: 1905, Campbell v. New Haven, 78 *Conn.* 394, 62 *Atl.* 665 (whether a sidewalk was in safe condition for travel, allowed). 1912, Schafer, Jr. & Co. v. Ely, 84 *Conn.* 501, 80 *Atl.* 775 (whether a building had been constructed in a workmanlike manner and according to plans, allowed; liberal opinion, by Wheeler, J.).

*Fla.*: 1906, Jacksonville El. Co. v. Sloan, 52 *Fla.* 257, 42 *So.* 516 (whether "all precautions possible" were taken, allowed).

*Ga.*: 1905, Southern R. Co. v. Cunningham, 123 *Ga.* 90, 50 *S. E.* 979 (whether cars were managed in a way "unusual or unnecessary," allowed). 1905, Evans v. The Josephine Mills, 124 *Ga.* 318, 52 *S. E.* 538 (whether a machine was dangerous, not allowed, for non-experts).

*Haw.*: 1906, Terr. v. Cotton, 17 *Haw.* 618, 635 (whether it was safe or prudent to moor a dredger, etc., allowed).

*Ida.*: 1911, Knauf v. Dover L. Co., 20 *Ida.* 773, 120 *Pac.* 157 (proper method of constructing a slasher, allowed).

*Ill.*: 1904, Henrietta Coal Co. v. Campbell, 211 *Ill.* 216, 71 *N. E.* 863 (whether certain conditions of a roadway made it safe, allowed, for experts). 1905, Kellyville Coal Co. v. Strine, 217 *Ill.* 516, 75 *N. E.* 375 (practicability of using crossbar props in a mine, allowed). 1905, Siegel, Cooper & Co. v. Trcka, 218 *Ill.* 559, 75 *N. E.* 1053 (whether the construction of an elevator door was safe, excluded). 1906, Schillinger Bros. Co. v. Smith, 225 *Ill.* 74, 80 *N. E.* 65 (whether boards were fit for scaffolding, not decided). 1908, Yarber v. Chicago & A. R. Co., 235 *Ill.* 589, 85 *N. E.* 928 (whether a mode of raising a car was "reasonably safe," excluded). 1913, Keefe v. Armour & Co., 258 *Ill.* 28, 101 *N. E.* 252 (whether a method of generating gas in a tank was reasonably safe, excluded).

*Ia.*: 1904, Collins v. Chicago, M. & St. P. R. Co., 122 *Ia.* 231, 97 *N. W.* 1103 (whether a cattle-gate was sufficient, excluded). 1905, Schroeder v. Chicago & N. W. R. Co., 127 *Ia.* 365, 103 *N. W.* 985 (whether an unblocked switch-frog is dangerous, allowed, for experts). 1905, Hofacre v. Monticello, 128 *Ia.* 239, 103 *N. W.* 488 (whether ice elsewhere was as bad, etc., allowed on cross-examination). 1905, German Ins. Co. v. Chicago & N. W. R. Co., 128 *Ia.* 386, 104 *N. W.* 361 (whether sparks could pass a netting, whether an engine could be operated without emitting cinders, etc., allowed). 1906, Hamner v. Janowitz, 131 *Ia.* 20, 108 *N. W.* 109 (the proper and safe method of structure for a crane-track, allowed). 1909, Bruggeman v. Illinois C. R. Co., 147 *Ia.* 187, 123 *N. W.* 1007 (whether a train could have been stopped more quickly, excluded). 1913, Escher v. Carroll Co., — *Ia.* —, 141 *N. W.* 38 (whether a bridge was reasonably safe, excluded; on this point, this Court does not seem to be able to free itself from the shackles of the Opinion rule as courageously as its repute demands).

*Kan.*: 1911, Duncan v. Atchison T. & S. F. R. Co., 86 *Kan.* 112, 119 *Pac.* 356 (whether a

[*Note 1 — continued*]

bridge was a safe place for coupling cars, not allowed). 1913, *Root v. Cudahy P. Co.*, 88 Kan. 413, 129 Pac. 147 (whether an elevator was safe, not allowed).

*Ky.*: 1913, *Newport R. M. Co. v. Mason*, 152 Ky. 224, 153 S. W. 220 (safety of a floor covering, allowed).

*Md.*: 1908, *Commissioners v. State*, 107 Md. 210, 68 Atl. 602 (what was necessary to safeguard a bridge, excluded; the deplorable extreme of this ruling may be gathered from the circumstance that though the witness was "a former keeper of this bridge," the opinion states that he "was not shown to possess any special skill or knowledge derived from or relating to any trade, profession, or technical pursuit which would qualify him to instruct the jury"; if there is no presumption that a bridge-keeper knows something special about safeguards for bridges, then there ought to be none that a judge knows something special about the law of evidence).

1908, *Fletcher v. Dixon*, 107 Md. 420, 68 Atl. 875 ("Please state whether or not in your opinion that horse was fit for a lady to drive," excluded; thus is Common Sense shut out of court and Scholasticism enshrined on an altar). 1913, *Capital Traction Co. v. Contrer*, 120 Md. 78, 87 Atl. 904 (whether a motorman could have stopped the car in time, excluded).

*Mass.*: 1904, *Meehan v. Holyoke St. R. Co.*, 186 Mass. 511, 72 N. E. 61 (proper way of stringing telegraph wires, excluded). 1906, *Erickson v. American S. & W. Co.*, 193 Mass. 119, 78 N. E. 761 (that cast-iron was unsuitable for a steam-pipe, allowed). 1912, *Robinson v. Springfield St. R. Co.*, 211 Mass. 483, 98 N. E. 576 ("Was there anything you could have done to avoid the collision?" held proper on the facts).

*Mich.*: 1904, *Johnson v. Detroit & M. R. Co.*, 135 Mich. 353, 97 N. W. 760 (efficiency of a cattle-guard, allowed).

*Minn.*: 1904, *McDonald v. Duluth*, 93 Minn. 206, 100 N. W. 1102 (whether a railing was safe, excluded). 1905, *Scarlotta v. Ash*, 95 Minn. 240, 103 N. W. 1025 (that a machine "operated all right," allowed). 1906, *Carlin v. Kennedy*, 97 Minn. 141, 106 N. W. 340 (whether a machine could be guarded, etc., allowed).

*Mo.*: 1908, *Meily v. St. Louis & S. F. R. Co.*, 215 Mo. 567, 114 S. W. 1013 (how many men required to load a car, allowed).

*Nebr.*: 1908, *Maxson v. Case Threshing M. Co.*, 81 Nebr. 546, 116 N. W. 281 (that a mode of putting on a belt was dangerous, allowed).

*N. C.*: 1904, *Marks v. Harriet Cotton Mills*, 135 N. C. 287, 47 S. E. 432 (whether cog-wheels should have been covered, etc., not allowed).

*Okla.*: 1912, *Hicks v. Davis*, 32 Okl. 195, 120 Pac. 260 (whether a gang plank was constructed in a prudent mode, excluded).

*Or.*: 1911, *Weiss v. Kohlhausen*, 58 Or. 144, 113 Pac. 46 (whether an excavation was necessary, allowed).

*S. C.*: 1904, *Koon v. Southern Ry.*, 69 S. C. 101, 48 S. E. 86 (whether a pile-driver was safe, allowed).

*S. D.*: 1909, *Reeves v. Chicago M. & St. Paul R. Co.*, 24 S. D. 84, 123 N. W. 498 (proper place for a brakeman, allowed).

*U. S.*: 1903, *Crane v. Fry*, 126 Fed. 278, 61 C. C. A. 260 (proper handling of a tie-boom, allowed). 1903, *Wabash S. D. Co. v. Black*, 126 Fed. 721, 727, 126 C. C. A. 639 (whether a pulley was safe, allowed). 1906, *Gila Valley G. & N. R. Co. v. Lyon*, 203 U. S. 465, 27 Sup. 145 (whether a certain kind of buffer was a safe and proper one, allowed, in the trial Court's discretion). 1908, *United States Smelting Co. v. Parry*, 8th C. C. A., 166 Fed. 407 (that a scaffold was dangerous, allowed).

*Utah*: 1904, *Johnson v. Union P. C. Co.*, 28 Utah 46, 76 Pac. 1089 (safer way of letting rails down a mine, excluded). 1904, *Meyers v. Highland B. G. M. Co.*, 28 Utah 96, 77 Pac. 347 (whether a light in a mine was necessary, sufficient, etc., not allowed; *McCarty, J.*, diss.). 1905, *Lee v. Salt Lake*, 30 Utah 35, 83 Pac. 562 (difficulty of riding a bicycle over a depression, not allowed). 1907, *Smith v. Ogden & N. W. R. Co.*, 33 Utah 129, 93 Pac. 185 (whether a fire could have been put out, not allowed).

[*Note 1 — continued*]

*Va.*: 1905, *Virginia I. C. & C. Co. v. Tomlinson*, 104 Va. 249, 51 S. E. 362 (whether a mode of starting a belt was dangerous, not allowed). 1907, *Virginia-Carolina C. Co. v. Knight*, 106 Va. 674, 56 S. E. 725 (whether a snatch-block was a safe appliance, excluded). 1909, *Hot Springs L. & M. Co. v. Revercomb*, 110 Va. 240, 65 S. E. 557 (whether a river was floatable for logs, allowed; good opinion by Keith, P.).  
*Wash.*: 1905, *Lambert v. La Conner T. & T. Co.*, 37 Wash. 113, 79 Pac. 608 (whether a captain could have prevented a collision, allowed). 1906, *Smith v. Dow*, 43 Wash. 407, 86 Pac. 555 (the proper way to tie packages, allowed).  
*W. Va.*: 1905, *Wheeling M. & F. Co. v. Wheeling S. & I. Co.*, 58 W. Va. 62, 51 S. E. 129 (certain testimony as to good faith, diligence, etc., in performing a contract, excluded under the issues).  
*Wis.*: 1904, *Northern Supply Co. v. Wangard*, 123 Wis. 1, 100 N. W. 1066 (whether potatoes were of good stock, etc., allowed). 1906, *Hamann v. Milwaukee Bridge Co.*, 127 Wis. 550, 106 N. W. 1081 (whether work was done in a dangerous way, excluded; the opinion makes a well-meaning but vain effort to infuse into the rule some savor of rationality). 1906, *Anderson v. Chicago Brass Co.*, 127 Wis. 273, 106 N. W. 1077 (whether a machine was dangerous, excluded). 1907, *Zarnik v. Reiss C. Co.*, 133 Wis. 290, 113 N. W. 752 (whether a door was safely locked, allowed). 1911, *Benson v. Superior Mfg. Co.*, 147 Wis. 20, 132 N. W. 633 (whether a hooking device was safe, suitable, etc., excluded). 1911, *Cook v. Doud Sons & Co.*, 147 Wis. 271, 133 N. W. 40 (whether an engine "threw more sparks than it should," allowed).

### § 1953. Opinion as to Foreign Law.

[*Note 3, l. 5; add.*]

1904, *Slater v. Mexican Nat'l R. Co.*, 194 U. S. 120, 24 Sup. 581 (deposition of a Mexican lawyer to the construction of Mexican statutes, received, additionally to the agreed translation of them).  
 1906, *Re International Mahogany Co.*, 147 Fed. 147, C. C. A. (copy of the text of a Cuban statute, held not to override the testimony of a Cuban lawyer).  
 1905, *Clark v. Eltinge*, 38 Wash. 376, 80 Pac. 556 (construction of a Montana statute; the testimony of a Montana attorney as to the "consensus of opinion of the bench and bar of Montana," excluded; otherwise if he had testified that the Montana courts "had construed the statute in a certain manner" or "had never passed upon said statute").

### § 1955. Opinion as to Interpretation of Documents; (1) Technical Words.

[*Note 1, par. 1; add.*]

1906, *Tubbs v. Mechanics' Ins. Co.*, 131 Ia. 217, 108 N. W. 324 (expert opinion as to the meaning of "machinery" in a fire insurance policy, excluded).  
 1905, *Kitchings v. Brown*, 180 N. Y. 414, 73 N. E. 241 (meaning of "tenement house" in a deed; expert testimony admitted).

Compare the cases cited *post*, § 2464.

### § 1956. Same: (2) Location of Descriptions, etc.

[*Note 1; add.*]

1904, *Dorlan v. Westervitch*, 140 Ala. 283, 37 So. 382 (that the land described in a deed and in a declaration is the same, allowed).  
 1905, *Brundred v. McLaughlin*, 213 Pa. 115, 62 Atl. 565 ("Where in your opinion is the line between Nos. 83 and 84?" allowed).  
 1904, *Baker v. State*, 47 Tex. Cr. 482, 83 S. W. 1122 (limits of Federal land).

[*Note 1 — continued*]

1909, *Tate v. Rose*, 35 Utah 229, 99 Pac. 1003 (identity of description in patent with land in issue).

1910, *Richmond v. Jones*, 111 Va. 214, 68 S. E. 181 (*Holleran v. Meisel* approved, but drawing an obscure distinction between knowledge and opinion).

1913, *Winding Gulf C. Co. v. Campbell*, — W. Va. —, 78 S. E. 384 (location of a survey).

[*Note 2; add.:*]

1908, *Keefe v. Sullivan Co. R. Co.*, 75 N. H. 116, 71 Atl. 379 (civil engineers not admitted to testify where a point of curve on the survey began, and whether a fence was upon the true line; this ruling almost makes one despair of the final victory of Common Sense in the law; if a Court with the high traditions of the New Hampshire Court backslides in this manner, little can be hoped for elsewhere; moreover the opinion has failed to fortify itself respectably on the subject, for it cites no rulings on the specific point, and ignores the precedents cited in this and the preceding note).

1910, *Richmond v. Jones*, 111 Va. 214, 68 S. E. 181 (opinion as to identity of land included in certain deeds, excluded).

§ 1957. *Same: (3) Contents of a Lost Document.*

[*Note 1, par. 2; add.:*]

Compare the application of the rule requiring the production of the original, where the witness is desired to testify summarily to the *effect of a document* or to the *state of accounts therein* (*ante*, §§ 1230, 1244).

Compare also the rule that a *party may explain his meaning* in a document offered against him as an admission (*ante*, §§ 1044, 1058, *post*, § 1972).

§ 1958. *Opinion as to Testator's or Grantor's or Accused's Capacity.*

[*Note 1, par. 1; add.:*]

1911, *Councill v. Mayhew*, 172 Ala. 295, 554 So. 314.

1909, *In re Coburn*, 11 Cal. App. 604, 105 Pac. 924.

1905, *Denver & R. G. R. Co. v. Scott*, 34 Colo. 99, 81 Pac. 763 (to a physician, "Whether S. was able to transact business, including such business as the settlement of the claim . . . for injuries from which he was suffering?" excluded; this is a bigoted application of the rule; if Courts cannot handle it any more practically than this, the whole rule will have to go by the board).

1911, *Atwood v. Atwood*, 84 Conn. 169, 79 Atl. 59 (whether a grantor was capable of making any contract, allowed, but not whether she was capable of making a particular contract or will; this tweedledum and tweedledee still satisfies a court which in the same opinion takes an advanced liberal stand on other aspects of this benighted Opinion rule).

1908, *Macafee v. Higgins*, 31 D. C. App. 355 (whether a testator "was capable and was of sufficient mental capacity to understand and execute a valid deed or contract," held not reversible error; a most enlightened ruling, worthy of notice by all other Courts).

1908, *Garrus v. Davis*, 234 Ill. 326, 84 N. E. 924 ("capable of executing a valid will," not allowed). 1911, *Wetzel v. Firebaugh*, 251 Ill. 190, 95 N. E. 1085 (whether the testatrix "had sufficient mental capacity to understand the business she was engaged in, of making a will," held improper). 1911, *Adams v. First Methodist Episcopal Church*, 251 Ill. 268, 96 N. E. 253 ("Was there any fraud, duress, or undue influence used to induce A. S. A. to sign her name?" held improper). 1911, *Bailey v. Beall*, 251 Ill. 577, 96 N. E. 567 ("sufficient mental capacity to make a will," excluded).

1905, *Glass' Estate*, 127 Ia. 646, 103 N. W. 1013 (whether the testator was capable of making the will, excluded; whether he was 'capable of transacting ordinary business and of

[*Note 1 — continued*]

intelligently disposing of property," allowed; *Betts v. Betts*, *supra*, said to have been "practically overruled"). 1904, *State v. McGruder*, 125 Ia. 741, 746, 101 N. W. 646 (whether a boy was "capable of knowing or appreciating the distinction between right and wrong," allowed). 1909, *State v. Bennett*, 143 Ia. 214, 121 N. W. 1021 (whether an accused was "irresponsible mentally for her acts," not allowed; *Betts v. Betts*, *supra*, cited). 1909, *Overpeck's Will*, 144 Ia. 401, 120 N. W. 1044, 122 N. W. 928 (whether a testatrix was "in the condition to comprehend the value of her property," etc., allowed; *Glass v. Glass* affirmed).

1910, *Searles v. Insurance Co.*, 148 Ia. 65, 126 N. W. 801 (whether an insured was "capable of transacting business," allowed; *Glass v. Glass* affirmed; *Betts v. Betts* apparently discarded).

1909, *Overpeck's Will*, 144 Ia. 400, 120 N. W. 1044 (*Glass' Estate* followed).

1912, *Erwin v. Fillenworth*, — Ia. —, 137 N. W. 502 (the unworkability of this complicated quiddity as exhibited in this State is shown by the continuous grist of decisions needed to correct errors; it is wearisome to chronicle the particular divagations; indeed, the Court itself in the present opinion remarks, whether complacently or exhaustively cannot be told, "Nothing need be added to what has been said in these decisions"; *selah*!).

1905, *Struth v. Decker*, 100 Md. 368, 59 Atl. 727 (excluded; opinion obscure). 1906, *Baughner v. Gesell*, 103 Md. 450, 63 Atl. 1078 (*Berry v. Safe D. & T. Co.*, *supra*, followed; whether the testator "was of sound and disposing mind and capable of making a valid deed or contract," excluded). 1906, *Kelly v. Kelly*, 103 Md. 548, 63 Atl. 1082 (similar; but decided on another ground, by another judge, without noticing the preceding opinion, dated the same day).

1907, *Cheney's Estate*, 78 Nebr. 274, 110 N. W. 731 ("able to make" a will, not allowed). 1903, *Pattee v. Whitcomb*, 72 N. H. 249, 56 Atl. 459 ("influence of the testator's wife over him," allowed).

1904, *Peterson, Re*, 136 N. C. 13, 48 S. E. 561 (question discussed).

1905, *Nashville C. & St. L. R. Co. v. Brundige*, 114 Tenn. 31, 84 S. W. 805 (opinion as to being "in a condition to transact business or make a contract," excluded; unsound).

[*Note 2, par. 1; add:*]

*Accord*: 1904, *State v. McGruder*, 125 Ia. 741, 101 N. W. 646.

1911, *Banks v. Com.*, 145 Ky. 800, 141 S. W. 380 (whether the accused could know right from wrong, allowed).

1910, *State v. Roselair*, 57 Or. 8, 109 Pac. 865 (whether he knew right from wrong, allowed).

*Contra*: 1904, *State v. Brown*, 181 Mo. 192, 79 S. W. 1111.

1906, *Reed v. State*, 75 Nebr. 509, 106 N. W. 649 (*Shults v. State*, *supra*, followed; ignoring *Pflueger v. State*, *supra*).

[*Note 2, l. 6:*]

For "id," read "Mo."

[*Note 2; add a new paragraph:*]

A similar question arises for a *child's* capacity: 1906, *Neville v. State*, 148 Ala. 681, 41 So. 1011 (larceny by a boy of ten; testimony that "he was a bright boy mentally," etc., admitted).

## § 1959. Solvency.

[*Note 1; add:*]

1910, *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849 (allowed for insolvency, under Civil Code, § 5285).

1912, *Moore v. Fryman*, 154 Ia. 534, 134 N. W. 534 (insolvency, allowed).

§ 1960. *Miscellaneous Instances (Possession, etc.).*

[*Note 1; add.:*]

- 1906, *Driver v. King*, 145 Ala. 585, 40 So. 315 (in possession, allowed, but not "in open and notorious possession of land").  
 1910, *Cabaniss v. State*, 8 Ga. App. 129, 68 S. E. 849 (admitted).  
 1910, *Jacobs v. Disharoon*, 113 Md. 92, 77 Atl. 258 (not clear).  
 1914, *Fadden v. McKinney*, — Vt. —, 89 Atl. 351 (wife's possession and control, excluded).

[*Note 2; add.:*]

- 1905, *Rosco v. Jefferson*, 142 Ala. 705, 38 So. 246 (title to personalty under a levy; testimony to ownership, allowed).  
 1909, *Perkins v. Sunset Tel. & T. Co.*, 155 Cal. 712, 103 Pac. 190 (that a claim was the witness' property, allowed).  
 1903, *Sparks v. Galena Nat'l Bank*, 68 Kan. 148, 74 Pac. 619 (mining property, allowed).  
 1913, *Fort Smith & W. R. Co. v. Winston*, 40 Okl. 173, 136 Pac. 1075 (personalty, allowed).  
 1905, *Hawley v. Bond*, 20 S. D. 215, 105 N. W. 464 ("Who was then the owner of that cow?" allowed).  
 1913, *Webb v. Reynolds*, — Tex. Civ. App. —, 160 S. W. 152 (that a person was "owner" of a note, allowed).

[*Note 3; add.:*]

- 1905, *Renshaw v. Dignan*, 128 Ia. 722, 105 N. W. 209 (that no deed had been received or accepted, allowed on the facts).

[*Note 4; add.:*]

- 1909, *Mobile, J. & K. C. R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37 (whether an authority was withdrawn, allowed).  
 1907, *Fritz v. Chicago G. & E. Co.*, 136 Ia. 699, 114 N. W. 193 (whether a person was agent, allowed).  
 1907, *People v. Mingey*, 190 N. Y. 61, 82 N. E. 728 (whether the witness' firm authorized an indorsement of its name, allowed on the facts).  
 1911, *Hutchings v. Cobble*, 30 Okl. 158, 120 Pac. 1013 (excluded).

[*Note 5; add.:*]

- 1909, *Fowler v. Delaplain*, 79 Oh. 279, 87 N. E. 260 (whether a building was "necessary," under a leasing clause, excluded).

[*Note 7; add.:*]

- 1906, *Owen v. McDermott*, 148 Ala. 669, 41 So. 730 (owing money; allowed).  
 1909, *Mobile J. & K. R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37 (whether a person had performed his duties under a contract, etc.; not decided).  
 1905, *Sampson v. Hughes*, 147 Cal. 62, 81 Pac. 292 ("Did you wilfully, negligently, etc., omit to watch the fire, etc.?" excluded).  
 1905, *Allison v. Wall*, 121 Ga. 822, 49 S. E. 831 (what would be a reasonable time for removing timber; not allowed).  
 1904, *Sokol v. People*, 212 Ill. 238, 72 N. E. 382 (that the witness saw the defendant married by a rabbi, excluded, the validity of the marriage being in issue; why did not the Court also hold that it was matter of opinion whether the celebrant was a rabbi and the place was a synagogue?).  
 1907, *Chicago & E. R. Co. v. Lawrence*, 169 Ind. 319, 82 N. E. 768 (whether a specific act was the duty of the switchman, not allowed on the facts).  
 1905, *National Fire Ins. Co. v. Hanberg*, 215 Ill. 378, 74 N. E. 377 ("net receipts" of an

[*Note 7 — continued*]

insurance company, in a statute, not allowed to be interpreted by the opinion of insurance experts).

1912, *Crane v. Ross*, 168 Mich. 623, 135 N. W. 83 (whether an agreement was reached, the agreement being in writing, excluded).

1905, *State v. Nevada C. R. Co.*, 28 Nev. 186, 81 Pac. 99 (expert accountant's statement of the "net earnings" of a railroad company as shown by their books, etc., excluded, partly on this principle and partly on that of § 1230, *ante*).

**§ 1963. Testimony to a State of Mind, in general, etc.**

[*Note 2; add:*]

1911, *Bogart v. New York*, 200 N. Y. 379, 93 N. E. 937 (death of B. at an automobile race; question to his wife, whether she "knew when he went out that he was going to see the automobile races," held improper, because it did not call for B.'s "acts or statements" but only the witness' "conjecture or conclusion"; no authority cited; this is a scholastic ruling; the husband does not have to say formally and solemnly, "Mary, I am going to the races," in order to express a clear intention; does not the learned judge's wife have a clear knowledge whether he expects to have two or four lumps of sugar put into his coffee without his telling her in a fixed formula every morning of his life? It is time that human nature off the Bench was recognized on the Bench; such rulings are laicly absurd).

[*Note 3; add:*]

1912, *Robinson v. Western Union T. Co.*, 169 Mich. 503, 135 N. W. 292 (sender's intent to act, on an issue whether a telegram had been properly transmitted, admitted).

[*Note 4; add:*]

1906, *Fitzgerald v. Benner*, 219 Ill. 485, 76 N. E. 709 (delay in performing a contract; "He kept putting me off," allowed, on the facts).

1907, *State v. Bennett*, 137 Ia. 427, 110 N. W. 150 (seduction; by the prosecutrix, that she yielded because of the defendant's promises, allowed). 1908, *Kinner v. Boyd*, 139 Ia. 14, 116 N. W. 1044 ("terribly excited," allowed, for a plaintiff speaking of himself).

1905, *McCrohan v. Davison*, 187 Mass. 466, 73 N. E. 553 (injury by a wagon while crossing a street; the plaintiff's testimony "I thought I would have plenty of time to pass," admitted). 1908, *Price v. State*, 1 Okl. Cr. 358, 98 Pac. 447 (intention of an assailant).

1912, *State v. Holter*, 30 S. D. 353, 138 N. W. 953 (whether the woman, in seduction, would have consented without a marriage-promise).

**§ 1966. Same: Alabama Doctrines.**

[*Note 1, par. (2), l. 7 of col. 1 on p. 2611; add:*]

1904, *Bell v. State*, 140 Ala. 57, 37 So. 281 (P.'s opinion of defendant's state of mind, excluded). 1906, *Delaney v. State*, 148 Ala. 586, 42 So. 815 (by a witness, that the deceased declarant "knew he was going to die," excluded). 1906, *Richardson v. State*, 145 Ala. 46, 41 So. 82 (tracing a manslayer by hounds; on re-direct examination, "Why did the dogs leave the trail?" was not allowed, on the present ground; this is an edifying example of the dogged consistency with which this rule of superfine wisdom is here applied; presumably the dogs should have been X-rayed to ascertain their motives; inasmuch as the dogs here were named respectively "Rock" and "Rye," it might well have been inferred that they left the trail on a still hunt). 1910, *Louisville & N. R. Co. v. Perkins*, 165 Ala. 471, 51 So. 870 (whether a third person knew the suit was pending, excluded). 1911, *Council v. Mayhew*, 172 Ala. 295, 55 So. 314 (whether a supposed insane person knew what he was doing when he signed checks, allowed on cross-examination; prior cases not cited).

[*Note 1*, par. (3), l. 8 from the end; *add.*:]

1904, *Gregory v. State*, 140 Ala. 16, 37 So. 259 (like *Holmes v. State*). 1905, *Barnewell v. Stephens*, 142 Ala. 609, 38 So. 662 (excluding a witness' testimony to his "wish"). 1905, *Sprouse v. Story*, 144 Ala. 542, 42 So. 23 (forcible entry; to the defendant, "How came you to go into the house on the premises in dispute?" excluded; this is a farcical game). 1906, *Smith v. State*, 145 Ala. 17, 40 So. 957 (homicide; to the defendant, by his counsel: "For what purpose did you have the pistol, etc.?" excluded; no authority cited). 1908, *Patterson v. State*, 156 Ala. 62, 47 So. 52 (like *Holmes v. State*). 1913, *Ex parte Woodward*, — Ala. —, 61 So. 295 (rule considered, in connection with the statute for *prima facie* evidence of intent to sell liquor). 1914, *Brooks v. State*, — Ala. —, 64 So. 295 (assault with intent to rape; prosecutrix' motive in delaying to prosecute, not admissible; at this period of this Court's history, cannot some member of the Court place on record the view that the rule itself is a wretched piece of absurdity, and that it is observed merely in consequence of its sanctity in precedents?).

[*Note 1*, par. (4), at the end; *add.*:]

1904, *Dorlan v. Westervitch*, 140 Ala. 283, 37 So. 382 (a claimant resting on adverse possession; "whether you have been claiming to own," allowed). 1905, *Carwile v. State*, 148 Ala. 576, 39 So. 220 (an impeached witness may explain why he made certain statements). 1906, *Reeder v. Huffman*, 148 Ala. 472, 41 So. 177 (constable's failure to execute a writ; to a witness, "Would you have told the constable, etc., if he had inquired?" excluded; no authority cited). 1906, *Lawrence v. Doe*, 144 Ala. 524, 41 So. 612 (adverse possession by defendant; to the defendant, "Why did you not pay the taxes?" excluded; this rule is certainly a successful device for suppressing the truth). 1906, *Western Union T. Co. v. Long*, 148 Ala. 202, 41 So. 965 ("Why did you not give the telegram to your brother?" excluded). 1908, *Patterson v. State*, 156 Ala. 62, 47 So. 52 (like *Linehan v. State*).

#### § 1967. Rules of Substantive Law, distinguished.

[*Note 1*; *add.*:]

So too for an act of *adverse possession*: 1905, *Murphy v. Com.*, 187 Mass. 361, 73 N. E. 524 (a claimant going upon the land claimed; "the secret and undisclosed intention of the witness was immaterial").

Compare here the *res gestæ* rules (*ante*, § 1778).

[*Note 3*; *add.*:]

1907, *State v. Simmons*, 143 N. C. 613, 56 S. E. 701 (carrying a concealed weapon).

[*Note 4*; *add.*:]

1906, *Anderson v. Metrop. Stock Exchange*, 191 Mass. 117, 77 N. E. 706 (statutory recovery for stock gambling; the defendant's manager's private intent, held immaterial). 1911, *Aldrich v. Island E. T. & T. Co.*, 62 Wash. 173, 113 Pac. 264 (malicious prosecutions; magistrate's reasons for discharging the plaintiff, excluded).

#### § 1969. Testimony to the Meaning of a Conversation, etc.

[*Note 1*, par. 1; *add.*:]

1910, *Bercher v. Gunter*, 95 Ark. 155, 128 S. W. 1036 (understanding as to the effect of a sub-contract, excluded).

1911, *Harrison v. Thackaberry*, 248 Ill. 512, 94 N. E. 172 (whether a letter from a creditor to a debtor was a consent to an extension of time on the note; the creditor not allowed to testify to his intent in writing it).

1905, *State v. Wertz*, 191 Mo. 569, 90 S. W. 838 (rape; whether the witness "understood" from what the prosecutrix said and did, that she had been raped, excluded).

[*Note 2, par. 1; add.:*]

1909, *Blossi v. Chicago & N. W. R. Co.*, 144 Ia. 697, 123 N. W. 360 (fraudulent release by an alien; the releasee's testimony that he believed the releasor to understand the provisions, admitted).

1905, *Union Hosiery Co. v. Hodgson*, 72 N. H. 427, 57 Atl. 384 (joint purchase of coal; the "understanding" of one of the purchasers as to the ownership, admitted).

**§ 1971. Same: Rules of Substantive Law, distinguished.**

[*Note 3; add.:*]

1905, *Farnum v. Whitman*, 187 Mass. 381, 73 N. E. 473 (wagering contract for wheat; the intent of one party only, held immaterial).

1904, *Downing v. Buck*, 135 Mich. 636, 98 N. W. 388 (brokerage).

1907, *Trombley v. Seligman*, 191 N. Y. 400, 84 N. E. 280 (sale of materials for a house; plaintiff's understanding as to who was the buyer, held immaterial).

[*Note 4; add.:*]

1907, *Ladwig v. Heyer*, 136 Ia. 196, 113 N. W. 767.

1908, *Harms v. Proehl*, 104 Minn. 303, 116 N. W. 587.

[*Note 5, par. 1; add.:*]

1903, *Green v. Miller*, 33 Can. Sup. 193.

1908, *Moran v. O'Regan*, 38 N. Br. 399 (hearer's opinion what "thief" meant, excluded; Landry, J., diss. correctly on the facts).

1906, *Goldborough v. Orem*, 103 Md. 671, 64 Atl. 36.

1907, *Julian v. Kansas City S. Co.*, 209 Mo. 35, 107 S. W. 496 (most sensible opinion on the subject, per Valliant, J.; Graves & Lamm, JJ., diss.).

1913, *Peak v. Taubman*, 251 Mo. 390, 158 S. W. 656 (approving *Julian v. Kansas City S. Co.*, Graves, J., diss.).

The following ruling should be noted:

1908, *Brinsfield v. Howeth*, 107 Md. 278, 68 Atl. 566 (slander; the defendant had said that he had had a chance to "strap" the plaintiff; a witness was asked if he knew the meaning of "strap" in the neighborhood when used of a female, and answered that he did, and that it meant "to have intercourse"; the local meaning was held a proper thing to prove, but this mode of proving it was held improper; the quiddities of the Court's reasoning are not worth setting out here; it is a good example of anachronistic Cokianism which has now become nauseous, and justly excites popular distrust of Courts).

**§ 1974. Corporal Appearances of Persons and Things.**

[*Note 1, par. 1; add.:*]

*Ala.*: 1905, *Tagert v. State*, 143 Ala. 88, 39 So. 293 (that a person appeared angry or surprised, allowable).

1905, *Dillard v. State*, — Ala. —, 39 So. 584 ("looked like a bottle of wine," allowed). 1906, *Sinis v. State*, 146 Ala. 109, 41 So. 413 ("seemed excited and looked like she had been crying," allowed).

*Cal.*: 1911, *People v. Wong Loung*, 159 Cal. 520, 114 Pac. 829 (that the accused was pale, nervous, etc., allowed).

*Conn.*: 1905, *Spencer's Appeal*, 77 Conn. 638, 60 Atl. 289 (whether a testator spoke affectionately or otherwise). 1905, *Nichols v. Wentz*, 78 Conn. 429, 62 Atl. 610 (whether E. did or said anything indicating an attempt at coercion of a testator, allowed). 1911, *Atwood v. Atwood*, 84 Conn. 169, 79 Atl. 59 (that a grantor was "in a condition to know nothing really," etc., allowed; liberal opinion by Wheeler, J.).

## [Note 1 — continued]

*Ga.*: 1905, *Roberts v. State*, 123 Ga. 146, 51 S. E. 374 ("appeared to be excited," etc., allowed). 1909, *Georgia R. & E. Co. v. Gilleland*, 133 Ga. 621, 66 S. E. 944 (that the plaintiff appeared "more stupid after the injury than before" (l), allowed). 1913, *Lanier v. State*, 141 Ga. 17, 80 S. E. 5 (that by the marks on a child's body the cause of death appeared to be smothering, allowed).

*Ill.*: 1904, *Illinois C. R. Co. v. Prickett*, 210 Ill. 140, 71 N. E. 435 (whether cracks in boilerbolts appeared old, allowed). 1909, *People v. Davidson*, 240 Ill. 191, 88 N. E. 565 (a witness to appearance as evidence of age must first "describe the appearance," etc.; this is a petty quibble). 1910, *Louth v. Chicago U. T. Co.*, 244 Ill. 244, 91 N. E. 341 (see citation *ante*, § 1721, n. 1).

*Ia.*: 1905, *Rothrock v. Cedar Rapids*, 128 Ia. 252, 103 N. W. 475 (whether snow appeared as if a person had fallen, allowed). 1905, *Kuhlman v. Wieben*, 129 Ia. 188, 105 N. W. 445 (intoxicated; allowed). 1906, *Kesselring v. Hummer*, 130 Ia. 145, 106 N. W. 501 (seduction; one who had seen the parties often in company was asked how they acted, and answered, "They acted like lovers"; held properly excluded; here again a peddling-out of machine-made law, not fit for even the bargain-counter of Justice; this ruling rivals that of *State v. Brown*, *supra*, and shows no improvement of attitude in the fourteen years' interval). 1909, *Greenway v. Taylor Co.*, 144 Ia. 332, 122 N. W. 943 (by a physician, whether the plaintiff had suffered pain, or was so injured as probably to cause pain, allowed).

*La.*: 1905, *State v. Hopper*, 114 La. 557, 38 So. 452 (whether the accused looked scared, etc., allowed).

*Md.*: 1910, *Fletcher v. Dixon*, 113 Md. 101, 77 Atl. 326 (how a person's nervousness showed itself, allowed).

*Mass.*: 1905, *Wolfe v. N. B. Cordage Co.*, 189 Mass. 591, 76 N. E. 222 (visual difference between iron and steel; not allowed).

*Mich.*: 1904, *Comstock v. Georgetown*, 137 Mich. 541, 100 N. W. 788 (whether a patient "flinched," etc., at the touch, excluded). 1905, *McCormick v. Detroit G. H. & M. R. Co.*, 141 Mich. 17, 104 N. W. 390 (whether a patient appeared to be feigning illness, excluded). 1911, *Merrill v. Leisenring*, 166 Mich. 219, 131 N. W. 538 (whether "he was devoted to his wife and children," allowed). 1912, *Marshall v. Wabash R. Co.*, 171 Mich. 180, 137 N. W. 89 (whether the plaintiff was able to simulate, or was simulating, the injury alleged; rule not easily to be gathered; the obstructive effect of the Opinion rule, and the delicate anxiety of some Courts to preserve each form of its puerilities, are notable in this opinion). *Minn.*: 1904, *Clarke v. Phila. & R. C. & I. Co.*, 92 Minn. 418, 100 N. W. 231 (intoxication, excluded on the facts).

*Mont.*: 1906, *State v. Trueman*, 34 Mont. 249, 85 Pac. 1024 (intoxication; allowed). 1910, *State v. Vanella*, 40 Mont. 326, 106 Pac. 364 ("nervous," allowed).

*N. Mex.*: 1914, *State v. Cooley*, — N. M. —, 140 Pac. 1111 (murder; whether deceased and defendant appeared friendly or otherwise, allowed).

*Pa.*: 1907, *Com. v. Eyler*, 217 Pa. 512, 66 Atl. 746 (intoxication; allowed).

*S.C.*: 1911, *Miller v. Hamilton B. S. Co.*, 89 S. C. 530, 72 S. E. 397 (whether a person was under the influence of a drug, admitted).

*S.D.*: 1908, *Palmer v. Schurz*, 22 S. D. 283, 117 N. W. 150 (intoxication).

*Utah*: 1909, *Miller's Estate*, 36 Utah 228, 102 Pac. 996 (that the testator's wife was "bitter," "agitated," etc., allowed; a perusal of this opinion will convince any one that the Opinion rule has gone to seed).

*Vt.*: 1913, *State v. Pierce*, — Vt. —, 88 Atl. 740 (physician's misdemeanor in failing to report known or suspected cases of communicable disease, here, diphtheria; the membrane having been shown to an expert witness, he was allowed to answer whether the diphtheritic symptom "would be apparent to an ordinary practicing physician").

*Wash.*: 1910, *State v. George*, 58 Wash. 681, 109 Pac. 114 (whether two persons appeared to care for each other, allowed).

[*Note 1, par. 2; add.:*]

1912, *Cole v. District Board*, 32 Okl. 692, 123 Pac. 426 (opinion as to negro race, admitted).

§ 1975. **Medical and Surgical Matters.**

[*Note 1; add.:*]

1905, *Hampton v. State*, 50 Fla. 55, 39 So. 421 (how recently a wound had been made allowed).

1906, *Swygart v. Willard*, 166 Ind. 25, 76 N. E. 755 (the effect of increase of drinking upon the testator, allowed).

1904, *Boyer v. Chicago, R. I. & P. R. Co.*, 123 Ia. 248, 98 N. W. 764 (whether a mare was with foal, allowed).

1906, *McDonald v. City El. R. Co.*, 144 Mich. 379, 108 N. W. 85 (how much a man's ability to labor was reduced, allowed, for a physician).

§ 1976. **Probability and Possibility; Capacity and Tendency; Cause and Effect.**

[*Note 1; add.:*]

*Eng.*: 1912, *Mason's Case*, 7 Cr. App. 67 (whether death was caused by wounds not self-inflicted, allowed).

*Ala.*: 1904, *Kroell v. State*, 139 Ala. 1, 36 So. 1025 (whether a quick succession of shots could have been fired by the same person, allowed). 1904, *Sims v. State*, 139 Ala. 74, 36 So. 138 (that a wound was fatal, allowed). 1904, *Dixon v. State*, 139 Ala. 104, 36 So. 784 (whether defendant's physical condition was such that he could have travelled, killed G., etc., allowed). 1904, *Nickles v. State*, — Ala. —, 37 So. 312 (whether there was time to return from a place, not allowed). 1904, *Southern R. Co. v. Bonner*, 141 Ala. 517, 37 So. 702 (how far a headlight could have been seen, allowed). 1906, *Foley v. Pioneer M. & M. Co.*, 144 Ala. 178, 40 So. 273 (cause of death, allowed). 1907, *Dupree v. State*, 148 Ala. 620, 42 So. 1004 (whether it was possible to break a lock in a certain way, not allowed). 1913, *Republic Iron & S. Co. v. Passafume*, — Ala. —, 61 So. 327 (whether a man could have been seen from a certain point, not allowed).

*Ark.*: 1908, *Kansas C. S. R. Co. v. Henrie*, 87 Ark. 443, 112 S. W. 967 (whether a coupling if in good repair would have operated properly, allowed).

*Cal.*: 1909, *Perkins v. Sunset Tel. & T. Co.*, 155 Cal. 712, 103 Pac. 190 (whether a fall or a blow could have caused certain injuries, allowed). 1913, *Foley v. Northern Cal. P. Co.*, 165 Cal. 103, 130 Pac. 1183 ("What was the cause of his death?" allowed).

*Fla.*: 1904, *Clemons v. State*, 48 Fla. 9, 37 So. 647 (whether a wound could have been caused by a fist, allowed).

*Ga.*: 1904, *Central of Ga. R. Co. v. Goodwin*, 120 Ga. 83, 47 S. E. 641 (whether a man could work at a place without seeing a certain thing, excluded). 1904, *Moran v. State*, 120 Ga. 846, 48 S. E. 324 (whether a weapon was one likely to produce death, the weapon being in court, excluded). 1909, *Pride v. State*, 133 Ga. 438, 66 S. E. 259 (whether the witness could have seen a person in a certain position, allowed).

*Ill.*: 1904, *Illinois C. R. Co. v. Smith*, 208 Ill. 608, 70 N. E. 628 (to a physician, whether the twisting of the plaintiff's foot had been caused by an even or an uneven surface, held improper, chiefly on the ground that it asked what "did cause," not what "might have caused"; this is a good example of that legal quibbling which creates for the law of trials a disrespect in the minds of competent physicians). 1907, *Chicago v. Didier*, 227 Ill. 571, 81 N. E. 698 (whether the injury was produced by the alleged cause, and not merely could or might have been, allowed; cases reviewed). 1907, *Chicago Union T. Co. v. Ertrachter*, 228 Ill. 114, 81 N. E. 816 (*Chicago v. Didier* followed). 1907, *Chicago Union Traction Co. v. Roberts*, 229 Ill. 481, 82 N. E. 401 (a question, on hypothetical data, whether the medical

[*Note 1 — continued*]

expert would believe the plaintiff's "present condition was due to traumatism or other causes," allowed; *Dunn, J.*: "It is entirely immaterial whether the witness testified that the injury *was* the cause of the condition, or that the injury was sufficient to cause the condition or *might* have caused it. . . . The question may be asked in either form"; *Chicago v. Didier, supra*, followed; *Illinois C. R. Co. v. Smith, supra*, distinguished; this seems to mark a definite and wholesome abandonment of the quibbling rule emphasized in *Ill. C. R. Co. v. Smith* and in the decisions of certain other States). 1908, *Shaughnessy v. Holt*, 236 Ill. 485, 86 N. E. 256 (personal injury; *Didier* and *Roberts* cases followed). 1908, *People v. Hagenow*, 236 Ill. 514, 86 N. E. 370 (abortion; similar ruling). 1913, *Lyons v. Chicago City R. Co.*, 258 Ill. 75, 101 N. E. 211 (a physician's opinion, as to the cause of a bloodshot eye, etc., that "he might have a fracture of the anterior fossa," held inadmissible; this is a strange reaction to over-strictness; such cautious statements are unavoidable for honest medical witnesses). 1913, *People v. Schultz*, 260 Ill. 35, 102 N. E. 1045 (opinion that specific inflamed condition resulted from a rape, excluded; another of those rulings which make the medical profession jeer at the law; what had become of the *Roberts Case, supra*?).

*Ia.*: 1905, *Rietveld v. Wabash R. Co.*, 129 Ia. 249, 105 N. W. 515 (whether a railroad track could be seen, allowed). 1906, *Martin v. Des Moines E. L. Co.*, 131 Ia. 724, 106 N. W. 359 (death of an employee in an electric light plant; the defendant claimed that heart disease caused death; a question to an expert, whether the deceased "received an electrical shock before he fell" was held improper; this ruling reaches an extreme of artificial aridity of law; such decisions show the need of a spiritual irrigation-law, for re-distributing the fountains of Justice). 1906, *Kesselring v. Hummer*, 130 Ia. 145, 106 N. W. 501 (*State v. Peterson, supra*, followed; whether conception would be probable upon first intercourse, excluded). 1909, *Gray v. Chicago R. I. & P. R. Co.*, 143 Ia. 268, 121 N. W. 1097 (whether a person could be seen, allowed). 1912, *Sever v. Minneapolis & St. L. R. Co.*, 156 Ia. 664, 137 N. W. 937 (physician's opinion as to the probable cause of an injury, excluded; the opinion shows an inclination to admit, but feels bound by many precedents to exclude; it states: "Having so many times announced the rule for this State, . . . we do not feel like changing it at this time, thus introducing confusion in the cases"; for rules of evidence, the celebrated sentiment of *Erskine* should rather be accepted: "No precedents can sanction injustice; if they could, every human right would long ago have been extinct upon the earth"; the precise kind of ruling above, common enough in other States also, is one of the most frequent obstructions to truth that the Opinion rule has ever produced; the "confusion in the cases," which the Court fears, is nothing like as fearsome as the obfuscation and unreason which such a rule fixes into the law). 1913, *Estes v. Chicago B. & Q. R. Co.*, — Ia. —, 141 N. W. 49 (cause of a river-bar, allowed). 1913, *State v. Wilson*, — Ia. —, 141 N. W. 337 (whether a wounded person could have walked, etc., allowed). 1914, *State v. Hassenius*, — Ia. —, 146 N. W. 58 ("What in your opinion caused the death?" allowed).

*Kan.*: 1905, *Sun Ins. Office v. Western W. M. Co.*, 72 Kan. 41, 82 Pac. 513 (whether wet wool was capable of spontaneous combustion, allowed). 1912, *State v. Buck*, 88 Kan. 114, 127 Pac. 631 ("an opinion upon the cause of death . . . is admissible").

*Md.*: 1909, *Consolidated G. E. L. & P. Co. v. State*, 109 Md. 186, 72 Atl. 651 (whether lineman could know of danger in wires, excluded; another backward turn given to the law).

*Mass.*: 1904, *Baxter v. Gormley*, 186 Mass. 168, 71 N. E. 575 (by a complainant in bastardy, that the defendant was the father of her child, allowed). 1905, *Gones v. New Bedford Co.*, 187 Mass. 124, 72 N. E. 840 (whether one's hand could be caught in a gear, if covered, allowed). 1906, *Erickson v. American S. & W. Co.*, 193 Mass. 119, 78 N. E. 761 (cause of bursting of a steam-pipe, allowed).

*Mich.*: 1885, *Geveke v. G. R. & I. R. Co.*, 57 Mich. 277, 24 N. W. 675 (what caused a horse's fright, allowed). 1894, *McCullough v. R. Co.*, 101 Mich. 234, 59 N. W. 618 (same). 1905, *Foster v. East Jordan L. Co.*, 141 Mich. 316, 104 N. W. 617 (what caused a horse's

## [Note 1 — continued]

fright, allowed). 1909, *Potter v. Grand Trunk W. R. Co.*, 157 Mich. 216, 121 N. W. 808 (possibility of emission of sparks, allowed). 1914, *People v. Macgregor*, — Mich. —, 144 N. W. 869 (whether arsenic was the cause of a death, allowed).

*Mo.*: 1904, *Wood v. Metropolitan St. R. Co.*, 181 Mo. 433, 81 S. W. 152 (whether an injury was the cause of a disease, allowed; good opinion by Gantt, P. J.). 1904, *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1, 84 S. W. 26 (similar). 1905, *Taylor v. Grand Ave. R. Co.*, 185 Mo. 239, 84 S. W. 873 (whether certain injuries "might, could, or would result in paralysis," allowed, but not whether, in the particular patient as examined by the physician, the injuries *were* the cause of paralysis; this quibble is justified by the following refined distinction: "To the trained legal mind there is a very essential difference between permitting an expert to give an opinion and permitting him to draw a conclusion"; to which it may be said that if the "trained legal mind" signifies one which has been infected by the rabies of such quibbling, then the community now urgently needs a Pasteur process which shall stay the ravages of such an affliction in the profession). 1905, *Glasgow v. Metropolitan St. R. Co.*, 191 Mo. 347, 89 S. W. 915 (corporal injury; "it was competent for the learned witnesses to state what cause or causes *might* produce such a result, . . . but it was incompetent for them to say that in this case the plaintiff's condition *was* in their opinion the result of the alleged fall," and then a long critique on the tweedledum and tweedledee of this distinction; it is singular that learned judges become so absorbed in the wild fancies of the Opinion rule that their common sense is buried for the purposes of justice). 1907, *Smart v. Kansas City*, 208 Mo. 162, 105 S. W. 709 (whether a fall did cause a necessity for amputation, and not merely was a sufficient cause therefor, improper). 1911, *State v. Hyde*, 234 Mo. 200, 136 S. W. 316 (murder by poison; "what that man died from," excluded; another of these absurd and unpractical muzzlings of experts). 1911, *McAnany v. Henrici*, 238 Mo. 103, 141 S. W. 633 (whether a crack in a molding must have existed, not allowed; an old-fashioned opinion, harping on the dead technical impropriety of using experts; the rule is much over-strictly stated, *i.e.* that the expert is not admissible unless the jurors as laymen "are incapable of drawing correct conclusions"; the whole opinion is typical of hundreds which resemble a stern practical judicial determination to get at the actual facts as much as a child's game of "muggins" resembles the destiny-directing diplomacy of Bismarck).

*Nebr.*: 1905, *Horst v. Lewis*, 71 Nebr. 365, 103 N. W. 460 (whether wounds were sufficient to cause death, allowed).

*N. Mex.*: 1905, *Miera v. Terr.*, 13 N. M. 192, 81 Pac. 586 (that a wound was not self-inflicted, allowed).

*N. D.*: 1904, *Meehan v. Great Northern R. Co.*, 13 N. D. 432, 101 N. W. 183 (cause of a coupling's breaking, not allowed).

*N. Y.*: 1905, *Schutz v. Union R. Co.*, 181 N. Y. 33, 73 N. E. 491 (cause of a derailment, excluded; whether a car could leave the track if properly laid, etc., not allowed). 1910, *People v. Fiorentino*, 197 N. Y. 560, 91 N. E. 195 (to a defendant, on an issue of self-defence, "Why is your coat cut and there are no cuts on your body?" allowed; sensible opinion). 1911, *McRorie v. Monroe*, 203 N. Y. 426, 96 N. E. 724 (capacity of a vehicle to make a turn in a certain space, allowed). 1914, *Marx v. Ontario B. H. & A. Co.*, — N. Y. —, 105 N. E. 97 ("Did this blow cause the injuries?" not allowed).

*N. C.*: 1911, *Deppe v. Atlantic C. L. R. Co.*, 154 N. C. 523, 70 S. E. 622 (whether steam-pipes were the cause of a fire, not allowed).

*Okla.*: 1913, *Miller v. State*, 9 Okl. Cr. 255, 131 Pac. 717 (that death was caused by strangulation, allowed).

*Or.*: 1906, *State v. White*, 48 Or. 416, 87 Pac. 137 (what caused an injured man's condition, allowed).

*S. C.*: 1903, *Riser v. Southern R. Co.*, 67 S. C. 419, 46 S. E. 47 (whether a certain shock produced a certain injury, excluded). 1905, *Biggers v. Catawba P. Co.*, 72 S. C. 264, 51 S. E. 882 (whether the danger could have been avoided, etc., allowed). 1906, *Nickles v. Sea-*

[*Note 1 — continued*]

board A. L. R. Co., 74 S. C. 102, 54 S. E. 254, 255 (cause of a derailment, excluded). 1906, *Fitzgerald v. Langley Mfg. Co.*, 74 S. C. 232, 54 S. E. 373 (cause of the shifting of a pulley-belt, excluded). 1911, *Hand v. Catawba Power Co.*, 90 S. C. 281, 73 S. E. 186 (that a dam caused destruction of water-power, allowed).

*S. D.*: 1905, *Klingaman v. Fish & H. Co.*, 19 S. D. 139, 102 N. W. 601 (how long an injured condition would continue, allowed).

*Tenn.*: 1914, *Cumberland Tel. & Tel. Co. v. Peacher Mill Co.*, — *Tenn.* —, 164 S. W. 1144 (whether a fire was "probably due to the lightning," etc., not allowed for an electrical expert; whether a certain cause "*could or might* produce the condition" is allowable, but not whether it "*probably did*"; and so the Law again slams the door in the face of Science; but, before long, the door will be taken off its hinges, Science will be given an unlimited franchise to enter, and Mummery will be cast out and delivered over to the dark places of Oblivion).

*Tex.*: 1908, *Metropolitan Life Ins. Co. v. Wagner*, 50 *Tex. Civ. App.* 233, 109 S. W. 1120 (whether a wound was self-inflicted, excluded, but whether it was made with a pen-knife, admitted; another case of tweedledum and tweedledee). 1912, *Freeman v. Grashel*, — *Tex. Civ. App.* —, 145 S. W. 695 (whether a floor depression was due to uneven rolling of wheels, allowed).

*U. S.*: 1912, *M'Intyre v. Modern Woodmen, C. C. A.*, 200 *Fed.* 1 (a physician's opinion as to the cause of death, founded on facts testified to by other physicians, must be based on their supposed facts only, and not on their inferences from facts; a piece of quibbling of the sort which accounts for the medical profession's attitude towards the legal profession, — a sorrowful and amazed disgust).

*Va.*: 1904, *Norfolk R. & L. Co. v. Spratley*, 103 *Va.* 379, 49 S. E. 502 (probable effect of a corporal injury, allowed). 1911, *Johnson v. Com.*, 111 *Va.* 877, 89 S. E. 1104 (what force caused an abrasion, allowed).

*Wash.*: 1913, *Patrick v. Smith*, 75 *Wash.* 407, 134 *Pac.* 1076 (cause of depletion of well-water).

*Wis.*: 1904, *Lyon v. Grand Rapids*, 121 *Wis.* 609, 99 N. W. 311 (cause of a disease, allowed). 1904, *Hallum v. Omro*, 122 *Wis.* 337, 99 N. W. 1051 (that injuries "were liable to be permanent," allowed).

§ 1977. **Distance, Time, Speed, Size, Weight, Direction, Form, Identity, etc.**

[*Note 2; add, under Distance and Size:*]

1907, *People v. Helm*, 152 *Cal.* 532, 93 *Pac.* 99 (width of a bicycle track, allowed).

1905, *State v. Voorhies*, 115 *La.* 200, 38 *So.* 964 (how far the gun was from the deceased, allowed).

1905, *Turley v. State*, 74 *Nebr.* 471, 104 N. W. 934 (comparative size of boot-tracks, allowed).

[*Note 2; add, under Speed:*]

1903, *Montgomery St. R. Co. v. Shanks*, 139 *Ala.* 489, 37 *So.* 166 ("it looked very fast," allowed).

1904, *Chicago City R. Co. v. Bundy*, 210 *Ill.* 39, 71 N. E. 28 (of a street car, allowed). 1904, *Chicago City R. Co. v. Matthieson*, 212 *Ill.* 292, 72 N. E. 443 (that a horse "ran fast and was wild," allowed). 1906, *Chicago City R. Co. v. McDonough*, 221 *Ill.* 69, 77 N. E. 577 (that a car was going "at full speed," allowed).

1906, *Cook v. Stimson M. Co.*, 41 *Wash.* 314, 83 *Pac.* 419 (speed of a train, excluded).

[*Note 2; add, under Direction:*]

1904, *Wilson v. U. S.*, 5 *Ind. Terr.* 610, 82 S. W. 924 (position of an arm when wounded, excluded).

1905, *Miera v. Terr.*, 13 N. M. 192, 81 *Pac.* 586 (that the victim shot must have been sitting down, allowed).

[*Note 2; add, under Identity:*]

- 1906, *DuBose v. State*, 148 Ala. 560, 42 So. 862 (that certain tracks were the defendant's, excluded). 1911, *Pope v. State*, 174 Ala. 63, 57 So. 245 (whether a mule would have made track similar to another track observed, allowed; three judges diss.). 1906, *People v. Gray*, 148 Cal. 507, 83 Pac. 707 (that a person's description tallied, excluded on the facts). 1904, *Alford v. State*, 47 Fla. 1, 36 So. 436 (buggy-tracks). 1905, *Jordan v. State*, 50 Fla. 94, 39 So. 155 (person). 1908, *Johnson v. State*, 55 Fla. 46, 46 So. 155 (mark in sand made by spur-leather). 1911, *People v. Jennings*, 252 Ill. 534, 96 N. E. 1077 (experts admitted to interpret fingerprints by the science of dactylos copy). 1908, *Craig v. State*, 171 Ind. 317, 86 N. E. 397 (identity of an assailant). 1909, *State v. Whitbeck*, 145 Ia. 29, 123 N. W. 982 (similarity of hair, by a non-expert, allowed, one of the kinds of hair not being at hand). 1905, *State v. Hopper*, 114 La. 557, 38 So. 452 (shoes). 1906, *State v. Graham*, 116 La. 779, 41 So. 90 (of shoe-tracks). 1905, *State v. Miller*, 71 N. J. L. 527, 60 Atl. 202 (spots on clothing). 1905, *State v. Rutledge*, 37 Wash. 523, 79 Pac. 1123 (police officer's identification of defendants from a description by the person robbed, excluded). 1905, *Roszczyńska v. State*, 125 Wis. 414, 104 N. W. 113 (accused).

In *Texas* there is a pretty body of law about testimony *identifying by foot-tracks*; it is as curious and as interesting as some of the quaint rituals of the Aztec priesthood; the following opinions collect some of the cases:

- 1904, *Parker v. State*, 46 Tex. Cr. 461, 80 S. W. 1008 (similarity of boot-tracks, excluded, but here because the witness had not sufficiently observed, on the principle of § 660, *ante*). 1906, *Porch v. State*, 50 Tex. Cr. 335, 99 S. W. 102.

#### § 1978. Miscellaneous Topics of Testimony.

[*Note 1; add:*]

- 1905, *Baker v. Cotney*, 142 Ala. 566, 38 So. 130 (how much cotton a tract produced, allowed). 1910, *Miller v. State*, 94 Ark. 538, 128 S. W. 353 (whether hairs were human, allowed). 1905, *Atchison, T. & S. F. R. Co. v. Watson*, 71 Kan. 696, 81 Pac. 499 (usual shrinkage of cattle-weight in transit, allowed). 1912, *Cecil Paper Co. v. Nesbitt*, 117 Md. 59, 83 Atl. 254 (usual conduct of mules, excluded). 1905, *State v. Olson*, 95 Minn. 104, 103 N. W. 727 (whether a liquor was intoxicating, allowed). 1905, *Earp v. State*, — Miss. —, 38 So. 288 (that the insane do not kill for money, not allowed). 1904, *Willis v. W. U. Tel. Co.*, — N. C. —, 48 S. E. 538 (how much anguish, etc., he suffered from non-receipt of a telegram, not allowed). 1907, *State v. Remington*, 50 Or. 99, 91 Pac. 473 (size of a hole which a rifle would make, allowed). 1904, *Brady v. Shirley*, 18 S. D. 608, 101 N. W. 886 (whether a colt was sired by a particular horse, allowed). 1906, *Leatherman v. State*, 49 Tex. Cr. 485, 95 S. W. 504 (indictment for vagrancy as a professional gambler; whether he was a professional gambler, excluded).

#### § 1983. Opinion as to Moral Character of Accused, etc.

[*Note 1, par. 1; add:*]

- 1904, *People v. Tibbs*, 143 Cal. 100, 76 Pac. 904 (*People v. Wade* approved). 1905, *People v. Sullivan*, 218 Ill. 419, 75 N. E. 1005 (disbarment; a statement signed by

[*Note 1 — continued*]

numerous judges that the respondent "was never fined, rebuked, or censured" by any of them, and that his "professional character was never assailed to their knowledge," held to relate only to the "personal knowledge or personal belief of the signers," and to be therefore inadmissible).

1905, *State v. Richards*, 126 Ia. 497, 102 N. W. 439 (*State v. Sterrett*, followed).

1906, *State v. Simmons*, 74 Kan. 799, 88 Pac. 57 (personal opinion inadmissible; certain forms of expression passed upon). 1908, *State v. Tawney*, 78 Kan. 855, 99 Pac. 268 ("Do you know his character, etc.?" held proper, the term being presumably used for "reputation"). 1909, *Spain v. Rakestraw*, 79 Kan. 758, 101 Pac. 466 (self-defence to a battery; witness to plaintiff's character as a quarrelsome man; rule of *State v. Johnson*, *post*, § 1985, applied, but with liberality).

1904, *People v. Albers*, 137 Mich. 678, 100 N. W. 908 (personal knowledge, excluded; *People v. Turney* not cited).

1907, *People v. Van Gaasbeck*, 189 N. Y. 408, 82 N. E. 718 (defendant in homicide; "the personal knowledge and belief of the witness must be excluded").

1907, *State v. Dickerson*, 77 Oh. 34, 82 N. E. 969 (*Gandolfo v. State* approved; "the accused is not confined to his reputation for a certain trait . . . but may by those most intimate with him during a course of years spread before the jury his real self").

1909, *State v. Hosey*, 54 Wash. 309, 103 Pac. 12 (rape under age; defendant's character proved by opinion based on personal knowledge, expressly declared admissible; Dunbar, J.: "reputation such as was proved under the old rule was only what a certain given number of people thought about a man, and was but an enlargement in numbers of what one man thought or knew about him; and there seems to be no good reason why the opinion and knowledge of the one man should be excluded because he is not able to duplicate that opinion by giving the names of others who have expressed their opinion as to his reputation"; but the Court's opinion is open to criticism in that it reaches this result by deduction from the rule that reputation may consist in not having heard anything against the man; personal opinion is distinct from that, and the decision should have recognized the distinction).

[*Note 1; add, at the end:*]

The question, "Do you believe that the defendant (or, a man of his character) would be likely to commit an act of the kind here charged?" which was usual in the early orthodox English practice (as seen *ante*, § 1981, par. b, n. 3, and § 59, n. 2), would be equally forbidden by the American Opinion rule as above accepted; a few cases showing this are cited *ante*, § 59, n. 3.

§ 1984. Character for Care, Competence, etc.

[*Note 3; add:*]

1905, *First Nat'l Bank v. Chandler*, 144 Ala. 286, 39 So. 822 (whether an employee was "a wide-awake, attentive boy," allowed).

1907, *Moore v. Dozier*, 128 Ga. 90, 57 S. E. 110 (custody of child; that the mother was "an unfit person to rear the children," not allowed).

1911, *Saunders v. Atchison T. & S. F. R. Co.*, 86 Kan. 56, 119 Pac. 552 (competence and skillfulness of an engineer, allowed).

1911, *Mayfield Lumber Co. v. Lewis' Adm'r*, 142 Ky. 727, 135 S. W. 420 (driver's incompetence; excluded; no authority cited).

1905, *Southern Pac. Co. v. Hetzer*, 135 Fed. 272, 277, 68 C. C. A. 26, *semble* (fellow-servant's character, admissible).

1905, *Purkey v. Southern C. & T. Co.*, 57 W. Va. 595, 50 S. E. 755 (opinion as to the competency of a mine-boss, excluded).

[*Note 4, par. 1; add.:*]

1905, *Cleveland v. Martin*, 218 Ill. 73, 75 N. E. 772 (injunction by medical author to restrain the publication of a book as not equal to contract and as likely to damage the plaintiff's repute; the opinions of medical men as to the probable or actual injury to repute by the publication were admitted).

1908, *Alexander v. Mud Lake L. Co.*, 153 Mich. 70, 116 N. W. 539 (wages; testimony to plaintiff's competency, admitted).

1909, *Johnson v. Coughren*, 55 Wash. 125, 104 Pac. 170 (injury by a blast; opinions as to the "competency and fitness of F. to perform his duties as a powder-man," excluded; *Chadwick, J., diss.*; the entire foregoing list of authorities is ignored).

#### § 1985. Witness' Moral Character.

[*Note 1; add.:*]

1907, *Mitchell v. State*, 148 Ala. 618, 42 So. 1014 (like *Crawford v. State*).

1906, *Maloy v. State*, 52 Fla. 101, 41 So. 791 (personal opinion, excluded).

1904, *Taylor v. State*, 121 Ga. 348, 49 S. E. 303 (belief on oath, not founded on a knowledge of general character, excluded).

1907, *State v. Blackburn*, — Ia. —, 110 N. W. 275 (rape under age; "Do you know her general moral character in the neighborhood?" referring to the prosecuting witness, held an improper form of question).

1908, *Hunneman v. Phelps*, 199 Mass. 15, 85 N. E. 169 (excluded). 1909, *Eastman v. Boston Elev. R. Co.*, 200 Mass. 412, 86 N. E. 793 ("Would you believe her on oath?" excluded, even after a statement as to knowing the reputation).

#### § 1986. Policy of the Exclusionary Rule.

[*Note 3; add.:*]

The opinion in *People v. Van Gaasbeck*, 189 N. Y. 408, 82 N. E. 718 (1907) attempts to answer the above argument.

#### § 2000. Comparison of Handwriting; Principle, etc.

[*Text, p. 2666, l. 10; add a new note 2a:*]

<sup>2a</sup> The scientific value of handwriting comparison is expounded by Mr. Albert S. Osborn, in his elaborate treatise, "Questioned Documents" (Rochester, 1910).

#### § 2004. Lay Testimony to Handwriting Specimens, etc.; Excluded in general, etc.

[*Note 1; add.:*]

1910, *Murphy v. Murphy*, 146 Ia. 255, 125 N. W. 191 (but this ruling is erroneous on the facts, for the reason stated *ante*, § 697, n. 4).

1904, *Groff v. Groff*, 209 Pa. 603, 59 Atl. 65.

[*Text, p. 2669; add in line 3 of the §:*]

An exception which "proves the rule" is the case of a layman who has seen a disputed document, *now lost*, but *did not then know the author* of it, and is now asked to compare a specimen of proved authorship and say whether the lost document was in the same hand. Here the reason of the Opinion rule falls away; for the jury cannot examine for themselves the lost docu-

[Text, p. 2669 — continued]

ment, and hence the lay witness can add some information not otherwise accessible; hence, his opinion, based on comparison, should be allowed.<sup>2</sup>

<sup>2</sup> *Accord*: 1889, *Hammond v. Wolf*, 78 Ia. 227 (attorney testifying to a note, now lost, and formerly placed in his hands for collection). 1891, *Sankey v. Cook*, 82 Ia. 125 (an expert who had once seen a contract now lost; here excluded, solely because the specimen used as a standard was not properly proved genuine). 1910, *Murphy v. Murphy*, 146 Ia. 255, 125 N. W. 191 (cited more fully *ante*, § 697, n. 4).

**§ 2006. Same: Old Exception for Ancient Documents.**

[Note 1, par. 2, l. 5; *add*.:]

1911, *Nicholson v. Eureka L. Co.*, 156 N. C. 59, 72 S. E. 86 (not confining the rule to experts).

**§ 2008. Expert Testimony; Whether Admissible, etc.**

[Note 1; *add*.:]

*Ala.*: 1905, *Campbell v. Bates*, 143 Ala. 338, 39 So. 144 (*Gibson v. Trowbridge F. Co.* followed). 1907, *Griffin v. Working Woman's H. Ass'n*, 151 Ala. 597, 44 So. 605 (papers otherwise in the case and conceded or proved genuine may be used).

*Ga.*: 1906, *Patton v. Bank*, 124 Ga. 965, 53 S. E. 664 (note; comparison with other signatures admitted genuine and in evidence, allowed).

*Ky.*: 1907, *Pulliam v. Sells*, 124 Ky. 310, 99 S. W. 289 (comparison allowed with signatures admitted by opponent on the stand to be genuine).

*La.*: For *olographic* wills, a special line of authorities exists:

*Civ. C.* § 1655 (must be proved by two witnesses "who must attest that they recognize the testament as being entirely written, dated, and signed in the testator's handwriting, and as having often seen him write and sign during his lifetime"; for the last clause, Act 119, p. 168, 1896, substituted this: "The judge shall interrogate the witnesses under oath touching their knowledge of the testator's handwriting and signature, and shall satisfy himself that they are familiar therewith").

1871, *Roth's Succession*, 31 La. Ann. 320 (expert testimony admissible in corroboration of the two witnesses speaking from personal knowledge).

1913, *White's Succession*, 132 La. 890, 61 So. 860 (rule of *Roth's Case* followed).

*Minn.*: 1912, *Cochran v. Stein*, 118 Minn. 323, 136 N. W. 1037 (*Morrison v. Porter* approved).

*R. I. St.* 1905, § 399 (see *post*, § 2016).

1907, *Taber v. New York P. & B. R. Co.*, 28 R. I. 287, 67 Atl. 8 (statute applied).

*S. Dak.*: 1906, *McClellan's Estate*, 20 S. D. 498, 107 N. W. 681 (expert comparison of photographic reproductions of certain papers with "proved signatures," held not improper on the facts).

*U. S.*: 1904, *Withaup v. U. S.*, 127 Fed. 530, 535, 62 C. C. A. 328 (comparison allowable "if a paper is in evidence in the case for some other purpose, and is admitted or satisfactorily proven to be" genuine, or if a paper is filed by a party and is part of the record of which the Court takes judicial notice; this is said to be "clearly established" (?) as the "common-law rule"; here, four papers in a former case were excluded, and two recognizances in the case at bar were admitted).

**§ 2012. Qualifications of the Expert as to Skill.**

[Note 3; *add*.:]

1904, *State v. Burns*, 27 Nev. 289, 74 Pac. 983 (bank teller).

1905, *Abernethy v. Yount*, 138 N. C. 337, 50 S. E. 696 (clerk of court).

§ 2015. **Modes of Testing the Opinion on Cross-Examination.**

[*Note 2; add.:*]

1907, *Griffin v. Working Women's H. Ass'n*, 151 Ala. 597, 44 So. 605 (witness speaking from knowledge of former writings, allowed to be cross-examined to identity of features between the document in issue and the former writing; the opinion need not have noticed this point, for the objection was baseless; Dowdell, J., diss., only as to the former writing being introduced in evidence, but that was a mere formal matter).

1905, *Wooldridge v. State*, 49 Fla. 137, 38 So. 3 (a witness to handwriting, not an expert, not allowed to be tested by other specimens; apparently an over-strict ruling; no authority cited).

1905, *Jacobs v. Boston El. R. Co.*, 188 Mass. 245, 74 N. E. 349 (a witness allowed to be asked on cross-examination to make a sample signature; the precise point of the ruling is however not ascertainable from the opinion).

1904, *Taylor v. Taylor's Estate*, 138 Mich. 658, 101 N. W. 832 (showing a signature only; the witness' insistence on seeing the whole of the document, held proper).

1905, *People v. Patrick*, 182 N. Y. 131, 74 N. E. 843 (testing an expert by proof of his mistakes as to selected signatures; *Hoag v. Wright* approved; but the trial Court's refusal here to allow the tests was held distinguishable, and in any event harmless error).

1904, *Groff v. Groff*, 209 Pa. 603, 59 Atl. 65 (alleged forgery of a note; non-expert witnesses testifying from knowledge of the handwriting, allowed to be tested by signatures shown through slits in envelopes and the witnesses' mistakes allowed to be proved; on the facts, the showing of the signature alone was held proper).

1904, *Wilmington S. Bank v. Waste*, 76 Vt. 331, 57 Atl. 241 (cross-examination by testing with specimens "conceded or proved to be genuine," allowable).

Compare the various methods illustrated in "Questioned Documents," by Albert H. Osborn (Rochester, 1910). All methods having scientific value ought to be freely allowed by law.

§ 2016. **Jury's Perusal of Specimens; Whether allowable, etc.**

[*Note 1; add.:*]

CANADA: *Alta.* St. 1910, 2d sess., Evidence Act, c. 3, § 54 (like Eng. St. 1854, c. 125, § 27). *Ont.* St. 1909, c. 43, § 52 (like R. S. 1897, c. 73, § 55).

*Sask.* St. 1907, Evidence Act, § 36 (like Eng. St. 1854, c. 125, § 27).

*Yukon* St. 1904, c. 5, § 33 (like Eng. St. 1854, c. 125, § 27).

UNITED STATES: *Ala.*: 1905, *Washington v. State*, 143 Ala. 62, 39 So. 388. 1906, *Bolton v. State*, 146 Ala. 691, 40 So. 409 (forgery of a check; other specimens, not otherwise in the case and not shown genuine, excluded). 1907, *Griffin v. Working Women's H. Ass'n*, 151 Ala. 597, 44 So. 605 (papers otherwise in the case and admitted or proved genuine may be used).

*Cal.*: 1906, *Castor v. Bernstein*, 2 Cal. App. 703, 84 Pac. 244 (breach of contract assigned to plaintiff; plea, release; the assignment offered by the plaintiff was allowed to be used by the defendant for the jury's inspection in determining the genuineness of the release, without any further evidence; Cooper, J., diss.).

*Fla.*: 1905, *Wooldridge v. State*, 49 Fla. 137, 38 So. 3 (forging of school warrants; Rev. St. 1892, § 1121, held applicable to criminal cases; under this statute, specimens of the forger's writing, and not merely of that of the person whose name is forged, are admissible; repudiating the doctrine of *Peck v. Callaghan*, N. Y.).

*Ga.*: 1904, *Vizard v. Moody*, 119 Ga. 918, 47 S. E. 348 (other specimens, including that of an affidavit to the plea, admitted).

*Ida.*: 1905, *State v. Seymour*, 10 Ida. 699, 79 Pac. 825 (*Bane v. Gwinn* followed).

*Ill.*: 1911, *Stitzel v. Miller*, 250 Ill. 72, 95 N. E. 53 (the plaintiff bank was indorsee of a note payable to H. M. and signed by D. C. M. deceased; in an action of assumpsit, D. C. M.'s

[Notes 1 — continued]

administrator denied the genuineness of the maker's signature; and offered to show that the signature was a traced facsimile of the signatures on two other notes purporting to be by D. C. M., neither of which was otherwise in the case; held that the usual limitations did not apply, this not being similarity of a specific person's type of hand, but identity of writing irrespective of the writer; careful opinion by Carter, J.).

*Ind.*: 1911, *Williams v. State*, 175 Ind. 93, 93 N. E. 448 (forgery; *Tucker v. Hyatt* followed). St. 1913, c. 312, p. 840, Mar. 15 (wherever "the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a basis for comparison by witnesses or by the jury, court, or officer conducting such proceedings, to prove or disprove such genuineness"). 1914, *Kahn v. State*, — Ind. —, 105 N. E. 385 (documents "in the case, which the party is estopped to deny, and such others as are admitted to be genuine," are alone admissible).

*Kan.*: 1904, *State v. Ryno*, 68 Kan. 348, 74 Pac. 1114 (*State v. Stegman* followed).

*Ky.*: 1907, *Howard v. Creech*, — Ky. —, 101 S. W. 974 (statute applied).

*Mich.*: 1906, *People v. Tollefson*, 145 Mich. 449, 108 N. W. 751 (forgery; hotel register, admitted for comparing accused's signature, no proper objection being made).

1907, *Brown v. Evans*, 149 Mich. 429, 112 N. W. 1079 (comparison with an affidavit on file in the case, allowed).

*Mo.*: 1907, *State v. Stark*, 202 Mo. 210, 100 S. W. 642 (Rev. St. 1899, § 4679 applied, on an issue of a forged deed).

*N. J.*: 1908, *State v. Skillman*, 76 N. J. L. 474, 70 Atl. 83 (writings otherwise in the case, admitted).

*N. Y.* St. 1909, c. 65, p. 24, Feb. 19 (placing St. 1880, c. 36, § 1, in C. C. P. as § 961*d*).

*N. C.*: 1906, *Shelton's Will*, 143 N. C. 218, 55 S. E. 705 (*Fuller v. Fox* followed).

1908, *Martin v. Knight*, 147 N. C. 564, 61 S. E. 447 (execution of a note and a duebill, the contents being by M. and the signature purporting to be by F.; documents allowed to be shown to the jury, the witnesses explaining the grounds for their opinion as to similarity or difference; prior cases exhaustively examined; able opinion by Connor, J.).

*N. C.* St. 1913, c. 52, p. 98 (like Eng. St. 1854, c. 125, § 27).

*N. D.*: 1910, *Cochrane v. National Elev. Co.*, 20 N. D. 169, 127 N. W. 725 (specimen conceded genuine, admitted).

*Pa.*: 1904, *Groff v. Groff*, 209 Pa. 603, 59 Atl. 65 (statute applied, to allow comparisons for jury and experts). St. 1913, No. 300, June 6, p. 451 (amending St. 1895, May 15, § 1; instead of "a question as to any simulated or altered document or writing," read "a question as to any writing").

*R. I.* St. 1905, § 399 (like the English Act).

*S. D.*: 1904, *State v. Coleman*, 17 S. D. 594, 98 N. W. 175 (whether writings proved or admitted genuine may be used, though not otherwise evidence in the case; not decided). 1905, *Mississippi L. & C. Co. v. Kelly*, 19 S. D. 577, 104 N. W. 265 (a writing "admitted or proved" genuine is admissible, though not otherwise in the case).

*Tex.*: 1904, *Mahon v. State*, 46 Tex. Cr. 234, 79 S. W. 28 (perjury in an affidavit; to identify the defendant as the signer, an application for witness-process, signed by him, was admitted for the jury's inspection, without calling experts; loose opinion, citing only two of the above cases). 1908, *Wade v. Galveston H. & S. A. R. Co.*, — Tex. Civ. App. —, 110 S. W. 84 (*Kennedy v. Upshaw* followed).

*U. S.*: 1904, *Withaup v. U. S.*, 127 Fed. 530, 535, 62 C. C. A. 328 ("where a comparison is permissible, it may be made by the Court and jury, with or without the aid of expert witnesses"; cited more fully *ante*, § 2008). 1908, *Barnes v. U. S.*, 5th C. C. A., 166 Fed. 113 (*Williams v. Conger* followed). 1911, *U. S. v. North*, D. C. Or., 184 Fed. 151 (rule of *Williams v. Conger* applied, to exclude a document not otherwise in the case). St. 1913, 62d Cong. 3d sess., c. 79, Feb. 26 (37 Stat. L. 683). ("In any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evi-

[*Note 1 — continued*]

dence as a basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness").

*Ut.*: 1906, *State v. McBride*, 30 *Utah* 422, 85 *Pac.* 440 (rule of *Tucker v. Kellogg* accepted).

*Vt.*: 1909, *State v. Kent*, 83 *Vt.* 28, 74 *Atl.* 389 (writings not otherwise in the case, but "admitted or proved to be genuine," may be used; here, capital letters carved on wood, etc.).

*Va.*: 1904, *Johnson v. Com.*, 102 *Va.* 927, 46 *S. E.* 789 (forgery of wife's will; specimens of defendant's and wife's writing, proved to be genuine, admitted).

*W. Va.* *St.* 1907, c. 39, p. 224 (in any civil or criminal proceeding "any writing proved to the satisfaction of the judge to be genuine may be used with or without the testimony of witnesses for the purpose of making a comparison with a disputed writing as evidence of the genuineness or otherwise of such disputed writing").

### § 2017. Ancient Documents.

[*Note 1; add.*]

1822, *Cantey v. Platt*, 2 *McCord* 260.

1906, *McCreary v. Coggeshall*, 74 *S. C.* 42, 53 *S. E.* 978 (an ancient letter; comparison with ancient official records by the same alleged author, admitted).

### § 2018. Unfair Selection of Specimens.

[*Note 5; add.*]

1909, *State v. Barris*, 78 *N. J. L.* 14, 73 *Atl.* 248 (under *Gen. St.* 1896, quoted *ante*, § 2016, the limitation excluding specimens made after controversy does not apply to specimens not offered by the party in whose hand they are, and in particular not to the State using a forger's specimens; furthermore, specimens made by the alleged forger after the date of the document in issue are admissible).

1906, *Greenwald v. Ford*, 21 *S. D.* 28, 109 *N. W.* 516 (checks; a signature made since the time of the signature in dispute is not thereby inadmissible, unless "manufactured since the controversy arose, for the purpose of comparison, by one having a motive to fabricate").

### § 2020. Specimens "Proved" Genuine; Mode of Proof.

[*Note 3, par. 1; add.*]

1906, *State v. McBride*, 30 *Utah* 422, 85 *Pac.* 440 (testimony of the prosecutrix based only on the defendant's oral admissions of authorship, without other evidence, held insufficient; *Straup, J.*, diss., and correctly, because the present question was strictly not involved, but that of § 699, *ante*).

1908, *State v. Ryder*, 80 *Vt.* 422, 68 *Atl.* 652 (proof by persons familiar with the handwriting, sufficient).

[*Note 3, par. 2; add.*]

1905, *Com. v. Tucker*, 189 *Mass.* 457, 76 *N. E.* 127 (the "equivalent evidence" which may serve instead of "direct evidence" may be circumstantial, and must merely not be opinion testimony resting solely on "comparison with another standard or with an exemplar in his own mind"; here, certain sale-slips were held sufficiently proved).

1909, *Newton Centre Trust Co. v. Stuart*, 201 *Mass.* 288, 87 *N. E.* 630 (under the circumstances, the trial Court's refusal to pass upon certain specimens offered as standards, because their genuineness was disputed, held improper; the specimen need not be evidenced by persons who saw them written, but may be evidenced by extra-judicial admissions).

[*Note 3 — continued*]

In Massachusetts it is now also further maintained, in accordance with the heterodox views of that Court in analogous questions (*ante*, § 861, *post*, § 2550), that the trial Court's ruling admitting proved specimens is *provisional only*, and that the jury may in criminal cases further reconsider and may reject the specimens as not genuine: 1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127.

**§ 2021. Specimens "Admitted" to be Genuine.**

[*Note 1; add.:*]

1906, *Stark v. Burke*, 131 Ia. 684, 109 N. W. 206 (the witness' "admission" of genuineness is not the party's, so as to entitle the document to be treated as one conceded to be genuine).

[*Note 2; add.:*]

1905, *Frank v. Berry*, 128 Ia. 223, 103 N. W. 358 (defendant's own signed answer in the cause, admitted, since a statute required every pleading to be signed by himself or his attorney).

*Contra*: 1906, *State v. Branton*, 49 Or. 86, 87 Pac. 535 (letters orally admitted by the defendant to be his, in conversation with a witness, were apparently held admissible, under a statute receiving writings "admitted or treated as genuine").

**§ 2024. Expert Testimony to Ink, Paper, Spelling, etc.**

[*Note 1; add.:*]

1909, *State v. Kent*, 83 Vt. 28, 74 Atl. 389 (peculiar method of using a period in punctuation, admitted).

[*Note 2; add.:*]

1906, *State v. Freshwater*, 30 Utah 442, 85 Pac. 447 (marks left by a defective typewriter).

1905, *Huber Mfg. Co. v. Claudel*, 71 Kan. 441, 80 Pac. 960 (typewritten and typesigned letters to defendant from plaintiff; agent of defendant allowed to identify them, without specifying reasons; "there might have been" some peculiarity in the typewriting).

1893, *Levy v. Rust*, — N. J. Eq. —, 49 Atl. 1017 (genuineness of seven receipts; typewriting marks considered as evidence of forgery).

1912, *People v. Storrs*, 207 N. Y. 147, 100 N. E. 730 (forgery of a typewritten document; to evidence the defendant's authorship, a specimen, typewritten on the defendant's machine, but otherwise irrelevant, was received; not as coming literally under C. C. P. § 961*d*, but as governed by the principle of mechanical traces, *ante*, § 148).

On all these matters, in their scientific probative aspect, consult Albert S. Osborn's "Questioned Documents" (Rochester, 1910).

[*Note 3; add.:*]

1909, *R. v. Law*, 19 Man. 259 (anonymous libels; comparison with admittedly genuine specimens as to style of expression, etc., held allowable, for experts, but not for the jury alone without experts; this qualification is unsound).

1886, *Scott v. Crerar*, 11 Ont. 541, 14 Ont. App. 152 (cited more fully *ante*, § 87).

1840, *Brown v. Kimball*, 25 Wend. 259, 261, 272 (a deed dated 1770, on a printed form ending "Commonwealth aforesaid," the land being in Massachusetts; evidence that Massachusetts was always described in deeds up to 1780 as a "Province" or "State," but not a "Commonwealth," used to show that the deed was a later forgery).

On all the above points, compare also the citations *ante*, § 570.

**§ 2025. Deciphering Illegible Writings.**

[Note 1, par. 1; *add*.:]

1910, *State v. Sysinger*, 25 S. D. 110, 125 N. W. 879.

*Contra*: 1903, *In re Hopkins*, 172 N. Y. 360, 65 N. E. 173 (whether cancellation marks on a testator's signature were made by him; expert testimony not allowed, under Laws 1880, c. 36, § 1, cited *ante*, § 2016; unsound).

**§ 2026. Imitations, Forgeries.**

[Note 3, par. 1; *add*.:]

1905, *McGarry v. Healey*, 78 Conn. 365, 62 Atl. 671 (whether a disguised hand would show the original characteristics, etc.).

1911, *Stitzel v. Miller*, 250 Ill. 72, 95 N. E. 53 (identity of traced signatures, allowed; cited more fully *ante*, § 2016, n. 1).

Ind. St. 1905, p. 584, § 238 (Rev. St. 1697, § 1892, re-enacted).

1907, *Rinker v. U. S.*, 151 Fed. 755, 760, C. C. A. (whether the hand was genuine or disguised).

1905, *Colbert v. State*, 125 Wis. 423, 104 N. W. 61 (whether a specimen is in normal handwriting).

**§ 2027. Erasures, Alterations, Time of Writing.**

[Note 1; *add*, under *Admitted*.:]

1913, *Putman v. Hamilton*, — Ia. —, 140 N. W. 886 (age of the document).

1911, *State v. Smalls*, 63 Wash. 172, 115 Pac. 82 (whether words were written at different times, allowed).

**§ 2032. History of Rules of Number.**

[Note 4, l. 3; *add*.:]

Esmein, "History of Continental Criminal Procedure" (transl. Simpson; Continental Legal History Series, Vol. V), 1913, pp. 57, 516, 620.

[Text, p. 2699, at the end of the quotation; *add* a new note 11a:]

The case cited by Thayer is now to be found in Maitland's edition of the Year Books, Vol. I (Selden Soc. Pub., Vol. XVII), 2 Ed. II, 1308, No. 54, p. 111 ("And because Tibald's proof was better and greater," says one text, but another says, "was proved by more").

[Note 22, par. 2, p. 2702; *add*.:]

1672, Conn. Revision, p. 69 ("It is ordered by this Court that no person for any fact committed shall be put to death without the testimony of two or three witnesses, or that which is equivalent thereunto"; this is still the law in Connecticut; *post*, § 2044, n. 1).

**§ 2034. General Principle; One Witness may Suffice, etc.**

[Note 1, par. 1; *add*.:]

Okl. Stats. 1903, § 68, art. 10.

The same language is sometimes expressly used by Courts:

1909, *Catchings v. State*, 6 Ga. App. 790, 65 S. E. 815. 1910, *Hudgins v. State*, 7 Ga. App. 785, 68 S. E. 336 (two witnesses against one).

1904, *St. Louis & O. R. Co. v. Union T. & S. Bank*, 209 Ill. 457, 70 N. E. 651.

1904, *Indianapolis St. R. Co. v. Johnson*, 163 Ind. 518, 72 N. E. 571 ("The preponderance of evidence does not depend upon the number of witnesses"; citing cases).

[*Note 1 — continued*]

1909, *State v. Blount*, 124 La. 202, 50 So. 12 (murder).

1909, *Nutting v. Watson*, 84 Nebr. 464, 121 N. W. 582 (horse).

1911, *Marzulli v. Metropolitan L. Ins. Co.*, 81 N. J. L. 166, 78 Atl. 1051.

There is a peculiar and absurd quibble in Wisconsin, used to clarify the jury's mind in instructing them as to the preponderance of proof (*post*, § 2498): 1905, *Garske v. Ridgeville*, 123 Wis. 503, 102 N. W. 22 (the trial Court charged that the preponderance "is not to be determined by the number of witnesses on either side, or by the number of witnesses on any particular material point"; this is held erroneous, by weird logic).

[*Note 2, l. 2; add:*]

1904, *Bradley v. Gorham*, 77 Conn. 211, 58 Atl. 689.

1906, *Alexander v. Blackman*, 26 D. C. App. 541, 544.

1904, *Hauser v. People*, 210 Ill. 253, 71 N. E. 416. 1905, *Chicago Union T. Co. v. O'Brien*, 219 Ill. 303, 76 N. E. 341 (there is no presumption "that an unimpeached witness has testified truly, and such instructions infringe upon the province of the jury to determine the credibility of the witnesses").

1909, *Arnd v. Aylesworth*, 145 Ia. 185, 123 N. W. 1000.

1908, *Lindenbaum v. N. Y. N. H. & H. R. Co.*, 197 Mass. 314, 84 N. E. 129. 1908, *Bearse*

*v. Mabie*, 198 Mass. 451, 84 N. E. 1015.

This loose and futile but not uncommon heresy that an unimpeached or uncontradicted witness must be believed is illustrated in the following opinions:

1905, *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884.

1908, *Larson v. Glos*, 235 Ill. 584, 85 N. E. 926 (with some variation).

Still less is there any *presumption* that a *contradicted* witness speaks truthfully:

1908, *State v. Halverson*, 103 Minn. 265, 114 N. W. 957 (good opinion by Elliott, J.).

#### § 2036. Treason; History of the Rule.

[*Note 20, p. 2716, l. 7; insert:*]

now reprinted in "Select Essays in Anglo-American Legal History," vol. I (1907; Ass'n of American Law Schools).

[*Note 20, at the end; add:*]

Similar evidence will be found in the learned essay of Professor Edward Jenks, "The Constitutional Experiments of the Commonwealth" (1890), pp. 54, 82.

#### § 2039. Same: Constitutional Sanctions.

[*Note 2; add:*]

*Ind. St.* 1905, p. 584, § 247.

*N. Mex. Const.* 1910, Art. II, § 16.

#### § 2040. Two Witnesses in Perjury; History.

[*Note 6; add:*]

1913, *Gaskell's Case*, 8 Cr. App. 103 (rule applied).

#### § 2041. Same: Policy of the Rule.

[*Note 1; add:*]

Mr. Wm. A. Purrington has forcefully commented on "The Frequency of Perjury" (*Columbia Law Review*, VIII, 67; 1908).

§ 2042. Perjury: (c) A Single Witness, if Corroborated, Suffices.

[Note 3; add:]

St. 1911, 1-2 Geo. V, c. 6, § 13 (no person to be convicted of perjury, or subornation thereof, "solely upon the evidence of one witness as to the falsity of any statement alleged to be false").

[Note 4; add:]

Cal. St 1903, c. 532 (adds a new P. C. § 1103a, like the last clause of C. C. P. 1872, § 1968, *supra*).

1906, *Cleveland v. State*, 50 Tex. Cr. 6, 95 S. W. 521 (the witness must be a "credible" one).

[Note 5; add:]

1906, *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384 (instruction construed).

1905, *Cook v. U. S.*, 26 D. C. App. 427.

1892, *Com. v. Davies*, 92 Ky. 460, 18 S. W. 10 (rule applied). 1905, *Goslin v. Com.*, 121 Ky. 698, 90 S. W. 223 (rule applied). 1907, *Stamper v. Com.*, — Ky. —, 100 S. W. 286 (rule applied). 1913, *Partin v. Com.*, 154 Ky. 701, 159 S. W. 542 (form of instruction declared).

1904, *State v. Hunter*, 181 Mo. 316, 80 S. W. 955 (*State v. Heed* followed).

1907, *State v. Pratt*, 21 S. D. 305, 112 N. W. 152 (citing some decisions not included in the note to this text).

1912, *Allen v. U. S.*, C. C. A., 194 Fed. 664 (an instruction requiring two witnesses or one witness with corroborative circumstances, held erroneously refused; nature of corroboration discussed).

1905, *State v. Rutledge*, 37 Wash. 523, 79 Pac. 1123 (the corroboration need not be "of equal weight" to another witness).

It has very sensibly been held that if the *defendant himself* takes the stand, his manner as a witness may sufficiently supply the corroboration, of which the jury alone judges; so that the rule virtually falls away: 1884, *State v. Miller*, 24 W. Va. 802, 807.

[Note 6; add:]

*Accord*: 1887, *U. S. v. Thompson*, 31 Fed. 331, C. C. (subornation of perjury; the perjurer's testimony need not be corroborated).

1906, *Boren v. U. S.*, 144 Fed. 801, 805, C. C. A., *semble* (subornation of perjury; the rule does not apply).

*Contra*: 1869, *People v. Evans*, 40 N. Y. 1 (subornation of perjury; the testimony of the perjurer, testifying to both perjury and subornation, required to be corroborated; the opinion proceeds upon the rule as to accomplices, *post*, § 2056).

[Note 7; add:]

1913, *R. v. Curry*, N. Sc. S. C., 12 D. L. R. 13.

[Text, p. 2725; add a new paragraph (5) :]

(5) The rule should not apply necessarily to a charge of *subornation of perjury*, because the act of subornation does not involve the theory of oath against oath, and the perjury may be evidenced by the perjured witness himself, whose present testimony is thus not opposed to the testimony for the prosecution.<sup>10</sup>

<sup>10</sup> Cases cited *supra*, n. 6, and *post*, § 2060, n. 1 (rule for accomplices).

1913, *State v. Richardson*, 248 Mo. 563, 154 S. W. 735 (subornation; the rule is here not applicable to proof of the perjury; cases collected).

§ 2043. **Same: (d) Exception for Contradictory Oaths.**

[*Note 2; add, under Contra:*]

1904, *State v. Hunter*, 181 Mo. 316, 80 S. W. 955.

1889, *State v. Buckley*, 18 Or. 228, 22 Pac. 838.

[*Note 3, par. 1; add, under Contra:*]

1906, *Billingsley v. State*, 49 Tex. Cr. 620, 95 S. W. 520 (there must be other evidence than the contradictory oath).

1876, *Schwartz v. Com.*, 27 Gratt. 1025 (leading opinion, by Staples, J.).

A New York statute of 1906 (c. 324, amending Penal Code, § 101a) seems to provide in part on this point (in perjury, the falsity shall be presumptively established by proof of the defendant's contrary testimony under oath "in any other written testimony, declaration, deposition, certificate, affidavit, or other writing by him subscribed").

§ 2044. **Sundry Crimes, under Statutes.**

[*Note 1; add:*]

Ont.: 1906, *R. v. Daun*, 12 Ont. L. R. 227, 231 (rule of Dom. Crim. Code, § 684, *supra*, applied, in a charge of seduction).

Cal. St. 1905, c. 532 (amends P. C. 1872, § 1110, as to the crimes covered).

Conn.: 1905, *State v. Marx*, 78 Conn. 18, 60 Atl. 690 (the trial Court need not define the meaning of "equivalent thereto," under the above statute). 1905, *State v. Kelly*, 77 Conn. 266, 58 Atl. 705. 1905, *State v. Bailey*, 79 Conn. 589, 65 At. 951. 1908, *State v. Washelesky*, 81 Conn. 22, 70 Atl. 63 (*State v. Smith* followed).

Fla. St. 1907, c. 5688, p. 201, May 11 (amending Gen. St. § 3558; U. S. revenue license or tax stamp in possession of alleged dealer in liquors may be proved "by two witnesses who have seen said license or tax stamp," etc.).

Ind. St. 1905, p. 584, § 238 (phraseology of Rev. St. 1897, § 1892, amended; larceny is an exception).

§ 2046. **Divorce Charge denied.**

[*Note 4; add:*]

1904, *Lenoir v. Lenoir*, 24 D. C. App. 160, 165 (cited *post*, § 2067, n. 10).

1904, *Cotter v. Cotter*, — N. J. Eq. —, 58 Atl. 73. 1905, *Sabin v. Sabin*, — N. J. Eq. —, 59 Atl. 627. 1905, *Hunt v. Hunt*, — N. J. Eq. —, 59 Atl. 642. 1905, *Wood v. Wood*, — N. J. Eq. —, 62 Atl. 429. 1905, *Kline v. Kline*, — N. J. Eq. —, 61 Atl. 160 (desertion). 1907, *Foote v. Foote*, 71 N. J. Eq. 273, 65 Atl. 205 (desertion). 1908, *Topfer v. Topfer*, — N. J. Eq. —, 68 Atl. 1071 (desertion).

[*Note 6, par. 2; add, under Accord:*]

1898, *Andrews v. Andrews*, 120 Cal. 186, 52 Pac. 208 (nature of corroboration, defined).

1905, *Avery v. Avery*, 148 Cal. 239, 82 Pac. 967 (similar).

1908, *Bell v. Bell*, 15 Ida. 7, 96 Pac. 196.

§ 2047. **Chancery Bill denied by Defendant's Oath.**

[*Note 4, par. 1; add, under Rule Applied:*]

1906, *Northwest E. I. Co. v. Campbell*, 28 D. C. App. 483, 493.

1904, *Parken v. Safford*, 48 Fla. 290, 37 So. 567.

1904, *Evans v. Evans*, — N. J. Eq. —, 59 Atl. 564.

1904, *McGary v. McDermott*, 207 Pa. 620, 57 Atl. 46.

1881, *Vigel v. Hopp*, 104 U. S. 441. 1885, *Conly v. Nailor*, 118 U. S. 127, 6 Sup. 1001.

[*Note 4 — continued*]

1892, *Monroe Cattle Co. v. Becker*, 147 U. S. 47, 13 Sup. 217. 1903, *Jacobs v. Van Sickle*, 127 Fed. 62, 61 C. C. A. 598.

1906, *Phelps v. Root*, 78 Vt. 493, 63 Atl. 941 (but here the rule is emasculated by declaring that "circumstantial evidence may take the place of the testimony of one or both witnesses, if of equal weight and credibility").

[*Note 4, par. 1; add, under Repudiated:*]

1904, *Thibodeaux v. Thibodeaux*, 112 La. 906, 36 So. 800 (apparently qualifying *Rush v. Landers*).

§ 2048. *Wills, etc., in Pennsylvania.*

[*Note 8; add:*]

1884, *Combs' Appeal*, 105 Pa. 155.

1893, *Simrell's Estate*, 154 Pa. 604, 26 Atl. 599.

1899, *McKenna v. McMichael*, 189 Pa. 440, 42 Atl. 14.

1906, *Michell v. Low*, 213 Pa. 526, 63 Atl. 246.

1906, *Fallon's Estate*, 214 Pa. 584, 63 Atl. 889.

1913, *Rhoads' Estate*, 241 Pa. 38, 88 Atl. 71 (statute held not satisfied because each witness did not separately depose to all the facts, following *Hock v. Hock*).

§ 2050. *Nuncupative Wills.*

[*Note 5; add:*]

1905, *Godfrey v. Smith*, 73 Nebr. 756, 103 N. W. 450 (statute applied).

[*Note 5; add:*]

N. Y. St. 1914, c. 443, § 2611 (surrogates' courts; for a nuncupative will, "its execution and tenor must be proved by at least two witnesses").

N. C. Rev. 1905, § 3127 (like Code 1883, § 2148).

§ 2051. *Holographic Wills, etc.*

[*Note 2; add:*]

N. C. Rev. 1905, §§ 3113, 3115, 3127 (like Code 1883, §§ 2136, 2176).

§ 2052. *Contents of a Lost Will.*

[*Note 1; add:*]

1913, *Thorman's Estate*, — Ia. —, 144 N. W. 7.

[*Note 3; add:*]

1909, *Patterson's Estate*, 155 Cal. 626, 102 Pac. 941 (C. C. P. § 1339 does not prevent the establishment by two witnesses, of a part only; good opinion by Shaw, J.).

1910, *Guinasso's Estate*, *Guinasso v. Arata*, 13 Cal. App. 518, 110 Pac. 335 (a person who only heard another read a document aloud is not one witness under this rule).

1906, *Inlow v. Hughes*, 38 Ind. App. 375, 76 N. E. 763 (all the provisions to be established must be proved by two witnesses, in the absence of a written copy proved).

N. Y. St. 1914, c. 443, § 2613 (surrogates' courts; "a lost or destroyed will can be admitted to probate in a surrogate's court," in a case where by C. C. P. § 1865 "a judgment establishing the will could be rendered by the Supreme Court").

Compare the rules for *restoring the record of lost documents*, including wills (*ante*, § 1660).

§ 2053. Usage or Custom.

[Note 2; add:]

1908, *Jones v. Herrick*, 141 Ia. 415, 118 N. W. 444 (custom in driving teams; one witness suffices).

1906, *Biggs v. Langhammer*, 103 Md. 94, 63 Atl. 198, *semble* (marine charter).

1906, *McDonough v. Boston El. R. Co.*, 191 Mass. 509, 78 N. E. 141.

1905, *Penland v. Ingle*, 138 N. C. 456, 50 S. E. 850 (brokerage custom).

[Note 3, par. 2; add:]

and what *degree of certainty* must be reached in the proof (*post*, § 2498).

§ 2054. Local Rules in Miscellaneous Civil Cases.

[Note 1; add:]

1904, *Pioso v. Bitzer*, 209 Pa. 503, 58 Atl. 891 (rule applied).

[Note 4, par. 1; add:]

Perhaps also in *New Jersey*: 1905, *Wilson v. Terry*, 70 N. J. Eq. 231, 62 Atl. 310 (apparently approving this rule for a deed absolute intended as a mortgage).

Compare the cases cited *post*, § 2498, n. 17 (proof beyond a reasonable doubt).

[Text, par. (2), at the end; add:]

It has been held in a few jurisdictions that a *claim against a decedent's estate* cannot be sufficiently established by the decedent's *oral admissions* alone.<sup>4a</sup>

<sup>4a</sup> 1906, *Clarke v. Roberts' Estate*, 38 Colo. 316, 87 Pac. 1077.

1855, *Wilder v. Franklin's Ex'r*, 10 La. An. 279.

1883, *Bodenheimer v. Bodenheimer's Ex'r*, 35 La. An. 1005.

1855, *Portis v. Hill*, 14 Tex. 69.

Compare the rule for *corroboration of a survivor* (*post*, § 2065).

In *Arkansas*, by an analogous rule, a *wife's testimony* to the consideration of a parol contract for a *conveyance* to her from the *insolvent husband* must be corroborated in chancery.<sup>4b</sup>

<sup>4b</sup> 1905, *Davis v. Yonge*, 74 Ark. 161, 85 S. W. 90, *semble*. 1905, *Waters v. Merrit P. Co.*, 76 Ark. 252, 88 S. W. 879 ("by some other evidence of the existence of a valid debt").

[Note 5; add:]

*Alta. St.* 1913, 2d sess., c. 27, § 4 (dangerous animals; an order of impounding may be made "upon hearing the evidence of two credible witnesses other than the complainant," where no claimant appears).

*Cal. St.* 1903, c. 364 (substituting a new chapter in the Political Code, for a lunacy commission; § 2169 provides that on a proceeding to commit, the judge "must compel the attendance of at least two medical examiners, who must hear the testimony of all witnesses, make a personal examination of the alleged insane person, and testify before the judge as to the result of such examination, and to any other pertinent facts within their knowledge").

*La.*: 1904, *Hannay v. New Orleans C. Exchange*, 112 La. 998, 36 So. 831 (Code rule applied). 1905, *Morris v. Pratt*, 114 La. 98, 38 So. 70.

§ 2056. Uncorroborated Accomplice; History and Present State of the Law.

[Note 1; add:]

*England*: 1908, *R. v. Tate*, 2 K. B. 680 (the omission of the caution renders the verdict invalid, where no corroboration existed, in the appellate Court's opinion).

[*Note 1 — continued*]

*Canada*: 1912, *Rex v. Betchel*, 4 Alta. 402, 5 D. L. R. 497 (abortion; the judge should give a caution to the jury, but a verdict without corroborative evidence is valid). 1910, *R. v. Frank*, 21 Ont. L. R. 196 (following *R. v. Meunier*). 1910, *R. v. Trapnell*, 22 Ont. L. R. 219, 224.  
1908, *R. v. Reynolds*, 1 Sask. 480.

[*Note 6; add:*]

1904, *State v. Carey*, 76 Conn. 342, 56 Atl. 632 (leading opinion, by Hamersley, J.). 1911, *State v. Kritchman*, 84 Conn. 152, 79 Atl. 75.  
1905, *Caldwell v. State*, 50 Fla. 4, 39 So. 188 (murder).  
1904, *Tong Kai v. Terr.*, 15 Haw. 612 (bribery).  
1906, *Juretic v. People*, 223 Ill. 484, 79 N. E. 181 (false pretences). 1908, *People v. Frankenburg*, 236 Ill. 408, 86 N. E. 128. 1908, *People v. Feinberg*, 237 Ill. 348, 86 N. E. 584.  
1912, *People v. Baskin*, 254 Ill. 509, 98 N. E. 957 (receiving stolen goods). 1914, *People v. Covitz*, 262 Ill. 514, 104 N. E. 887.  
1904, *State v. Hauser*, 112 La. 313, 36 So. 396.  
1912, *Schuster v. State*, 178 Ind. 320, 99 N. E. 422.  
1896, *Com. v. Bishop*, 165 Mass. 148, 42 N. E. 560. 1906, *Com. v. Phelps*, 192 Mass. 591, 78 N. E. 741.  
1909, *State v. Shelton*, 223 Mo. 118, 122 S. W. 732.  
1904, *State v. Lyons*, 70 N. J. L. 635, 58 Atl. 398 (murder). 1904, *State v. Simon*, 71 N. J. L. 142, 58 Atl. 109. 1911, *State v. Lieberman*, 80 N. J. L. 506, 79 Atl. 331. 1912, *Letts v. Letts*, 79 N. J. Eq. 630, 82 Atl. 845.  
1903, *State v. Register*, 133 N. C. 746, 46 S. E. 21.  
1913, *State v. Hare*, 87 Oh. 204, 100 N. E. 825 (bribery).  
1912, *Com. v. De Masi*, 234 Pa. 570, 83 Atl. 430.  
1887, *U. S. v. Thompson*, 31 Fed. 331, C. C. 1905, *Wong Din v. U. S.*, 135 Fed. 702, 68 C. C. A. 340 (conspiracy to evade immigration law). 1910, *Hohngren v. U. S.*, 217 U. S. 509, 30 Sup. 588, *semble*. 1912, *Keliher v. U. S.*, C. C. A., 193 Fed. 8 (*contra*: "It is well known that the rule in Massachusetts has always been as stated in *Roscoe*," citing *Com. v. Bosworth*, but erroneously treating it as laying down a rule of law).  
1901, *State v. Harraas*, 25 Wash. 416, 65 Pac. 774 (*State v. Coates* followed). 1905, *State v. Pearson*, 37 id. 405, 79 Pac. 985 (refusal to give a long instruction requiring corroboration under certain circumstances, held error; the opinion harks back to *Edwards v. State*, throws doubt on the intervening rulings, and then declines to lay down any rule; a good example of the kind of cobwebby opinion directed more to arachnidial athletics than the demands of plain certainty in criminal justice). 1909, *State v. Jones*, 53 Wash. 142, 101 Pac. 708. 1911, *State v. Ray*, 62 Wash. 582, 114 Pac. 439. 1911, *State v. Stapp*, 65 Wash. 438, 118 Pac. 337. 1911, *State v. Dalton*, 65 Wash. 663, 118 Pac. 829. 1911, *State v. Mallahan*, 66 Wash. 21, 118 Pac. 898. 1912, *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989.  
1894, *State v. Juneau*, 88 Wis. 180, 59 N. W. 580. 1905, *Murphy v. State*, 124 Wis. 635, 102 N. W. 1087. 1905, *Means v. State*, 125 Wis. 650, 104 N. W. 815.  
1906, *Clay v. State*, 15 Wyo. 42, 86 Pac. 17 ("[The question] was discussed by this Court in *Smith v. State*, but was not decided"; here again left undecided).

[*Note 10; add:*]

1913, *Fairgrieve v. State*, — Okl. —, 134 Pac. 837 (an instruction is obligatory). 1913, *Gillam v. State*, — Okl. Cr. App. —, 135 Pac. 441.

In *Tennessee* and in *Texas*, statutes have now reverted to the common law rule: *Tenn. St.* 1913, 2d Extra Sess., c. 1, p. 659, § 13 (liquor offences; "the unsupported evidence of any accomplice" suffices).

[*Note 10 — continued*]

*Tex.*: C. Cr. P. 1895, § 391 (quoted *supra*). St. 1913, Spec. Sess., c. 31, p. 62, § 16 (liquor laws; conviction may be had "on the unsupported evidence of an accomplice or participant").

[*Note 11; add:*]

But in *California*, even under C. C. P. § 2061 (quoted *supra*, n. 10), the instruction is not demandable; though the repeated dissent of some of the judges leaves the matter still partly in controversy; 1903, *People v. Wardrip*, 141 Cal. 229, 74 Pac. 744. 1904, *People v. Buckley*, 143 id. 375, 77 Pac. 169. 1904, *People v. Moran*, 144 id. 48, 77 Pac. 77. 1904, *People v. Ruiz*, 144 id. 251, 77 Pac. 907.

§ 2057. **Same: Policy of the Rule.**

[*Note 1; add:*]

1904, *Hamersley, J.*, in *State v. Carey*, 76 Conn. 342, 56 Atl. 632 (best opinion, analyzing the development in history and policy).

§ 2059. **Same: Nature of Corroborative Evidence required.**

[*Note 2; add:*]

1909, *Gay's Case*, 2 Cr. App. 327 ("This Court will certainly not hold that the evidence of a number of accomplices needs any less corroboration than that of one accomplice").

[*Note 4; add:*]

1913, *Payne's Case*, 8 Cr. App. 171 (*R. v. Neal* questioned; point not decided).

[*Note 5; add, under Accord:*]

1912, *R. v. Eberts*, 4 Alta. 310.

[*Note 11; add:*]

1909, *Everest's Case*, 2 Cr. App. 130 ("some particular which goes to implicate the accused"). 1909, *Warren's Case*, 2 Cr. App. 194 ("It is not sufficient that the accomplice has said something which was true"); then comes vacillation again: 1911, *Wilson's Case et al.*, 6 Cr. App. 125 ("It must not be supposed that corroboration is required, amounting to independent evidence implicating the accused"). 1911, *Blatherwick's Case*, 6 Cr. App. 281 ("Everest's Case goes too far; Wilson's Case is the correct statement of the law"). 1911, *Dimes' Case*, 7 Cr. App. 43 (incest; corroboration necessary for an accomplice). 1913, *Watson's Case*, 8 Cr. App. 249 (*Pickford, J.*, citing *Wilson's Case*, thought "that authority seems to show that corroboration generally that the story is true is sufficient"; yet *Ridley, J.*, in argument, harking back a century to *Thistlewood's Case*, 33 How. St. Tr. 681, says "An accomplice may be believed without corroboration"). 1913, *Bloodworth's Case*, 9 Cr. App. 80 (not clear; *Ridley, J.*, cites *Thistlewood's Case* again).

[*Note 12; add:*]

*Wash.*: *State v. Jones*, 53 Wash. 142, 101 Pac. 708.

[*Note 13; add:*]

*Ala.*: 1909, *McDaniels v. State*, 162 Ala. 25, 50 So. 324.

*Ark.*: 1905, *Chancellor v. State*, 76 Ark. 215, 88 S. W. 880.

*Cal.*: 1904, *People v. Balkwell*, 143 Cal. 259, 76 Pac. 1017. 1912, *People v. Coffey*, 161 Cal. 433, 119 Pac. 901.

[Note 13 — continued]

*Ga.*: 1905, *Rawlins v. State*, 124 *Ga.* 31, 52 *S. E.* 1.  
*Ida.*: 1906, *State v. Bond*, 12 *Ida.* 424, 86 *Pac.* 43 (murder).  
*Ky.*: 1904, *Mann v. Com.*, — *Ky.* —, 79 *S. W.* 230 (felonious assault). 1907, *Simpson v. Com.*, 126 *Ky.* 441, 103 *S. W.* 332 (murder).  
*La.*: 1905, *State v. Hopper*, 114 *La.* 557, 38 *So.* 452 (manslaughter).  
*Mont.*: 1912, *State v. Lawson*, 44 *Mont.* 488, 120 *Pac.* 808.  
*Nev.*: 1913, *State v. Williams*, 35 *Nev.* 276, 129 *Pac.* 316.  
*N. D.*: 1911, *State v. Reilly*, 22 *N. D.* 353, 133 *N. W.* 914.  
*Okl.*: 1905, *Hill v. Terr.*, 15 *Okl.* 212, 79 *Pac.* 757. 1906, *Barbe v. Terr.*, 16 *Okl.* 562, 86 *Pac.* 61. 1906, *Fisher v. Terr.*, 17 *Okl.* 455, 87 *Pac.* 301 (here the instruction omitted the words of the statute "or the circumstances thereof," though it added other words requiring corroboration of the circumstances connecting the defendant; for this reason alone a new trial was ordered; which demonstrates that freedom from bigoted traditions of antiquated technicality is not necessarily to be looked for in the Courts of a new and advanced community). 1907, *Coopar v. Terr.*, 19 *Okl.* 496, 91 *Pac.* 1032.  
*Or.*: 1907, *State v. Kelliher*, 49 *Or.* 77, 88 *Pac.* 867 (forgery). 1912, *State v. Wong Si Sam*, 63 *Or.* 266, 127 *Pac.* 683.  
*S. D.*: 1910, *State v. Walsh*, 25 *S. D.* 30, 125 *N. W.* 295 (*State v. Hicks* not cited).  
*Tex.*: 1905, *Wright v. State*, 47 *Tex. Cr.* 433, 84 *S. W.* 593. 1905, *Crenshaw v. State*, 48 *Tex. Cr.* 77, 85 *S. W.* 1147 (this Court appears disposed to enter upon some questionable quibblings in the wording of charges).  
*Ut.*: 1906, *State v. Thompson*, 31 *Utah* 228, 87 *Pac.* 709 (adultery).  
*Vt.*: 1905, *State v. Bean*, 77 *Vt.* 384, 60 *Atl.* 807 (Massachusetts rule approved).  
*Wyo.*: 1906, *Clay v. State*, 15 *Wyo.* 42, 86 *Pac.* 17.

[Note 15, par. 1; add:]

1909, *Lane v. Com.*, 134 *Ky.* 519, 121 *S. W.* 486.

[Note 15, par. 2, at the end; add:]

In *Keliher v. U. S., C. C. A.*, 193 *Fed.* 8 (1912) the supposed Massachusetts rule is applied without any notice of the later cases.

[Note 15, par. 2, l. 4 from the end; add:]

and continued in *Com. v. Phelps*, 192 *Mass.* 591, 78 *N. E.* 741 (1906).

[Note 15, par. 3; add:]

1896, *People v. Mayhew*, *N. Y.* (cited *infra*, n. 18).  
 1905, *People v. Patrick*, *N. Y.* (cited *infra*, n. 18).  
 1908, *Barrett's Case*, 1 *Cr. App.* 64 ("some material parts of the evidence").  
 1912, *State v. Dodson*, 23 *N. D.* 305, 136 *N. W.* 789.

[Note 17; add:]

In *Idaho* these two phrasings are combined: 1905, *State v. Knudtson*, 11 *Ida.* 524, 83 *Pac.* 226 (interpreting *Rev. St.* 1887, § 7871, quoted *ante*, § 2056).

[Note 18; add:]

1910, *Kams' Case*, 4 *Cr. App.* 8. 1910, *Lucy's Case*, 4 *Cr. App.* 165. 1910, *Mason's Case*, 5 *Cr. App.* 171. 1910, *Martin's Case*, 5 *Cr. App.* 1.  
 1906, *Hargrove v. State*, 125 *Ga.* 270, 54 *S. E.* 164 (murder).  
 1914, *Deaton v. Com.*, 157 *Ky.* 308, 163 *S. W.* 204.  
 1905, *People v. Patrick*, 182 *N. Y.* 131, 74 *N. E.* 843.  
 1914, *Gillespie v. State*, — *Tex. Cr.* —, 166 *S. W.* 135 (wherein the Court finds itself obliged

[*Note 18 — continued*]

to repudiate "the impression which prevails with some" that the corroborating evidence "must itself show appellant's guilt without and exclusive of the accomplice's testimony"; it is painful to think that such a belief could be entertained by a lawyer holding a brief in an appellate court).

§ 2060. Same: Who is an Accomplice?

[*Note 1, par. 1; add.:*]

1903, *Porter v. People*, 31 Colo. 508, 74 Pac. 879 (larceny).  
1906, *Hargrove v. State*, 125 Ga. 270, 54 S. E. 164 (murder).  
1913, *Hendrix v. State*, 8 Okl. Cr. 530, 129 Pac. 78 (gaming).  
1904, *State v. Phillips*, 18 S. D. 1, 98 N. W. 171 (larceny).

[*Note 1, par. 2; add.:*]

1912, *People v. Coffey*, 161 Cal. 433, 119 Pac. 901.  
1912, *State v. Wappenstein*, 67 Wash. 502, 121 Pac. 989 (approving *State v. Durnam*, Minn.).

[*Note 1, par. 3; add.:*]

*Accord:* 1887, *U. S. v. Thompson*, 31 Fed. 331, C. C. (subornation of perjury).

[*Note 1, par. 4; add.:*]

1913, *Newman v. People*, 55 Colo. 374, 135 Pac. 460.

[*Note 2; add.:*]

1909, *State v. Brown*, — Ia. —, 121 N. W. 513.  
1912, *Letts v. Letts*, 79 N. J. Eq. 630, 82 Atl. 845.  
1912, *State v. Case*, 61 Or. 265, 122 Pac. 304.

[*Note 3; add, under Accord:*]

1910, *Brown's Case*, 6 Cr. App. 24; 1911, *Drine's Case*, 7 Cr. App. 43 (incest; the girl held not an accomplice on the facts). 1913, *Bloodworth's Case*, 9 Cr. App. 80 (not clear).  
1904, *People v. Stratton*, 141 Cal. 604, 75 Pac. 166 (like *Porath v. State*, Wis., *infra*).  
1905, *Whidby v. State*, 121 Ga. 588, 49 S. E. 811.  
1908, *State v. Goodsell*, 138 Ia. 504, 116 N. W. 605 (unless "the victim of force, fraud, or undue influence," or unless she is under age). 1912, *State v. Heft*, 155 Ia. 21, 134 N. W. 950 (ignoring *State v. Kouhus*, *infra*).  
1906, *State v. Mungeon*, 20 S. D. 612, 108 N. W. 552.  
1903, *Tate v. State*, — Tex. Cr. —, 77 S. W. 793 (if she consents).  
1904, *Clifton v. State*, 46 Tex. Cr. 18, 79 S. W. 824 (for one who "did not oppose the act").

[*Note 3; add, under Contra:*]

1910, *Gaston v. State*, 95 Ark. 233, 128 S. W. 1033.  
1905, *State v. Rennick*, 127 Ia. 294, 103 N. W. 159 (here the intercourse was by force).  
1912, *State v. Hornaday*, — Or. —, 122 Pac. 304 (apparently without qualification).

The real futility of this accomplice rule is well seen in the opinions on this question whether the woman in incest is an accomplice; it is obviously a matter of the individual case, and will not submit to a rigid rule; any such rule on this subject is solemn gabble.

[*Note 4; add.:*]

1909, *Reeves v. Terr.*, 2 Okl. Cr. 351, 101 Pac. 1039.

[*Note 5; add:*]

1900, *Winston v. Winston*, 165 N. Y. 553, 59 N. E. 273 (it is "not a rule of evidence, but one for the guidance of the judicial conscience").

1914, *Yates v. Yates*, — N. Y. —, 105 N. E. 195 (rule held not applicable on the facts).

[*Note 6, par. 1; add:*]

1905, *Washington v. State*, 124 Ga. 423, 52 S. E. 910 (reviewing and approving *Keller v. State, supra*).

[*Note 7; add:*]

*Accord*: 1904, *State v. Carey*, 76 Conn. 342, 56 Atl. 632 (best opinion, by Hamersley, J.).

1912, *Meno v. State*, 117 Md. 435, 83 Atl. 759.

1904, *Smartt v. State*, 112 Tenn. 539, 80 S. W. 586.

*Contra*: 1912, *R. v. Betchel*, 4 Alta. 402.

Mo. St. 1907, p. 245, Mar. 16 (dying declarations of woman in abortion cases; cited more fully *ante*, § 1432).

[*Note 8; add:*]

*Contra*: 1908, *R. v. Tate*, 2 K. B. 680 (boy of 16).

[*Note 9, par. 1; add:*]

1909, *Bickley's Case*, 2 Cr. App. 53. 1910, *Henser's Case*, 6 Cr. App. 76.

1908, *O'Grady v. People*, 42 Colo. 312, 95 Pac. 346.

1910, *State v. Lee*, 228 Mo. 480, 128 S. W. 987 (gaming).

1911, *State v. Smith*, 33 Nev. 438, 117 Pac. 19.

1905, *Marmer v. State*, 47 Tex. Cr. 424, 84 S. W. 830 (liquor offence; here by express statute).

Compare the cases *ante*, § 969, as to a detective's testimony being less credible.

[*Note 10; add:*]

An *accomplice's wife* may need corroboration: 1913, *Payne's Case*, 8 Cr. App. 171.

[*Note 11; add, under Contra:*]

1910, *Davis v. State*, 96 Ark. 7, 130 S. W. 547 (abortion; *McFalls v. State* approved).

[*Note 12; add, under Accord:*]

1907, *Driggers v. U. S.*, 7 Ind. Terr. 752, 104 S. W. 1166.

1912, *Smith v. Com.*, 148 Ky. 60, 146 S. W. 4. 1914, *Beaton v. Com.*, 157 Ky. 308, 163 S. W. 204.

1908, *Driggers v. U. S.*, 21 Okl. 60, 95 Pac. 612.

1908, *Franklin v. State*, 53 Tex. Cr. 547, 110 S. W. 909 (but the judge should charge *peremptorily*, where there is no doubt).

[*Note 14; add:*]

1912, *State v. Wong Si Sam*, 63 Or. 266, 127 Pac. 683.

## § 2061. Uncorroborated Complainant in Rape, etc.

[*Note 1; add, under Accord:*]

(1) *Rape*: 1904, *People v. Keith*, 141 Cal. 686, 75 Pac. 304.

1904, *Peckham v. People*, 32 Colo. 140, 75 Pac. 422 (rape under age).

1907, *Fields v. State*, 2 Ga. App. 41, 58 S. E. 327 (assault with intent to rape; rule of *Davis v. State, infra*, refused to be extended to assault with intent).

[*Note 1 — continued*]

- 1905, *State v. Dilts*, 191 Mo. 665, 90 S. W. 782. 1905, *State v. Welch*, 191 Mo. 179, 89 S. W. 945 (following *State v. Marcks*).  
 1904, *Brenton v. Terr.*, 15 Okl. 6, 78 Pac. 83 (repudiating *Sowers v. Terr.*, *infra*, which purported to go upon a statute; "this Territory has no statute" applicable to rape). 1904, *Brenton v. Terr.*, 15 Okl. 10, 78 Pac. 84. 1909, *Reeves v. Terr.*, 2 Okl. Cr. 351, 101 Pac. 1039.  
 1905, *Wallace v. State*, 48 Tex. Cr. 548, 89 S. W. 827 (rape under age).  
 1903, *State v. Fetterly*, 33 Wash. 599, 74 Pac. 810 (rape under age).  
 1905, *State v. Patchen*, 37 Wash. 24, 79 Pac. 479 (rape under age). 1906, *State v. Mobley*, 44 Wash. 549, 87 Pac. 815 (rape under age).  
 1909, *Vogel v. State*, 138 Wis. 315, 119 N. W. 190.  
 (2) *Seduction*: 1913, *Bray v. U. S.*, 39 D. C. App. 600 (seduction). 1906, *Wrynn v. Downey*, 27 R. I. 454, 63 Atl. 401 (breach of promise).  
 (3) *Bastardy*: 1910, *Belford v. State*, 96 Ark. 274, 131 S. W. 953. 1874, *McFarland v. People*, 72 Ill. 368, *semble*.  
 1905, *Evans v. State*, 165 Ind. 369, 74 N. E. 244.  
 1881, *State v. McGlothlen*, 56 Ia. 544, 9 N. W. 893.  
 (4) *Rape under Age*: 1912, *Kidwell v. U. S.*, 38 D. C. App. 566 (rape under age; corroboration not technically necessary; but here a verdict was set aside for lack of it).  
 1911, *State v. Brown*, 85 Kan. 418, 116 Pac. 508.  
 1912, *State v. Stackhouse*, 242 Mo. 444, 146 S. W. 1151.  
 1908, *Leedom v. State*, 81 Nebr. 585, 116 N. W. 496. 1910, *State v. Fugita*, 20 Nebr. 555, 129 N. W. 360.  
 1911, *State v. Rash*, 27 S. D. 185, 130 N. W. 91.  
 (5) *Incest*: 1909, *State v. Aker*, 54 Wash. 342, 103 Pac. 420.  
 (6) *Improper Liberties*: 1910, *People v. Freeman*, 244 Ill. 590, 91 N. E. 708 (but the evidence must be "most clear and convincing").

[*Note 1, par. 2; add, under Contra:*]

- (1) *Rape*: 1906, *Livinghouse v. State*, 76 Nebr. 491, 107 N. W. 854 (rape under age).  
 1904, *Davis v. State*, 120 Ga. 435, 48 S. E. 180 (by a majority).  
 1913, *Allen v. State*, — Okl. Cr. App. —, 134 Pac. 91, *semble*.  
 (2) *Bastardy*: see the early English cases for married women's filiation proceedings, *post*, § 2063.

[*Note 2, par. 2; under ENGLAND, add:*]

- (1) *Rape under Age, Incest, Indecent Assault*. 1909, *Cohen's Case*, 3 Cr. App. 234 (carnal knowledge; St. 48-9 Vict. c. 69 applied). 1909, *Hedges' Case*, 3 Cr. App. 262 (statute applied). 1910, *Graham's Case*, 4 Cr. App. 218 (carnal knowledge; here the extraordinary statement is made by Channell, J., that "it is not a case in which corroboration is necessarily required"). 1910, *Brown's Case*, 6 Cr. App. 24, 148 (here the extraordinary statement in *Graham's Case*, *supra*, is extraordinarily repeated; but on the present charge under the Incest Act 1908, 8 Edw. VII, c. 45, § 2, it is said that "the jury ought to have been cautioned against accepting the uncorroborated evidence of the girl"). 1910, *Stone's Case*, 6 Cr. App. 89 (similar to *Brown's Case*). 1913, *Pitt's Case*, 8 Cr. App. 126 (indecent assault, not under St. 48-9 Vict., on a girl of 10; "a jury may act on her uncorroborated evidence," but a caution as to a young child's evidence "is always wise"). 1913, *Murray's Case*, 9 Cr. App. 248 (similar; the jury ought to be directed to require corroboration, where the child is not on oath). 1913, *Cratchley's Case*, 9 Cr. App. 232 (sodomy with boys of 12 and 10; similar direction, but not mentioning the oath).  
 (2) *Bastardy*: 1852, *R. v. Percy*, 17 Q. B. 902 (corroboration found, under the statute). 1877, *Cole v. Manning*, L. R. 2 Q. B. D. 611 (under St. 35 & 36 Vict. c. 65, § 4, acts of familiarity held a corroboration on the facts of the case). 1913, *Mash v. Darley*, [1914]

## [Note 2 — continued]

1 K. B. 1 (bastardy; the defendant's conviction of the carnal intercourse with the complainant, held sufficient corroboration).

(4) *Cruelty*: 1904, St. 4 Edw. VII, c. 15, § 15 (Prevention of Cruelty to Children Act; similar to St. 52 & 53 Vict. c. 44, *supra*).

[Note 2; *add*, under CANADA:]

*Dom. Crim. Code* 1892, § 684 (quoted *ante*, § 2036, n. 22; the rule for treason is made applicable to fraudulent marriage and seduction; but note that it is not of the present type of rule, which requires corroboration for the prosecutrix, but of the former type, *ante*, § 2044, which requires corroboration for a single witness of any sort).

*Alta. St.* 1910, 2d sess., c. 3, Evidence Act, § 11 (like B. C. St. 1900, c. 9, § 3). 1912, *R. v. Whistnant*, *Alta. S. C.*, 8 D. L. R. 468 (indecent assault on a child of 12, under Cr. Code, § 1003; testimony of another child, here her sister aged 9, held not sufficient corroboration).

*Br. C.*: 1910, *R. v. Irnan Din*, 15 Br. C. 476 (indecent assault on boys; statute applied).

*Man.*: 1903, *Cockerill v. Harrison*, 14 Man. 366 (English statute for breach of promise, held in force, and applied). St. 1912, 2 Geo. V, c. 29, § 6 (illegitimate children, filiation of; no order to be made "unless the evidence of the mother is corroborated by some other material evidence implicating the accused").

*Ont.*: 1906, *R. v. Daun*, 12 Ont. L. R. 227, 231 (*Dom. Crim. Code* 1892, § 684, cited *supra*, applied, on a charge of seduction). 1906, *R. v. Burr*, 13 Ont. L. R. 485 (seduction; corroboration broadly defined). 1907, *R. v. Armstrong*, 15 Ont. L. R. 47 (rape under age; *Com. Cr. Code* applied). 1909, *R. v. Bowes*, 20 Ont. L. R. 111 (*Cr. Code* applied). St. 1909, c. 43, § 11 (like *R. St.* 1897, c. 73, § 6). *Rev. St.* 1897 c. 169, § 2, as amended by St. 1911, 1 Geo. V, c. 36, § 2 (action against father for support of bastard; no recovery "unless the fact of the defendant being the father is proved by other testimony than that of the mother or her testimony is corroborated by some other material evidence of that fact"). 1912, *Dunn v. Gibson*, *Ont. C. A.*, 8 D. L. R. 297 (action for assault and ravishment; rule of corroboration held not applicable).

[Note 2; *add*, under UNITED STATES:]

*Ala.*: 1905, *Weaver v. State*, 142 Ala. 33, 39 So. 341 (corroboration as to "either of the material facts, so as to satisfy the jury that prosecutrix was worthy of credit" suffices).

*Ark. Stats.* 1894, § 1900 (no person shall be convicted of seduction under marriage-promise "upon the testimony of the female, unless the same be corroborated by other evidence").

*Cal. St.* 1905, c. 532 (amends P. C. 1872, § 1108, as to the crimes named).

*Ill.*: 1874, *McFarland v. People*, 72 Ill. 368, *semble* (bastardy; no rule of corroboration exists).

*Ind. St.* 1905, p. 584, § 244 (after "female," substitute, "must be supported by at least one other witness, or by strong corroborating circumstances as to every material point necessary to the commission of the offence"). 1905, *Evans v. State*, 165 Ind. 369, 74 N. E. 244 (in bastardy, no corroboration for the mother is necessary). 1905, *Evans v. State*, 165 Ind. 369, 75 N. E. 651 (under *Rev. St.* 1897, §§ 1004, 1008, quoted *ante*, §§ 488, 1326, 1387, 1413, in bastardy no corroboration of the mother is required as a rule of law; here a married mother).

*Ia.*: 1881, *State v. McGlothlen*, 56 Ia. 544, 9 N. W. 893 (bastardy; corroboration is not required).

*Kan.*: 1907, *State v. Waterman*, 75 Kan. 253, 88 Pac. 1074 (seduction under promise of marriage; rule applied).

*Mo.*: 1914, *State v. Long*, — Mo. —, 165 S. W. 748.

*N. Y. St.* 1909, c. 524, p. 1316 (amending *Consol. L. c.* 40, St. 1909, c. 88, adding a new § 2177 for seduction, and amending § 71, for abduction and compulsory marriage; no conviction is to be had on the female's testimony "unsupported by other evidence").

[*Note 2 — continued*]

*N. C.* Rev. 1905, § 3360 (criminal elopement with a married woman; "no conviction shall be had upon the unsupported testimony of any such married woman"). 1906, *State v. Connor*, 142 N. C. 700, 55 S. E. 787 (statute applied).

*S. C.* St. 1905, Feb. 22, 24 Stat. L. 937 (seduction; no conviction "on the uncorroborated testimony of the woman"). 1909, *State v. Turner*, 82 S. C. 278, 64 S. E. 424 (statute applied).

*Wash.* St. 1907, c. 170, p. 396 (no conviction for rape or seduction "upon the testimony of the female raped or seduced, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense"). St. 1909, c. 249, p. 942, § 182 (slander of a woman's chastity; no conviction to be had "upon the testimony of the woman slandered unsupported by other evidence"). Penal Code 1909, § 191, Rem. & Ball. Code, § 2443, replacing the former statute of 1907 repealed by P. C. 1909, § 52, Rem. & Ball. Code, I, § 2304 (no conviction for rape, seduction, or other sexual crimes, "upon the testimony of the female upon or against whom the crime was committed, unless supported by other evidence"). St. 1913, c. 100, p. 298 (repealing Rem. & Ball. Annot. Codes & Stats. § 2443).

For the admissibility of *pregnancy or birth of a child*, as corroborating evidence, see *ante*, § 168.

## § 2062. Same: Nature of Corroborative Evidence.

[*Note 2; add:*]

1909, *Allen v. State*, 162 Ala. 74, 50 So. 279 (*Cunningham v. State* followed). 1909, *Pannell v. State*, 162 Ala. 81, 50 So. 281 (similar).

1909, *Henderson v. State*, 85 Nebr. 444, 123 N. W. 459 (the fresh complaint may suffice as corroboration; the opinion makes certain distinctions which seem to be more than any jury should be expected to understand or any trial judge to remember).

[*Note 3; add, under RAPE:*]

*Ia.*: 1904, *State v. Carpenter*, 124 Ia. 5, 98 N. W. 775. 1904, *State v. Egbert*, 125 Ia. 443, 101 N. W. 191. 1905, *State v. Norris*, 127 Ia. 683, 104 N. W. 282. 1906, *State v. Crouch*, 130 Ia. 478, 107 N. W. 173. 1907, *State v. Blackburn*, — Ia. —, 110 N. W. 275 (rape under age). 1907, *State v. Johnson*, 133 Ia. 38, 110 N. W. 170. 1907, *State v. Stevens*, 133 Ia. 684, 110 N. W. 1037 (rape under age). 1908, *State v. Ralston*, 139 Ia. 44, 116 N. W. 1058. 1909, *State v. Hetland*, 141 Ia. 524, 119 N. W. 961.

*Nebr.*: 1907, *McConnell v. State*, 77 Nebr. 773, 110 N. W. 666 (assault with intent). 1907, *Fitzgerald v. State*, 78 Nebr. 1, 110 N. W. 676. 1909, *Mott v. State*, 83 Nebr. 228, 119 N. W. 461 (opportunity alone is not enough).

*Wash.*: 1909, *State v. McCool*, 53 Wash. 486, 102 Pac. 422. 1911, *State v. Gibson*, 64 Wash. 131, 116 Pac. 872. 1912, *State v. Raymond*, 69 Wash. 98, 124 Pac. 495 (rape; the corroboration must extend to both the intercourse and the force; this court is here back-sliding in its elaboration of such technical rules; it was enough to say that there was not sufficient evidence in this case, without building up a fabric of fixed rules).

[*Note 3; add under SEDUCTION:*]

*Ark.*: 1904, *Keaton v. State*, 73 Ark. 265, 83 S. W. 911. 1905, *Carrens v. State*, 77 Ark. 16, 91 S. W. 30. 1905, *Burnett v. State*, 76 Ark. 295, 88 S. W. 956. 1906, *Lasater v. State*, 77 Ark. 468, 94 S. W. 59. 1909, *Nichols v. State*, 92 Ark. 421, 122 S. W. 1003 (must relate to the promise and the connection).

*Ind.*: 1912, *Hay v. State*, 178 Ind. 478, 98 N. E. 712 (seduction; nature of corroboration, discussed).

*Mo.*: 1904, *State v. Phillips*, 185 Mo. 185, 83 S. W. 1080. 1905, *State v. Sublett*, 191 Mo.

[*Note 3 — continued*]

163, 90 S. W. 374 (defendant's admission may suffice). 1911, *State v. Long*, 238 Mo. 383, 141 S. W. 1099.

*Nebr.*: 1907, *Russell v. State*, 77 Nebr. 519, 110 N. W. 380.

*S. D.*: 1912, *State v. Holter*, 30 S. D. 353, 138 N. W. 953 (*State v. King* followed).

*Tex.*: 1911, *Nash v. State*, 61 Tex. Cr. 259, 134 S. W. 709 (the corroboration need not cover the essentials of the offence, in particular, both the promise and the intercourse; Davidson, P. J., diss.; prior cases reviewed). 1912, *Murphy v. State*, — Tex. Cr. —, 143 S. W. 616 (*Nash v. State* followed).

[*Note 3; under ABORTION, add:*]

1911, *People v. Richardson*, 161 Cal. 552, 120 Pac. 20 (*People v. Josslyn* approved).

**§ 2063. Parent's Bastardizing of Issue, by Testimony to Non-Access.**

[*Note 11; add:*]

1879, *Nottingham Guardians v. Tomkinson*, L. R. 4 C. P. D. 343 (ruling in *Yearwood's* Trusts doubted).

1889, *Burnaby v. Baillie*, L. R. 42 Ch. D. 282, 294 (similar).

[*Note 14, par. 1; add:*]

*Cal.*: 1911, *People v. Richardson*, 161 Cal. 552, 120 Pac. 20 (defendant was charged with administering drugs with intent to commit abortion, to a woman seduced by him in August, 1908–June, 1909, and married to another man in August, 1909, the child being safely born alive in December, 1909; the mother's testimony to the pregnancy by the defendant, held not to be excluded by the present doctrine).

*Del.*: 1912, *Bancroft v. Bancroft*, — Del. —, 85 Atl. 561 (question not decided).

*Ga.*: 1854, *Wright v. Hicks*, 15 Ga. 160, 172 (adulterine bastardy; the declarations of the parents, were they alive, were said to be not admissible, "but being dead, they are competent testimony").

*Haw.*: 1906, *Godfrey v. Rowland*, 17 Haw. 577, 583 (rule followed).

*St.* 1913, No. 83, p. 103, Apr. 15, § 6 (in prosecutions for wife-desertion, etc. the parents are competent as to "the parentage of such child or children").

*Ind.*: 1868, *Dean v. State*, 29 Ind. 483 (bastardy suit by a married woman whose husband had been absent in the army; the mother admitted as a witness). 1905, *Evans v. State*, 165 Ind. 369, 74 N. E. 244 (bastardy; the married mother's testimony to non-access of her husband is admissible).

1905, *Evans v. State*, 165 Ind. 369, 75 N. E. 651 (the married mother, on a bastardy charge, may testify to non-access; repudiating the policy of the above rule, but reaching the result under Rev. St. 1897, §§ 1004, 1008, quoted *ante*, §§ 488, 1326, 1387, 1413, by refusing to imply the rule into the statute as a qualification; refusing also to require corroboration as a rule of law).

*Ia.*: 1908, *Wallace v. Wallace*, 137 Ia. 37, 114 N. W. 527 (divorce on the ground of wife's pregnancy by another man at the time of marriage; a child was born four months after marriage; the wife's affidavit of her ante-marital intercourse with the other man and of lack of intercourse with the husband at the same period, rejected; but on the former point alone, the Court would have admitted the affidavits).

*Kan. St.* 1911, c. 163, p. 247, Mar. 13, § 6 (like *Haw. St.* 1913, No. 83).

[*Note 14, par. 4; add:*]

Compare the rulings on *corroboration in bastardy* (*ante*, § 2061), and the modern statutes making parents competent in cases of *family-desertion* (*ante*, § 488).

**§ 2065. Surviving Claimant's Testimony against Deceased.**

[Note 2; add:]

*Man.*: 1906, *Doidge v. Mimms*, 13 *Man.* 48, 54 ("There is no distinct law against it; the rule is one of prudence only"; but here it was applied).

*N. W. Terr.*: 1901, *Blank Estate*, 5 *Terr. L. R.* 230 (the rule of corroboration held not applicable in passing an administrator's account, but only where a claim is contested in court; *Re Garnett* and *Re Hodgson* approved).

[Note 4, l. 11; add:]

1903, *McDonald v. McDonald*, 33 *Can. Sup.* 145 (applying the Nova Scotia statute).

1903, *Thompson v. Coulter*, 34 *Can. Sup.* 261 (applying the Ontario statute).

*Alta. St.* 1910, 2d sess., c. 3, Evidence Act, §§ 12, 13 (like *Ont. Rev. St.* 1897, c. 73, §§ 10, 11, as amended by *St.* 1900, c. 17).

1904, *Blacquiére v. Corr*, 10 *Br. C.* 448.

1910, *Kaulbach's Estate*, *Moorhead v. Kaulbach*, 45 *N. Sc.* 62 (each fact material to recovery must be corroborated). *Ont. St.* 1909, c. 43, § 12 (like *R. S.* 1897, c. 73, § 10); *ib.* § 13 (substantially like *Rev. St.* 1897, c. 73, § 11, and *St.* 1900, c. 17, § 13). 1910, *Schwent v. Roetter*, 21 *Ont. L. R.* 112 (statute applied).

*Yukon St.* 1904, c. 5, § 35 (like *N. Sc. Rev. St.* 1900, c. 163, § 35).

[Note 5, par. 1; add:]

*La. St.* 1906, No. 207 (no debt or liability of a "party deceased" shall be proved by parol evidence except on the "testimony of at least one credible witness of good moral character besides the plaintiff," unless there is a written acknowledgment or unless action is brought within twelve months after decease).

*N. Mex.*: 1910, *Radcliffe v. Chavez*, 15 *N. M.* 258, 110 *Pac.* 699 (statute applied).

*Or. Codes & Gen. L.* 1892, § 1134, *B. & C.'s ed.* 1901, § 1161 (no claim against an executor or administrator, if rejected by him, shall be allowed "except upon some competent or satisfactory evidence other than the testimony of the claimant"). 1904, *Goltra v. Pentland*, 45 *Or.* 254, 77 *Pac.* 129 (nature of the corroboration, defined).

In *Maryland*, an analogous rule requires a claim of contract against a deceased person to be established by "clear and satisfactory proof from disinterested sources": 1903, *Duckworth v. Duckworth*, 98 *Md.* 92, 56 *Atl.* 490 (citing the prior cases, and ruling also as to the use of the deceased's admissions).

Compare the rule in some jurisdictions for the sufficiency of proof of such claims by the decedent's oral admissions alone (*ante*, § 2054, n. 4).

**§ 2066. Miscellaneous Witnesses requiring Corroboration.**

[Note 1; add:]

*Eng.*: 1889, *St.* 52 & 53 *Vict.* c. 44, § 8 (offences of cruelty to children; cited *ante*, § 2061, n. 2). 1904, *St.* 4 *Edw. VII.* c. 15, § 15 (Prevention of Cruelty to Children Act; similar to the preceding act). *St.* 1908, 8 *Edw. VII.* c. 67, § 30 (Children Act; like *St.* 48-9 *Vict.* c. 69, § 4, for offences against children).

*Alta. St.* 1910, 2d sess., c. 3, Evidence Act, § 17 (like *Can. St.* 1893, c. 31, § 25).

*Sask. St.* 1907, c. 12, Evidence Act, § 31 (like *Can. St.* 1893, c. 31, § 25).

*N. Y.*: *C. Cr. P.* § 392 (quoted in full, *ante*, § 1828, n. 1).

[Note 2; add:]

1904, *U. S. v. Louie Juen*, 128 *Fed.* 522, *D. C.* (Chinese witnesses suffice to prove presence as a merchant before the passage of *St.* 1892). 1908, *In re Martorana*, *D. C. E. D. Pa.*, 159 *Fed.* 1010. 1908, *In re Schatz*, *C. C. Or.*, 161 *Fed.* 237 (the two witnesses to prove at

[Note 2 — continued]

the hearing need not be the same two witnesses named in the notice posted prior to the hearing).

[Note 3; *add*, at the end:]

For the *exclusion* of Chinese witnesses in similar cases, see *ante*, § 516.

[Note 4; *add*.:]

For statutes requiring *citizens'* testimony in naturalization cases, see *ante*, § 516, n. 7.

[Note 5; *add*.:]

1912, *Bancroft v. Bancroft*, — Del. —, 85 Atl. 561 (construing St. 1907, c. 221, § 20, vol. 24, replacing Rev. St. 1893, c. 75, § 6).

*Contra*, for illegal liquor sales:

1911, *Pickrell v. State*, 5 Okl. Cr. 391, 116 Pac. 957.

[Note 6; *add*.:]

*Mo.* St. 1907, p. 245, Mar. 16 (corroboration of the woman's dying declarations in abortion cases; cited more fully *ante*, § 1432).

*Wash.*: 1894, *Quinn v. Parke & L. M. Co.*, 9 Wash. 136, 37 Pac. 288 (oral rescission of a written contract; the uncorroborated testimony of a party, held not sufficient). 1903, *Western L. & S. Co. v. Waisman*, 32 Wash. 644, 73 Pac. 703 (mortgagors' uncorroborated testimony, not allowed to overthrow a certificate of acknowledgment). 1904, *Cooke v. Cain*, 35 id. 353, 77 Pac. 682 (oral rescission; *Quinn v. P. & L. M. Co.*, *supra*, held not to establish a general rule).

Compare the rule for the measure of *proof beyond a reasonable doubt* in civil cases (*post*, § 2498).

In *patent causes* certain rules appear to have developed: 1908, *Durkee v. Wingust*, 31 D. C. App. 248 ("It is well settled that the uncorroborated testimony of a junior party in an 'interference' is insufficient to overcome the presumption attaching to the prior filing date of the senior party"). 1909, *Schmidt v. Clark*, 32 D. C. App. 290. 1912, *Huff v. Gulick*, 38 D. C. App. 334. 1913, *Kitchen v. Smith*, 39 D. C. App. 500. 1913, *Shields v. Lees*, 41 D. C. App. 236.

## § 2067. Uncorroborated Confession of Respondent in Divorce.

[Note 8; *add*.:]

*Getty v. Getty*, [1907] p. 334 (written confession by wife of adultery committed 19 years before, not mentioning the name; corroboration required; the facts of this case are as odd as any modern fiction).

1912, *Edmonds v. Edmonds*, B. C., S. C., 1 D. L. R. 550.

[Note 10; *add*.:]

*Cal.*: 1905, *Berry v. Berry*, 145 Cal. 784, 79 Pac. 531.

*D. C.*: Code 1901, § 964 (similar to Comp. St. 1894, c. 30, § 33). 1904, *Lenoir v. Lenoir*, 24 D. C. App. 160, 165 (rule applied in a proceeding for annulment, where on a default the plaintiff testified by deposition). 1905, *Michalowicz v. Michalowicz*, 25 D. C. App. 484 (corroboration held not sufficient on the facts).

*Ida.*: 1908, *Bell v. Bell*, 15 Ida. 7, 96 Pac. 196 (the confession of the respondent is not sufficiently corroborated by the plaintiff's testimony and admissions; going on the language of the statute).

*Kan.*: 1905, *May v. May*, 71 Kan. 317, 80 Pac. 567 (statutes applied).

*Ky.*: 1908, *Robards v. Robards*, — Ky. —, 109 S. W. 422 (*McCampbell v. McCampbell* followed).

[*Note 10 — continued*]

*N. C. Rev.* 1905, § 1564 (like *Code* 1883, § 1288).

*Va. Code* 1887, § 2260 (in suits for divorce, "the bill shall not be taken for confessed, and whether the defendant answer or not, the cause shall be heard independently of the admissions of either party, in the pleadings or otherwise").

*W. Va. Code* 1899, c. 64, § 8 (like *Va. Code* 1887, § 2260, *supra*). 1906, *Trough v. Trough*, 59 *W. Va.* 464, 53 *S. E.* 630 (statute applied).

Compare the cases cited *ante*, § 2046 (corroboration of divorce complainant).

§ 2069. **Same: Scope of the Rule.**

[*Note 5; add.*]

1905, *Michalowicz v. Michalowicz*, 25 *D. C. App.* 484.

[*Note 8; add.*]

1890, *Hampton v. Hampton*, 87 *Va.* 148, 12 *S. E.* 340 (excluded, under the statute quoted *ante*, § 2067, n. 10; displacing *Bailey v. Bailey*, 21 *Gratt.* 43).

1906, *Trough v. Trough*, 59 *W. Va.* 464, 53 *S. E.* 630 (excluded, under the statute quoted *ante*, § 2067, n. 10).

§ 2070. **Uncorroborated Confession of Accused; (1) English Rule.**

[*Note 5; add.*]

1913, *Sykes' Case*, 8 *Cr. App.* 233 (murder; corroboration apparently held necessary).

§ 2071. **Same; (2) Rule in the United States.**

[*Note 3; add.*]

*Ga.*: 1909, *Milner v. State*, 7 *Ga. App.* 82, 66 *S. E.* 280. 1910, *Huey v. State*, 7 *Ga. App.* 398, 66 *S. E.* 1023 (assault with intent to rape).

*Ind. St.* 1905, p. 584, § 239 (substituting "evidence" for "testimony," in *Rev. St.* 1897, § 1893, re-enacted).

*Kan.*: 1905, *State v. Kesner*, 72 *Kan.* 87, 82 *Pac.* 720. 1913, *State v. Cardwell*, 90 *Kan.* 606, 135 *Pac.* 597, *semble* (rape under age).

*N. J.*: 1912, *State v. Kwiatkowski*, 83 *N. J. L.* 650, 85 *Atl.* 209.

*Or.*: 1904, *State v. Rogoway*, 45 *Or.* 601, 78 *Pac.* 987, 81 *Pac.* 234 (rule in *U. S. v. Williams* approved).

*Vt.*: 1904, *State v. Blay*, 77 *Vt.* 56, 58 *Atl.* 794 (larceny).

[*Note 4; add.*]

*Ark.*: 1905, *Misenheimer v. State*, 73 *Ark.* 407, 84 *S. W.* 494 (rape; New York rule followed). 1905, *Hubbard v. State*, 77 *Ark.* 126, 91 *S. W.* 11 (murder; foregoing case approved). 1910, *Harshaw v. State*, 94 *Ark.* 343, 127 *S. W.* 745 (forgery). 1913, *Greenwood v. State*, 107 *Ark.* 568, 156 *S. W.* 427. 1914, *Russell v. State*, — *Ark.* —, 166 *S. W.* 540 (embezzlement).

*Cal.*: 1913, *People v. Frey*, 165 *Cal.* 140, 131 *Pac.* 127.

*Ga.*: 1904, *Joiner v. State*, 119 *Ga.* 315, 46 *S. E.* 412 (wife-beating; corroboration found). 1904, *Owen v. State*, 119 *Ga.* 304, 46 *S. E.* 433 (larceny); 1904, *Morgan v. State*, 120 *Ga.* 499, 48 *S. E.* 238 (arson).

*Ill.*: 1914, *People v. Harrison*, 261 *Ill.* 517, 104 *N. E.* 259 (a quibble over the instructions).

*Ind.*: 1904, *Griffiths v. State*, 163 *Ind.* 555, 72 *N. E.* 563 (corroboration defined). 1909, *Strickland v. State*, 171 *Ind.* 642, 87 *N. E.* 12. 1911, *Messel v. State*, 176 *Ind.* 214, 95 *N. E.* 565 (stating the rule in a peculiar form, not noting the real point of distinction).

[*Note 4 — continued*]

*Ind. Terr.*: 1906, *Leftridge v. U. S.*, 6 Ind. T. 305, 97 S. W. 1018 (homicide; some evidence of the *corpus delicti* is needed).

*Ia.*: 1905, *State v. Westcott*, 130 Ia. 1, 104 N. W. 341 (murder; rule of the statute applied and developed).

*Ky.*: 1908, *Polson v. Com.*, — Ky. —, 108 S. W. 844 (rule as to instructions, stated). 1911, *Higgins v. Com.*, 142 Ky. 647, 134 S. W. 1135 (murder; *Patterson v. Com.* followed). 1913, *Lee v. Com.*, 155 Ky. 62, 159 S. W. 648 (burglary; instruction not needed where the *corpus delicti* is independently proved).

*Mich.*: 1908, *People v. Ranney*, 153 Mich. 293, 116 N. W. 999 (obtaining money by a worthless check; prior cases collected). 1911, *People v. Lapidus*, 167 Mich. 53, 132 N. W. 470.

*Mo.*: 1904, *State v. Knowles*, 185 Mo. 141, 83 S. W. 1083 (embezzlement).

*Nebr.*: 1905, *Blacker v. State*, 74 Nebr. 671, 105 N. W. 302 (forgery).

*Nev.*: 1905, *Re Kelly*, 28 Nev. 491, 83 Pac. 223 (rape).

*Okl.*: 1909, *Shires v. State*, 2 Okl. Cr. 89, 99 Pac. 1100.

*Or.*: 1909, *State v. Brinkley*, 55 Or. 134, 105 Pac. 708 (larceny; *semble*, other admissions of the accused may suffice as evidence to corroborate the confession).

*Tex.*: 1912, *Harris v. State*, 64 Tex. Cr. 594, 144 S. W. 232 ("the confession may be used to aid the proof of the *corpus delicti*").

*Wash.*: 1906, *State v. Marselle*, 43 Wash. 273, 86 Pac. 586 (rape; here the rule is pedantically applied).

[*Note 6, par. 1; add:*]

In *Messel v. State*, 176 Ind. 214, 95 N. E. 565 (1911), the opinion needlessly hesitates by stating that this "seems to be" thus.

But of course the *rule itself* does not apply to a *committing magistrate's* action.

1909, *Lundstrom v. State*, 140 Wis. 141, 121 N. W. 883 (not decided).

[*Text, p. 2780, l. 5 of the quotation from Bergen v. People:*]

After "had" insert "not."

## § 2072. Same: Definition of Corpus Delicti.

[*Note 2, l. 1; add:*]

1910, *Ausmus v. People*, 47 Colo. 167, 107 Pac. 204 (stating also but not definitely approving the orthodox rule).

1907, *State v. Pienick*, 46 Wash. 523, 90 Pac. 645.

1913, *State v. Merrill*, — W. Va. —, 78 S. E. 699 (infanticide).

[*Note 2, last line; add:*]

1908, *State v. Washalesky*, 81 Conn. 22, 70 Atl. 63.

[*Text, p. 2783, par. (3), l. 16 on the page; add a new note 2a:*]

<sup>2a</sup> Repudiating this definition:

1911, *Messel v. State*, 176 Ind. 214, 95 N. E. 565 (rape under age).

[*Note 3; add:*]

1908, *State v. Gebbia*, 121 La. 1083, 47 So. 32 (fact of death is the *corpus delicti*).

1904, *State v. Knapp*, 70 Oh. 380, 71 N. E. 705 (the term does not include the precise mode of death as charged, — here, by strangulation).

[*Note 4; add:*]

*Contra*: 1911, *R. v. Girvin*, 3 Alta. 387, 398.

[*Note 5, par. 1; add.:*]

*Accord:* 1908, *People v. Ranney*, 153 Mich. 296, 116 N. W. 999 (obtaining money by passing a worthless check).

*Contra:* 1904, *Johnson v. State*, 142 Ala. 1, 37 So. 937 (false pretences; the falsity of the pretence is part of the *corpus delicti*, under the present rule).

[*Note 5; add, after par. 1:*]

*Other crimes:* 1904, *Wistrand v. People*, 213 Ill. 72, 72 N. E. 748 (rape; the age of the defendant, being part of the *corpus delicti*, cannot be evidenced by the confession alone).

1901, *Brown v. State*, 85 Miss. 27, 37 So. 497 (breaking and entering with intent):

The following curious statute seems to belong here: Kan. St. 1913, c. 244, p. 423, Mar. 14 (in prosecutions for forgery, "proof that such signature is not in the handwriting of the person whose signature it purports to be shall be *prima facie* evidence that the signing of such name was unauthorized and is a forgery").

**§ 2073. Same: Order and Sufficiency of Evidence, etc.**

[*Note 2, par. 1; add, under Accord.:*]

1904, *Scott v. State*, 141 Ala. 1, 37 So. 357 (homicide by poisoning; one judge diss.).

1910, *People v. Wilkins*, 158 Col. 130, 111 Pac. 612.

1908, *State v. Washelesky*, 81 Conn. 22, 70 Atl. 62.

1905, *Williams v. State*, 123 Ga. 138, 51 S. E. 322 (murder).

1905, *State v. Kesner*, 72 Kan. 87, 82 Pac. 720.

1908, *State v. Gebbia*, 121 La. 1083, 47 So. 32.

[*Note 3; add.:*]

1905, *People v. Ward*, 145 Cal. 736, 79 Pac. 448 (he must "advise" them to acquit; prior cases in this State reconciled).

[*Text, p. 2785; add a new §:*]

**§ 2075. Uncorroborated Admissions in Civil Cases.** There is no general rule that the admissions of a party in a civil case are insufficient, without corroborating evidence, as a foundation for a verdict (*ante*, § 1055). But there are a few such rules limited to admissions in specific classes of issues, viz. *divorce* (*ante*, § 2067) and *marriage* (*post*, § 2086), or to admissions dispensing with certain rules of evidence, viz. *documentary originals* (*ante*, §§ 1255, 1259), and *attesting witnesses* (*ante*, § 1300).

**§ 2079. In Criminal Cases, All Eye-Witnesses, etc., must be Produced.**

[*Note 1, at the end; add.:*]

By St. 1894, 57 & 58 Vict. c. 41, § 16 (Prevention of Cruelty to Children), providing for using the child's deposition when its evidence was not "essential," some question arose whether the cause could be proceeded with at all for lack of the child's testimony; but a statute of 1904, 4 Edw. VII, omitted the doubtful clause; the citations are given *ante*, § 1411, n. 1.

[*Note 2; add.:*]

1904, *People v. Hossler*, 135 Mich. 384, 97 N. W. 754 (like *People v. Wolcott, supra*).

[*Note 3; add:*]

*Ill.*: 1912, *People v. Baskin*, 254 Ill. 509, 98 N. E. 957 (State may ask the judge to call an eye-witness). 1912, *People v. Rardin*, 255 Ill. 9, 99 N. E. 59 (similar for three indorsed witnesses).

*Ind.* St. 1905, p. 584, § 76 (re-enacts Rev. St. 1897, § 1730).

*Ky.*: 1911, *Porter v. Com.*, 145 Ky. 548, 140 S. W. 643 (two of five eye-witnesses of a homicide; Commonwealth's attorney's discretion controls).

*La.*: 1878, *State v. Williams*, 30 La. Ann. 842 (murder; the calling of certain witnesses not required; Michigan rule repudiated; but the State's attorney's unfair conduct may be ground for a new trial). 1906, *State v. Goodson*, 116 La. 388, 40 So. 776 (*State v. Gosey* approved). 1906, *State v. Stewart*, 117 La. 476, 41 So. 798 (assault with intent to kill; an exception to the judge's refusal "to require the district attorney to call the witnesses to the *res gesta* and to place them upon the stand for examination" was overruled, following *State v. Williams*; the professional duty of the State officer to elicit all the truth "is other and very different from a right in the accused to require that the district attorney" should produce all the eye-witnesses; "it may be that some special case might justify special relief").

*Minn.*: 1907, *State v. Sheltrey*, 100 Minn. 107, 110 N. W. 353 (the prosecution held not bound to call all eye-witnesses or indorsed witnesses; but either party may comment on the failure of the other to call, on the principles of § 285, *ante*).

*Pa.*: 1908, *Com. v. Deitrick*, 221 Pa. 7, 70 Atl. 275 (rule repudiated).

*S. D.*: 1906, *State v. Kapelino*, 20 S. D. 591, 108 N. W. 335 (assault with intent; Michigan rule repudiated).

*Tex.*: 1901, *McCandless v. State*, 42 Tex. Cr. 655, 62 S. W. 745. 1903, *Holloway v. State*, 45 Tex. Cr. 303, 77 S. W. 14 (this and the preceding case leave the rule still unsettled). 1905, *Thompson v. State*, — Tex. Cr. —, 89 S. W. 1081 (assault; one eye-witness having testified, the rule that the others must be called was held not applicable; "it seems that the later authorities have drifted away from that proposition; but it is not necessary to discuss it"; is "drifting away" a process to be viewed with equanimity). 1906, *McCrear v. State*, 49 Tex. Cr. 228, 94 S. W. 899 (assault on defendant's wife; the State not required to call the wife).

*Wis.*: 1909, *Dillon v. State*, 137 Wis. 655, 119 N. W. 352 (rule rejected).

## § 2081. *Corpus Delicti* must be proved by Eye-Witnesses, etc.

[*Note 4, at the end; add:*]

In 12 American Criminal Reports 213 (1905), the editor, Mr. John F. Geeting, has a valuable note collecting cases, including some not elsewhere noticed.

[*Note 8; add:*]

1904, *Heyman v. Heyman*, 210 Ill. 524, 71 N. E. 591 (divorce). 1905, *Hoch v. People*, 219 Ill. 265, 76 N. E. 356 (murder). 1913, *People v. See*, 258 Ill. 152, 101 N. E. 257. 1914, *People v. Goodwin*, 263 Ill. 99, 104 N. E. 1018.

1908, *Mason v. State*, 171 Ind. 78, 85 N. E. 776 (larceny). 1911, *Messel v. State*, 176 Ind. 214, 95 N. E. 565 (rape under age).

1906, *Leftridge v. U. S.*, 6 Ind. T. 305, 97 S. W. 1018 (homicide).

1913, *State v. Cardwell*, 90 Kan. 606, 135 Pac. 597 (rape under age).

1905, *State v. Henderson*, 186 Mo. 473, 85 S. W. 576 (murder). 1906, *State v. Barrington*, 198 Mo. 23, 95 S. W. 235 (murder). 1911, *State v. McCord*, 237 Mo. 242, 140 S. W. 885 (rape).

1913, *Woody v. State*, — Okl. Cr. —, 136 Pac. 430 (adultery).

1905, *State v. Williams*, 46 Or. 287, 80 Pac. 655 (murder). 1906, *State v. Barnes*, 47 Or. 592, 85 Pac. 998 (murder).

[*Note 8 — continued*]

1913, *State v. Merrill*, — W. Va. —, 78 S. E. 699 (infanticide).

1905, *Winsky v. State*, 126 Wis. 99, 105 N. W. 480 (burglary).

[*Note 9; add:*]

1905, *People v. Patrick*, 182 N. Y. 131, 74 N. E. 843 (statute applied).

§ 2082. **Proof of a "Marriage in Fact," etc.**

[*Note 3; add:*]

1905, *Reaves v. Reaves*, 15 Okl. 240, 82 Pac. 490 (summarizing the history).

[*Text*, p. 2800, l. 4 from the end; *add* a new note 6.]

\* An example of the efficacy of the cohabitation evidence in leading to the inference even of a ceremonial marriage is seen in *Re Shephard*, 1904, 1 Ch. 456. An example of the occasional violence of this inference, based on habit and repute only, is found in *Travers v. Reinhardt*, 205 U. S. 423, 27 Sup. 563.

§ 2083. **Same: Habit and Repute as the Ordinary Evidence.**

[*Note 1; add:*]

*Del.*: 1902, *State v. Miller*, 3 Pen. 518, 52 Atl. 262 (information for failure to support children).

*Ia.*: 1906, *Smith v. Fuller*, — Ia. —, 108 N. W. 765 (dower).

*U. S.*: 1907, *Travers v. Reinhardt*, 205 U. S. 423, 27 Sup. 563.

*Wash.*: 1909, *Weatherall v. Weatherall*, 56 Wash. 344, 105 Pac. 822 (bill to establish a marriage; prior cases reviewed).

[*Note 3*, par. 1; *add:*]

*Accord*: 1906, *Ward v. Merriam*, 193 Mass. 135, 78 N. E. 745 (slander).

§ 2085. **Same: Eye-Witness required for Criminal Conversation and Bigamy.**

[*Notes 1*, par. 1; *add:*]

1912, *Zdrahal v. Shatney*, Man. C. A., 7 D. L. R. 554 (criminal conversation; the testimony of the plaintiff alone to a ceremonial marriage, held not sufficient, by two judges; but *Cameron and Haggart*, JJ. A., correctly held that "we have the evidence of an eye-witness, to wit, the plaintiff," and thus the rule of *Morris v. Miller* was satisfied).

1905, *Snowman v. Mason*, 99 Me. 490, 59 Atl. 1019.

[*Note 3; add:*]

*Ind. St.* 1905, p. 584, § 455 (re-enacts Rev. St. 1897, c. 96, § 60).

[*Note 4; add:*]

1904, *State v. Eggleston*, 45 Or. 346, 77 Pac. 738, *semble*.

[*Note 6; add:*]

*Can. St.* 1913, 3-4 Geo. V, c. 13, § 14 (inserting a new § 242 B in Criminal Code 1906; failure to support family; "that a man has cohabited with a woman or has in any way recognized her as being his wife" shall be evidence of lawful marriage, and "that a man has in any way recognized children as being his children" shall be evidence of their being his legitimate children).

[*Note 6 — continued*]

*Ark. St.* 1909, c. 52, p. 134, Mar. 5, § 2 (wife-abandonment, etc.; "no other evidence" than in civil cases, needed to prove marriage or paternity).

*Cal.*: 1909, *People v. Le Doux*, 155 Cal. 535, 102 Pac. 517 (marricide; a bigamous marriage with L. being alleged as the motive, the rule for bigamy was correctly not applied to the proof of marriage with the deceased, because the defendant's belief alone was material to the motive).

*D. C. St.* 1906, Mar. 23, § 2, c. 1131, U. S. Stat. L. vol. 34, p. 87 (offence of failing to support one's family; "no other evidence shall be required" to prove marriage or parentage than in civil actions).

*Haw. St.* 1913, No. 83, p. 103, Apr. 15, § 6 (desertion of family by husband; "no other or greater evidence" required to prove the marriage or paternity than in civil action).

1906, *State v. Rocker*, 130 Ia. 239, 106 N. W. 645 (murder; marriage of one co-defendant to the deceased).

*Kan. St.* 1911, c. 163, p. 247, Mar. 13, § 6 (family-desertion by husband; like *Haw. St.* 1913, No. 83).

*Nev. St.* 1913, c. 272, p. 445 (cited more fully *ante*, § 488).

*Tex. St.* 1907, c. 62, p. 133, § 2 (family-desertion; for proving marriage or parentage "no other evidence shall be required" than in civil actions; wife shall be competent to all facts, including marriage and parentage).

*Wash. St.* 1907, c. 103, p. 199, § 3 (family-desertion; no other evidence required to prove marriage or parentage than "to prove such facts in a civil action").

*Wis. St.* 1911, c. 576, p. 731 (family-desertion; "no other or greater evidence shall be required to prove the marriage of such husband or wife, or that the defendant is the father or mother of such child or children whether legitimate or illegitimate, than is or shall be required to prove such facts in a civil action").

[*Note 7; add:*]

1903, *State v. Tillinghast*, 25 R. I. 391, 56 Atl. 181 (crime of non-support; rule assumed to apply to all criminal cases, without citing authority, and in an ill-considered opinion).

Note also the following: 1906, *Green v. State*, 125 Ga. 742, 54 S. E. 724 ("a witness cannot be impeached by showing by parol evidence that he has committed bigamy"; no authority is cited for this confused statement).

[*Note 9, par. 1; add:*]

So also for *civil cases* in general:

1913, *Farmer v. Towers*, 106 Ark. 123, 152 S. W. 993 (heirship).

**§ 2086. Same: Eye-Witness not required when Proof is by Admissions.**

[*Note 4; add:*]

*Contra*: 1876, *R. v. Savage*, 13 Cox Cr. 178.

1890, *R. v. Ray*, 20 Ont. 209 (bigamy; defendant's confession of the first marriage, not sufficient; "We must follow the latest English case, *R. v. Savage*").

*Accord*: 1904, *McSein v. State*, 120 Ga. 175, 47 S. E. 544 ("the defendant's uncorroborated admissions are sufficient to establish the first marriage").

*Not clear*: 1911, *R. v. Naoum*, 24 Ont. L. R. 306 (bigamy; defendant's oral admission of first marriage; not clear).

[*Note 5; add:*]

1912, *Johnson v. State*, — Tex. Cr. —, 150 S. W. 936 (following *Dumas v. State*; but mere-admissions, without cohabitation or other circumstances, do not suffice).

[*Note 6, par. 1; add.:*]

1907, *Williams v. State*, 151 Ala. 108, 44 So. 57 (*Parker v. State* approved and followed).  
1905, *Murphy v. State*, 122 Ga. 149, 50 S. E. 48.

[*Note 7; add.:*]

*Haw.*: 1902, *Terr. v. Castro*, 14 Haw. 131 (adultery).  
*Utah*: 1906, *State v. Thompson*, 31 Utah 228, 87 Pac. 709. 1909, *State v. Moore*, 36 Utah 521, 105 Pac. 293. 1912, *State v. Moore*, — Utah —, 126 Pac. 322.

[*Note 9; add.:*]

Can. St. 1913, 3-4 Geo. V, c. 13, § 14 (failure to support family; quoted *ante*, § 2085, n. 6).  
1910, *People v. Adams*, 162 Mich. 371, 127 N. W. 354 (seduction by a married man); and the other statutes concerning family-desertion, quoted *ante*, § 2085, n. 6.

[*Note 11, par. 1; add.:*]

*Accord*: 1902, *State v. Miller*, 3 Pennw. Del. 518, 52 Atl. 262 (information for failure to support children).  
1909, *Walker v. Walker*, 151 N. C. 164, 65 S. E. 923 (inheritance depending on legitimacy; the mother's declarations as to non-marriage received).  
*Contra*: 1911, *Whigby v. Burnham*, 135 Ga. 584, 69 S. E. 1114 (action by son against widow, for land inherited; the deceased father's admission that he was already married to another woman, not received for the plaintiff; the grounds of the ruling are inexplicable).

[*Note 12; add, under Contra.:*]

1905, *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084 (to prove identity; the opinion is full of loose law).

§ 2088. **Same: Celebrant's Certificate, etc., not Preferred.**

[*Note 4; add.:*]

1906, *Richardson v. State*, 103 Md. 112, 63 Atl. 317.

[*Note 5; add.:*]

1913, *State v. Nieburg*, 86 Vt. 392, 85 Atl. 769.  
1905, *State v. Nelson*, 39 Wash. 221, 81 Pac. 721.

[*Note 6; add.:*]

1903, *State v. Tillinghast*, 25 R. I. 391, 56 Atl. 181, *semble* (non-support).

[*Note 7; add.:*]

1906, *Hill v. Pomelear*, 72 N. J. L. 528, 63 Atl. 269.

[*Note 9, par. 1; add.:*]

1906, *Southern R. Co. v. Brown*, 126 Ga. 1, 54 S. E. 911 (death by wrongful act). 1907, *Sellers v. Page*, 127 Ga. 633, 56 S. E. 1011 (foreclosure).  
1906, *Smith v. Fuller*, — Ia. —, 108 N. W. 765 (dower).  
1905, *Hardin v. Hardin*, — Ky. —, 87 S. W. 284 (negro marriage).  
1907, *Massuco v. Tomasi*, 80 Vt. 186, 67 Atl. 551 (breach of promise to marry).

§ 2089. **Owner's Testimony to Non-Consent, in Larceny.**

[*Note 5; add.:*]

1905, *Jones v. People*, 33 Colo. 161, 79 Pac. 1013 (rule apparently approved, citing only Wisconsin cases; but here it was proved impossible to find the owner).

[*Note 5 — continued*]

1910, *Johns v. State*, 88 Nebr. 145, 129 N. W. 247 (non-consent must clearly appear from the owner's evidence).

[*Note 6; add:*]

1893, *People v. Davis*, 97 Cal. 194, 31 Pac. 1109 (larceny of a pocket-book; rule not applied).  
 1913, *State v. Patchen*, 36 Nev. 510, 137 Pac. 406 (burglary).  
 1906, *Hurst v. Terr.*, 16 Okl. 600, 86 Pac. 280 (larceny of cattle; rule repudiated).  
 1908, *State v. Faulk*, 22 S. D. 183, 116 N. W. 72 (non-consent need not be proved by the owner).

§ 2094. **Completeness of Verbal Utterance; General Principle.**

[*Note 4; add:*]

As to the *giving of an instruction* on this point, there is much useless learning:

1903, *People v. Wardrip*, 141 Cal. 233, 74 Pac. 744 (under C. C. P. § 2061). 1904, *People v. Buckley*, 143 id. 375, 77 Pac. 169. 1904, *People v. Moran*, 144 id. 48, 77 Pac. 777. 1904, *People v. Ruiz*, 144 id. 251, 77 Pac. 907.  
 1905, *Castner v. Chicago, B. & Q. R. Co.*, 126 Ia. 581, 102 N. W. 499.  
 1905, *Rosenwald v. Middlebrook*, 188 Mo. 58, 86 S. W. 200.  
 1904, *Thompson v. Purdy*, 45 Or. 197, 77 Pac. 113, 83 Pac. 139.  
 1906, *State v. Hutchings*, 30 Utah 319, 84 Pac. 893.  
 1905, *Grotjan v. Rice*, 124 Wis. 253, 102 N. W. 551.

[*Text*, p. 2823; after the quotations in par. (1), *add* the following:]

1909, "Trial of Professor Foster for Heresy" (*Chicago Record-Herald*, June 8, 1909).  
 Dr. Wm. Matthews, a zealous religionist, believing that Professor Foster, of the Theological Faculty of the University of Chicago, had published heretical doctrine, advanced charges of heresy before an ecclesiastical Conference held in Chicago. The critic in his address quoted many passages from the accused's writings, and commented on them; and the following incident here occurred: Dr. Matthews, after quoting Professor Foster as stating in his book that "he who calls himself a Bible believer is a knave," declared with great earnestness: "If that be so, thank God I am one."

"Does Professor Foster say that?" interrupted Professor Parker.

"Yes, sir," declared Dr. Matthews.

"On what page?" demanded Professor Parker.

"Page 282," was the reply.

"How do you spell the word 'knave'?" was the next question.

"K-n-a-v-e," spelled Dr. Matthews.

"If you will turn to the passage you refer to on page 282 of Professor Foster's book," returned Professor Parker, pointing to it in an open copy of the book which he held in his hand, "you will find that it reads: 'He who calls himself a Bible believer is a naive,' meaning a simple, untutored person, not a scoundrel, as one would be led to believe from your interpretation."

Dr. Matthews thanked the professor for his correction, but was visibly embarrassed by his error.

§ 2097. **Verbal Precision; General Principle, etc.**

[*Note 1; add:*]

1904, *McKee v. Higbee*, 180 Mo. 263, 79 S. W. 407 (conversations and terms of a lost letter, involving a contract to bequeath, held not sufficiently proved).  
 1905, *Busch v. Robinson*, 46 Or. 539, 81 Pac. 237, *semble*.  
 1910, *People v. Giro*, 197 N. Y. 152, 90 N. E. 432.

[*Note 2; add:*]

1911, *Godinho's Case*, 7 Cr. App. 12 (not decided; *R. v. Sexton*, as cited in *Roscoe*, "Crim. Evidence," 13th ed., 39, doubted).

1904, *State v. Brinte*, 4 Del. 551, 58 Atl. 258 (the questions, to which the confession made answer, need not be included).

#### § 2098. Same: Application to Testimony at a Former Trial.

[*Note 4, par. 1; add:*]

1905, *Petty v. State*, 76 Ark. 515, 89 S. W. 465 (substance).

1905, *Arnold's Estate*, 147 Cal. 583, 82 Pac. 252 (usually the questions, and not only the answers, must be read).

1912, *Hope v. Valente*, 86 Conn. 301, 85 Atl. 541 (a party's admission contained in his former testimony may be read against him without putting in the remainder).

1904, *State v. Harmon*, 70 Kan. 476, 78 Pac. 805 (substance suffices; preceding cases not cited, though cases from seven other jurisdictions are cited); but a stricter rule is laid down in *Kan. St. 1905, c. 494, § 1*, making a court stenographer's transcript of "all the evidence of any witness," admissible; cited more fully *ante*, § 1669.

1906, *State v. Herlihy*, 102 Me. 310, 66 Atl. 643 ("it is sufficient to prove the substance of the whole testimony").

Compare also the cases cited *ante*, § 1045, n. 3 (witness' self-contradictions).

[*Note 4, par. 3; add:*]

1908, *McGivern v. Steele*, 197 Mass. 164, 83 N. E. 405. 1910, *Jaquith v. Morrill*, 204 Mass. 181, 90 N. E. 556 (*Costigan v. Lunt* approved and applied). 1911, *Com. v. Shooshanian*, 210 Mass. 123, 96 N. E. 70 (the witness may state such part as he remembers, if the needed remainder is stated by others).

[*Note 7; after Southern L. & T. Co. v. Benbow, N. C., add:*]

Compare the second ruling in this case, cited *post*, § 2099, n. 1.

#### § 2099. Entirety of Parts: General Principle, etc.

[*Note 1, par. 1; add:*]

1906, *State v. Freddy*, 117 La. 121, 41 So. 436 (conversation only partly heard, admitted).

[*Note 1, par. 2, l. 4; add:*]

1849, *O'Brien v. Cheney*, 5 Cush. 148, 152 (admission as to a bond; "the admission in full" must be taken; here, however, a judicial admission was concerned).

1904, *Southern L. & T. Co. v. Benbow*, 135 N. C. 303, 47 S. E. 435 (memorandum of admissions in a conversation, not containing the exact words nor the entire substance, but only the effect of isolated parts, excluded; the opinion confuses the principles involved, and while citing inappropriate cases on former testimony, fails to cite either the N. C. cases *supra*, or that cited *ante*, § 2097, n. 1, or even the prior ruling on the similar point at the former trial of the same case cited *ante*, § 2098, n. 7).

#### § 2100. Same: Application to Accused's Confessions.

[*Note 1, par. 1; add:*]

1910, *People v. Luis*, 158 Cal. 285, 110 Pac. 580 (admitted, where he heard all and remembers the substance).

1904, *Green v. Com.*, — Ky. —, 83 S. W. 638 (here the substance is required).

1904, *State v. Gianfala*, 113 La. 463, 37 So. 30 ("in the main, all that was said" suffices).

1906, *State v. Lu Sing*, 34 Mont. 31, 85 Pac. 521 (confession of a Chinese, speaking broken

[*Note 1 — continued*]

English, and understood in part only, admitted; the above rule confirmed). 1909, *State v. Berberick*, 38 Mont. 423, 100 Pac. 209 (substance of a confession, admitted). 1911, *State v. Averill*, 85 Vt. 115, 81 Atl. 461.

[*Note 2; add:*]

1910, *People v. Giro*, 197 N. Y. 152, 90 N. E. 432.

[*Note 3, par. 1; add:*]

1910, *Stone's Case*, 6 Cr. App. 89, 96. 1911, *Gray's Case*, 6 Cr. App. 242.  
1904, *Risdon v. Yates*, 145 Cal. 210, 78 Pac. 641 (the defendant's plea of guilty before a justice having been introduced, the Court allowed the entire statement made at the time by the defendant to be used in explanation).  
1912, *People v. Bowen*, 170 Mich. 129, 135 N. W. 824 (the remainder may be introduced, even though it involved disclosing privileged communications with a wife).  
1904, *State v. Knowles*, 185 Mo. 141, 83 S. W. 1083. 1905, *State v. Merkel*, 189 Mo. 315, 87 S. W. 1186. 1906, *State v. Myers*, 198 Mo. 225, 94 S. W. 242 (for the prosecution).  
1906, *Clay v. State*, 15 Wyo. 42, 86 Pac. 17.

[*Note 5, par. 1, col. 2, l. 5; add:*]

*Canada*: 1905, *R. v. Martin*, 9 Ont. L. R. 218 (the whole is read, but the judge instructs the jury "not to pay the slightest attention to it except so far as it goes to affect such person" confessing).

*United States*: 1904, *Howson v. State*, 73 Ark. 146, 83 S. W. 933.

1904, *State v. Brinte*, 4 Del. 551, 58 Atl. 258.

1914, *People v. Hotz*, 261 Ill. 239, 103 N. E. 1007.

1908, *Polson v. Com.*, — Ky. —, 108 S. W. 844.

1913, *Com. v. Borasky*, 214 Mass. 313, 101 N. E. 377.

1911, *Ford v. State*, 5 Okl. Cr. 240, 114 Pac. 273.

1908, *Gibson v. State*, 53 Tex. Cr. App. 349, 110 S. W. 41.

1912, *State v. Romeo*, — Utah —, 128 Pac. 530.

1905, *State v. Mann*, 39 Wash. 144, 81 Pac. 561. 1912, *State v. Beebe*, 66 Wash. 463, 120 Pac. 122 (*contra* distinguishing *State v. Mann* in some way not entirely clear).

[*Note 5, par. 1, l. 6 from the end; add:*]

1907, *McCann v. People*, 226 Ill. 562, 80 N. E. 1061 (here two judges dissented because of this principle).

[*Text*, p. 2841, at the end of the section, *add*, as a new paragraph 4:]

(4) Of course, the *prosecution* may desire here to invoke the rule (*post*, § 2115) *allowing* the whole to be put in. This is usually the case where the confession contains a mention of *another crime* committed by the accused. On the usual principles (*ante*, §§ 194, 300-367), this additional crime would ordinarily not be provable for its own sake; yet under the present principle and that of § 2115, *post*, the accused's allusion to it in his confession may and must be listened to if it is a part of the one entire statement confessing the crime charged at bar.<sup>6</sup>

<sup>6</sup> There is usually an unnecessary scrupulosity on this point:

1896, *Gore v. People*, 162 Ill. 259, 266, 44 N. E. 500 (murder).

1905, *Wistrand v. People*, 218 Ill. 323, 75 N. E. 891 (rape; the whole may be read, under proper instructions).

[*Text*, p. 2841 — *continued*]

1854, *Lord v. Moore*, 37 Me. 208, 217 (civil action for arson; in the defendant's admissions, a part which mentioned another similar act of his was received as being inseparable from the whole).

1904, *People v. Loomis*, 178 N. Y. 400, 70 N. E. 919 (a confession of another crime, made at the same time as the confession of the crime charged, is not admissible, unless the latter "necessarily relates to another crime" or "is so essentially interwoven with every other part" of the statement that the whole must be listened to). 1908, *People v. Rogers*, 192 N. Y. 331, 85 N. E. 135 (murder; following *People v. Loomis*, *supra*). 1908, *People v. Cahill*, 193 N. Y. 232, 86 N. E. 38 (electoral perjury; three judges dissenting).

1904, *State v. Knapp*, 70 Oh. 380, 71 N. E. 705 (wife-murder; defence, insanity; a written confession, recounting also the killing of four other women, held properly admitted, under cautionary instructions).

1907, *Barnett v. State*, 50 Tex. Cr. 538, 99 S. W. 556 (burglary).

1906, *State v. Dalton*, 43 Wash. 278, 86 Pac. 590 (murder at a burglary; a confession mentioning former crimes, admitted).

#### § 2102. Document Produced in Court, etc.

[*Note 1*, par. 1; *add.*:]

1909, *Augusta N. S. Co. v. Forlaw*, 133 Ga. 138, 65 S. E. 370 (the whole of a letter need not be offered).

1904, *Fowles v. Joslyn*, 135 Mich. 333, 97 N. W. 790 (defendant's book-entry admitting payment, received against him, without offering the entire book).

#### § 2103. Same: Depositions and Former Testimony.

[*Note 3*, par. 1; *add.*:]

*Accord*: 1908, *Farmers' Merchants' Bank v. Wood*, 143 Ia. 635, 118 N. W. 282 (whether the deposition of an officer of an opponent corporation must all be offered, not decided).

1904, *Gussner v. Hawks*, 13 N. D. 453, 101 N. W. 898 (*First N. Bank v. M. & N. E. Co.* approved; but here the cross-examiner's offer of three answers of the cross-examination only was held insufficient).

1909, *Crotty v. Chicago Great Western R. Co.*, 8th C. C. A., 169 Fed. 593 (not all need be read, "if what is read does not consist of mere fragmentary excerpts, a correct appreciation of which depends upon the context").

*Contra*: 1876, *Fountain's Adm'r v. Ware*, 56 Ala. 558, *semble*.

1913, *Walter v. Sperry*, 86 Conn. 474, 85 Atl. 739 *semble*.

1913, *Boney v. Boney*, 161 N. C. 614, 77 S. E. 784 (cannot put in the cross-examination alone).

Compare the cases cited *post*, § 2115, n. 3, and *ante*, § 1045, n. 3.

[*Note 5*; *add.*:]

1908, *Leifheit v. Neylon*, 139 Ia. 32, 117 N. W. 4 (testimony of a party-opponent at a former trial, here used as containing admissions; the offerer need read only such parts as he sees fit).

#### § 2104. Same: Separate Writings referred to, etc.

[*Note 1*, *add.*:]

1906, *Merchant's L. & T. Co. v. Egan*, 222 Ill. 494, 78 N. E. 800 (memorandum referred to in a conversation; the trial Court's discretion controls).

§ 2105. **Document Lost or Destroyed; (1) Deeds, etc.**

[*Note 1, par. 1, line 1; add:*]

The following cases include those which merely require a stronger *degree of proof* of the contents than mere preponderance of evidence, under the principle of § 2498, *post* (see par. d, at the end of note 5, in the present section; Courts do not always distinguish the two principles).

1905, *Carpenter v. Jones*, 76 Ark. 163, 88 S. W. 871 (lost deed; instructions passed upon; foregoing cases not cited).

1909, *Robinson v. Singerly P. & P. Co.*, 110 Md. 382, 72 Atl. 828 (lost agreement, sufficiently shown).

1908, *Rogers v. Clark Iron Co.*, 104 Minn. 198, 116 N. W. 739 (lost land-patent; *Perry v. Burton, Ill.*, approved).

1904, *Capell v. Fagan*, 29 Mont. 507, 77 Pac. 55 (deed's terms not sufficiently shown).

1913, *Borstelman v. Brohan*, 81 N. J. Eq. 401, 87 Atl. 145 (proof should be "clear and cogent").

1906, *Ivey v. Bessemer C. C. Mills*, 143 N. C. 189, 55 S. E. 613 (a "substantial copy of the greater part of a letter," excluded, on the facts). 1911, *State v. Corpening*, 157 N. C. 621, 73 S. E. 214 (part of a letter of defendant being destroyed, the remainder containing admissions was received; but the opinion does not show appreciation of the question involved). 1904, *Simpson v. Weise*, 34 Wash. 360, 75 Pac. 973 (a memorandum of a contract detained by the opponent may suffice). 1909, *Scurry v. Seattle*, 56 Wash. 1, 104 Pac. 1129 (deed with conditions, held not sufficiently evidenced).

[*Note 1, par. 5, p. 2848, under Recital of a Seal; add:*]

1904, *Wilson v. Braden*, 56 W. Va. 372, 49 S. E. 409.

[*Note 5, at the end, add:*]

(d) The degree of persuasion — whether beyond a reasonable doubt, or the like — required for proof of a lost deed is usually greater than that required ordinarily in civil cases (*post*, § 2498); see the remarks in par. (a) of note 1 to § 2106, *post*.

§ 2106. **Same: (2) Wills.**

[*Note 1, par. 1; add:*]

1909, *Patterson's Estate*, 155 Cal. 426, 102 Pac. 941 (a part distinctly proved can be given effect).

1913, *Cassem v. Prindle*, 258 Ill. 11, 101 N. E. 241 ("substance of the will" suffices).

1907, *Bradshaw v. Butler*, 125 Ky. 162, 100 S. W. 837 (*Steele v. Price* followed).

1910, *In re Lord's Will*, 106 Me. 51, 75 Atl. 286; ("clear, strong, satisfactory, and convincing"; why not add, "positive, plain, pronounced, and persuasive"?)

1913, *Tinnan v. Fitzpatrick*, 120 Md. 342, 87 Atl. 802 (purporting, executor the sole beneficiary with holding a will for eight years until all attesting witnesses were dead, and then coming forward with a copy, the original having been destroyed in a great conflagration; proof held not sufficient).

1906, *Michell v. Low*, 213 Pa. 526, 63 Atl. 246.

§ 2109. **Public Records; Application to Sundry Public Records.**

[*Note 1; add, at the end:*]

Compare also, on all the kinds of documents in this section, the cases cited *ante*, § 1678 (certificate of effect of a record).

§ 2110. **Same: Application to Judicial Records.**

[Note 2; add:]

1906, *Patterson v. Drake*, 126 Ga. 478, 55 S. E. 175.1905, *Chicago & S. E. R. Co. v. Grantham*, 165 Ind. 279, 75 N. E. 265 (eminent domain; transcript held sufficient).1903, *Tompkins v. Com.*, 117 Ky. 138, 77 S. W. 712 (competency of a divorced wife; record of divorce not required).1911, *Mundy v. Jacques*, 116 Md. 11, 81 Atl. 289 (nuptial record; complete copy of Illinois judgment-record required; distinguishing Code Art. 35, *supra*, n. 1, as applying only to domestic judgments).1912, *King v. Cox*, 126 Tenn. 553, 151 S. W. 58 (damages on dissolution of injunction; part of record, held not sufficient on the facts; cases collected).Compare the citations *ante* § 1678 (certificate of effect of a record).

[Note 3; add:]

1909, *Pineland Club v. Robert*, 4th C. C. A., 170 Fed. 341 (a record of a will must show that there was a decree admitting it to probate, on the principle of § 1658, *ante*; hence a re-record of a certified copy of a will from the probate court, no decree of probate appearing therein, was held not admissible under S. C. St. 1866, Dec. 20, admitting records of certified copies of lost originals).

[Page 2857; par. (5), at the end; add a new note 4:]

Similar questions arise for an *administrator's deed*: 1908, *Felix v. Caldwell*, 235 Ill. 159, 85 N. E. 228 (administrator's deed without decree, the records of court being destroyed, admitted, in connection with Rev. St. 1872, c. 30, § 12).§ 2113. **General Principle; the Whole, etc., May be put in.**

[Text, page 2860, line 9 from above; add a note 1a:]

Approved in *People v. Schlessel*, 196 N. Y. 476, 90 N. E. 44 (1909).

[Note 3; add:]

The propriety of the distinction taken in the Queen's Case has been well defended by Spear, J., in *Lombard v. Chaplin*, 98 Me. 309, 56 Atl. 903 (1903).

[Note 6; add:]

*Accord*: 1841, *Storer v. Gowen*, 18 Me. 174 ("Both are equally evidence to the jury").*Contra*: 1894, *Carter v. Carter*, 152 Ill. 434, 449, 28 N. E. 948 (letters referred to in a conversation). 1906, *Merchant's L. & T. Co. v. Egan*, 222 Ill. 494, 78 N. E. 800.§ 2115. **Principle's Application; (1) Oral Admissions, etc.**

[Note 1, par. 1; add:]

1905, *Braham v. State*, 143 Ala. 28, 38 So. 919 (all said upon the same subject).1904, *Risdon v. Yates*, 145 Cal. 210, 78 Pac. 641 (general principle stated).1909, *Thomas v. Young*, 81 Conn. 702, 71 Atl. 1100 (not all that is said on any subject at a single interview is admissible).1904, *Brown v. State*, 119 Ga. 572, 46 S. E. 833 (only the explanatory parts).1904, *Chicago City R. Co. v. Bundy*, 210 Ill. 39, 71 N. E. 28 (remainder of a conversation forming part of a negotiation of compromise, admitted). 1913, *Foster v. Shepherd*, 258 Ill. 164, 101 N. E. 411 (remainder of defendant's conversation with several persons, admitted).1912, *Tyrrel v. State*, 177 Ind. 14, 97 N. E. 14 (former testimony; after impeachment by parts, then only so much as "explains, modifies, or is necessary to enable the jury to understand the statements introduced to impeach," is admissible in rebuttal).

[*Note 1 — continued*]

1904, *Pettis v. Green Riv. A. Co.*, — Ia. —, 99 N. W. 235 (Code rule applied).  
 1841, *Storer v. Gowen*, 18 Me. 174 (party's oral admissions; the whole "must be taken together").  
 1903, *Lombard v. Chaplin*, 98 Me. 309, 56 Atl. 903 (party's letter; the whole admitted).  
 1904, *Flowers v. State*, 85 Miss. 591, 37 So. 814 (statement of the deceased).  
 1911, *State v. McDonough*, 232 Mo. 219, 134 S. W. 545 (remainder of a conversation with a witness on other topics, excluded). 1911, *State v. Lovell*, 235 Mo. 343, 138 S. W. 523.  
 1911, *Gibbons v. Terr.*, 5 Okl. Cr. 212, 115 Pac. 129.  
 1909, *Mahon v. Rankin*, 54 Or. 328, 102 Pac. 608 (only the qualifying parts; the opinion illustrates the possibilities of perverse technicalism above-mentioned in § 2113).  
 1910, *State v. West*, 24 S. D. 530, 124 N. W. 751 (accused's admissions).  
 1905, *State v. Bean*, 77 Vt. 384, 60 Atl. 807 ("all that he said upon the subject at the same time must be received").  
 1906, *Smith v. Milwaukee E. R. & L. Co.*, 127 Wis. 253, 106 N. W. 829 (whole of a conversation affecting contributory negligence).  
 Compare the citations *ante*, § 1045, n. 1 (witness' self-contradictions).

[*Note 2; add.:*]

Compare also the citations *ante*, § 2100.

[*Note 3; add.:*]

1905, *Miller v. People*, 216 Ill. 309, 74 N. E. 743 (former testimony used as admissions; the remainder may be offered "which tended to explain, qualify, correct, or in any manner throw light on the matters touched upon by the questions and answers which were proven").  
 1910, *Grebenstein v. Sone & Webster Eng. Co.*, 205 Mass. 431, 91 N. E. 411 (the whole of a witness' former statement, held not improperly read, in the trial Court's discretion).  
 1904, *Culver v. South H. & E. R. Co.*, 126 Mich. 443, 101 N. W. 663 (whole of former testimony, inadmissible).  
 1857, *State v. Phillips*, 24 Mo. 475, 485 (deposition). 1875, *Prewitt v. Martin*, 59 Mo. 325, 334 (deposition). 1906, *State v. Myers*, 198 Mo. 225, 94 S. W. 242 (foregoing cases approved).  
 1904, *Hanlon v. Ehrich*, 178 N. Y. 474, 71 N. E. 12 (there is no "hard and fast rule that will fit every case alike"; "in no event, however, should the writing, or any part thereof, be read until it has been marked in evidence"; here a general objection, not specifying the parts objected to as not strictly contradictory, was held not sufficient). 1904, *Taft v. Little*, 178 N. Y. 127, 70 N. E. 211 (other parts of the opponent's former testimony, allowed to be read, so far as explanatory).  
 1904, *Flohr v. Terr.*, 14 Okl. 477, 78 Pac. 565.  
 1907, *Corpus v. State*, 51 Tex. Cr. 315, 102 S. W. 1152 (so much as is pertinent and explanatory of a contradictory statement offered in impeachment may be used; otherwise, the whole; here applied to former testimony).

Compare also the cases cited *ante*, § 1045, n. 3.

Such offers, however, may also involve the distinct question whether, in showing the rest of the utterances, the *magistrate's report of testimony* may be contradicted or added to (*ante*, § 1349).

## § 2116. Same: (2) Sundry Writings.

[*Note 1; add.:*]

1905, *McBrayer v. Walker*, 122 Ga. 245, 50 S. E. 95 (a deed offered by a grantee's administrator; the grantor allowed to use, on this principle, the grantee's indorsement on the deed showing a usurious mortgage; properly, however, the principles governing were those of § 2132, *post*, and § 1082, *ante*, and not the present one at all).

§ 2118. **Same : (4) Account-Books.**

[*Note 1; add, under Accord:*]

1907, *Page v. Hazelton*, 74 N. H. 252, 66 Atl. 1049 (other items in an account-book, admitted).  
1904 *Simpson v. First Nat'l Bank*, 129 Fed. 257, 264, C. C. A. (banking account).

[*Note 1; add, at the end:*]

Where an entry in a book of entries is offered under the principle of § 1551, *ante* (regular entries), the jury may examine *the whole* of the book in order to determine *from its appearance* whether it is what it purports to be: 1904, *Hauser v. People*, 210 Ill. 253, 71 N. E. 416 (hotel-register).

§ 2119. **Separate Utterances excluded; (1) Conversations, etc.**

[*Note 1, p r. 1, l. 5; add:*]

1912, *Norton v. Clark*, 253 Ill. 557, 97 N. E. 1079 (admitting the statements made by the other conversant when useful for explaining the sense of the statements of the other conversant already admitted).  
1904, *State v. Leuhrman*, 123 Ia. 476, 99 N. W. 140 (prior statement, excluded).  
1906, *State v. Thompson*, 116 La. 829, 41 So. 107 (accused).  
1906, *State v. Kapelino*, 20 S. D. 591, 108 N. W. 335 (assault with intent; conversations between other persons, at a prior time, the defendant and the injured person being present, excluded).

[*Note 2; add:*]

1914, *Clark v. U. S.*, 8th C. C. A., 211 Fed. 916 ("The question then presents itself, whether when an indictment charges that a certain book is obscene, the passages which the prosecutor claims to be obscene may be introduced in evidence and submitted to the jury, and the remaining portion of the book excluded?" The question is of course answered, No. The odd thing about it is that neither counsel nor judges, so far as the opinion or the printed briefs show, had an inkling that a great principle was involved over which our forebears in the law had contended in notable political and historic struggles at different times going back three centuries. It is a discouraging hint of the ignorance and indifference of our intelligent bench and bar to the importance of historical knowledge and professional biography that a case involving this principle could reach and pass through the appellate court of the United States without any of the participants discovering that the principle involved had been made immortal in our legal history by the names of Sidney and Erskine).

§ 2120. **Same : (2) Utterances incorporated by Reference, etc.**

[*Note 2, par. 1; add:*]

1906, *Proctor v. Cable Co.*, 145 Mich. 503, 108 N. W. 992 (salary contract; series of letters, admitted).  
1904, *Gosnell v. Webster*, 70 Nebr. 705, 97 N. W. 1060 (rest of a correspondence, admitted).  
1908, *Sears v. Howe*, 80 Conn. 414, 68 Atl. 983 (letters referred to in replies thereto, held admissible as a part of the replies).  
1909, *People v. Schlessel*, 196 N. Y. 476, 90 N. E. 44 (the witness' mere avowal of ignorance of a document's contents, when asked on cross-examination, is not a reference sufficient to admit the document in rebuttal).

[*Note 3; add:*]

*Accord:* 1913, *Mulroy v. Jacobson*, 24 N. D. 354, 139 N. W. 697 (not clear).

*Contra:* 1905, *Hoggson & P. Mfg. Co. v. Sears*, 77 Conn. 587, 60 Atl. 133 (plaintiff's reply-letter admitted for him, on the facts).

[*Note 3 — continued*]

1904, *Robertson v. Vasey*, 125 Ia. 526, 101 N. W. 271.

1909, *Crawford v. U. S.*, 212 U. S. 183, 29 Sup. 260 (an accused having surreptitiously taken away certain correspondence apparently inculcating, the custodian wrote him charging him with the act; this letter being admitted, the answer was held also admissible; no authority is cited; but the ruling rests properly on the principle of § 281, *ante*). 1909, *Perlin v. U. S.*, 9<sup>th</sup> C. C. A., 169 Fed. 17 (contracts by the defendant made on Oct. 31, 1903, Nov. 20, 1903, and Feb. 4, 1904, forwarded by the defendant in a letter of Sept. 14, 1905; the contract of Oct. 31, 1903, being offered by the prosecution as an admission, the defendant was held entitled to introduce the other contracts; *Gilbert, J., diss.*).

§ 2121. **Chancery Answer: (1) Used at Law as an Evidential Admission.**

[*Note 1, par. 1; add.:*]

*Contra:* 1909, *Colby v. Reams*, 109 W. Va. 308, 63 S. E. 1009 (citing merely a treatise on the general principle of § 2113, *ante*, and apparently quite unaware of the specific rule here applicable).

§ 2122. **Chancery Answer: (2) Used in Chancery as a Pleading, etc.**

[*Note 5; add.:*]

1904, *Stewart v. N. C. R. Co.*, 136 N. C. 385, 48 S. E. 793; *Hedrick v. Southern R. Co.*, *ib.* 510, 48 S. E. 830.

1905, *Reager's Adm'r v. Chappellear*, 104 Va. 14, 51 S. E. 170 (administrator's answer).

§ 2123. **Same: (3) Anomalous New York Rule.**

[*Note 13, par. 1; add, under Accord:*]

*Fla.:* 1906, *Mayo v. Hughes*, 51 Fla. 495, 40 So. 499 (failure of consideration): 1906, *Southern Lumber & S. Co. v. Verdier*, 51 Fla. 570, 40 So. 676 (creditor's bill to set aside a voluntary conveyance; an answer upon facts "inseparably connected . . . is responsive to the bill as well when it discharges as when it charges the defendant").

[*Note 16; add.:*]

1905, *Ocala F. & M. W. v. Lester*, 49 Fla. 347, 38 So. 56.

§ 2124. **Same: (4) Party's Answer to Statutory Interrogatories.**

[*Note 2, par. 1; add.:*]

1899, *Bank v. Leland*, 122 Ala. 289, 25 So. 195 (a defendant's answers not responsive may be stricken out; reverting to the original rule). 1904, *Garrison v. Glass*, 139 Ala. 512, 36 So. 725 (following *Bank v. Leland*). 1909, *Sullivan Timber Co. v. Louisville & N. R. Co.*, 163 Ala. 125, 50 So. 941 (the foregoing two cases overruled; *Saltmarsh v. Bower* followed). 1911, *Birmingham R. L. & P. Co. v. Bush*, 175 Ala. 49, 56 So. 731 (the original rule again; part may be used without making the whole evidence; foregoing cases not cited). 1913, *Southern R. Co. v. Hayes*, — Ala. —, 62 So. 874 (*Sullivan T. Co v. L. & N. R. Co.* followed).

[*Note 3; add.:*]

*Man.* St. 1906, 5 & 6 Edw. VII, c. 17, § 1 (amends Rev. St. 1902, c. 40, by adding Rule 407 B, of which par. (10) provides as in Eng. Rules of Court, Ord. XXXI, rule 24, *supra*). *Newf.* St. 1904, c. 3, Rules of Court 28, par. 27 (like Eng. Ord. XXXI, Rule 24). *Yukon* Consol. Ord. 1902, c. 17, Ord. XXI, R. 223 (like Ont. Rule 461, par. 1).

[*Note 3 — continued*]

*N. C.*: 1897, *Gossler v. Wood*, 120 N. C. 69, 27 S. E. 33 (part of an answer admitting the first five allegations of a complaint, admitted, without reading the remainder setting up a counterclaim).

#### § 2125. Inspection of Opponent's Document, etc.

[*Note 4, par. 1; add.*]

1913, *Eckels & S. I. M. Co. v. Cornell E. Co.*, 119 Md. 107, 86 Atl. 38.

1911, *Boyle v. Boston Elevated R. Co.*, 208 Mass. 41, 94 N. E. 247 (rule properly held not applicable to admit a document which though called for and produced was not otherwise admissible for the calling party; whether the rule itself should be regarded as now valid, not decided).

#### § 2130. General Principle of Authentication, etc.

[*Note 1; add.*]

1909, *People v. Muhly*, 11 Cal. App. 129, 104 Pac. 466 (keys, clothes, etc., held not sufficiently connected with the defendant).

1905, *State v. Seery*, 129 Ia. 259, 105 N. W. 511 (weapon).

1904, *State v. Aspara*, 113 La. 940, 37 So. 883 (pistol). 1905, *State v. Gordon*, 115 La. 571, 39 So. 625 (pistol).

1909, *Hauger v. U. S.*, 4th C. C. A., 173 Fed. 54, 60 (coins, in a counterfeiting charge).

[*Note 3; add.*]

1913, *Oregon & Cal. R. Co. v. Grabissich*, 9th C. C. A., 206 Fed. 577 (answer filed in a prior suit).

Compare the authorities cited in § 2134, n. 1, *post*.

#### § 2131. Modes of Authenticating Documents.

[*Note 5; add.*]

1904, *Bauer v. State*, 144 Cal. 740, 78 Pac. 280 (testimony by one who had not seen the actual signing of the document, held sufficient on the facts).

1907, *Proctor & Gamble Co. v. Blakeley O. & F. Co.*, 128-Ga. 606, 57 S. E. 879 (arbitration contract in the custody of a third party out of the State; handwriting testimony not being accessible, and a sworn copy being in evidence, the execution was held sufficiently evidenced by the parties' prior conduct, etc.).

#### § 2132. Authentication not necessary when not in Issue, etc.

[*Note 1; add.*]

1905, *State v. Waldrop*, 73 S. C. 60, 52 S. E. 793 (murder; a rent-contract in the deceased's pocket; "formal proof of the execution" not required).

[*Note 2, par. 1; add.*]

1904, *Dorlan v. Westervitch*, 140 Ala. 283, 37 So. 382 (deed not acknowledged nor attested nor recorded, admitted). 1905, *Brannan v. Henry*, 142 Ala. 698, 39 So. 92.

1905, *Leavitt v. Shook*, 47 Or. 239, 83 Pac. 391 (bill of sale of a mare, used to show the circumstances of obtaining possession).

1909, *Hassam v. Safford*, 82 Vt. 444, 74 Atl. 197 (deed defectively sealed and acknowledged, used as color of title).

[Note 5; add:]

The following statute seems to belong either here or under § 1211, *ante*:

S. C. St. 1910, No. 361, p. 695 (one may introduce "any instrument purporting to be the original or copy of any waybill, receipt, bill of lading, or similar instrument issued by a common carrier as *prima facie* evidence that the same is genuine or is a true and correct copy; provided the adverse party shall fail upon due notice given to produce the original instrument").

[Text, par. 2, p. 2894; at the end, add:]

When the opponent *fails to object* to the admission of the document, this is, of course, on general principles (*ante*, § 18) a waiver as to the need of any evidence authenticating its genuineness; and this waiver is commonly held to extend to the fact of *authority of an agent* purporting to sign the document for a principal, but not as to the *legal sufficiency* of the instrument for any purpose.<sup>66</sup>

<sup>66</sup> 1860, *Lowe v. Bliss*, 24 Ill. 168 (note not objected to; its execution held to be admitted, but not its validity).

1822, *Birney v. Haim*, 2 Litt. 262, 268 (deed purporting to be by town trustees).

1880, *Bartlett v. O'Donoghue*, 72 Mo. 263 (unacknowledged deed not objected to; execution held to be admitted, but not its legal effect as a conveyance).

1905, *McClung v. McPherson*, 47 Or. 73, 82 Pac. 13 (notice of termination of tenancy, not objected to; the attorney's authority to sign, held to be admitted, but not the legal sufficiency of the notice).

Compare the doctrine for *ancient documents* (*post*, § 2144).

[Note 8; add:]

1910, *In re Pirie*, 198 N. Y. 209, 91 N. E. 587 (recital of a note in a mortgage is not an admission that a specific note offered is the note so described; other evidence of genuineness is needed; *People v. Corey* approved; this seems over-cautious).

## § 2134. Authentication as involving either Signature or Contents.

[Note 1, l. 2; add:]

1909, *Western Union Tel. Co. v. Northcutt*, 158 Ala. 539, 48 So. 553, *semble* (telegram delivery sheet).

[Note 1, at the end; add:]

1886, *Chamberlain v. Chamberlain*, 116 Ill. 480, 484 (an indorsement of payment on a note is presumed to have been made by the payee or on his authority, when the note is produced from his custody of the party entitled under him; otherwise, when produced by the obligor). 1827, *Stocking v. Fairchild*, 5 Pick. 181 (action on a mortgage-title; a condition of mortgage, written on the back of the deed, presumed to be "a part of the original contract").

Compare the following: 1881, *Bailey v. Danforth*, 53 Vt. 504 (promissory note given by the deceased payee to the plaintiff, and bearing an indorsement of payment of date before the statute had run; *semble*, the indorsement presumed to be in the payee's hand and of the purporting date).

Upon proof of the signature of an *agent*, no presumption as to his *authority* arises (*post*, § 2521, par. b); otherwise, for ancient documents (*post*, § 2144). As to the effect in this respect of an *admission*, see *ante*, § 2132, par. (2).

## § 2138. Authentication by Age; Thirty Years, etc.

[Note 7; add:]

1906, *Bower v. Cohen*, 126 Ga. 35, 54 S. E. 918 (map dated 1859, but not shown to exist till later).

§ 2139. **Natural Custody.**

[*Note 3; add:*]

1905, *Campbell v. Bates*, 143 Ala. 338, 39 So. 144 (the proper custody will be presumed, in favor of the ruling below).

[*Note 6; add:*]

1904, *Re Butrick*, 185 Mass. 107, 69 N. E. 1044 (possession of a grantee's heir, held sufficient).

1911, *Wright v. Hull*, 83 Oh. 385, 94 N. E. 813 (receipt's custody by the party here held insufficient, in view of suspicious discrepancies).

1905, *McGuire v. Blount*, 199 U. S. 142, 26 Sup. 1 (certain probate records of Spanish Florida, in the custody of the U. S. Surveyor-General, received).

§ 2140. **Unsuspecting Appearance.**

[*Note 1; add:*]

1905, *Campbell v. Bates*, 143 Ala. 338, 39 So. 144 (rule applied).

§ 2141. **Possession of the Land, for Deeds and Wills.**

[*Note 4; add:*]

1913, *Lane v. Watts*, 41 D. C. App. 139, 156 (requirement not mentioned).

1909, *Leverett v. Tift*, 6 Ga. App. 90, 64 S. E. 317 (deed of 1843, recently recorded, admitted without proof of possession).

1890, *Havens v. Sea Shore L. Co.*, 47 N. J. Eq. 365, 379, 20 Atl. 497 (possession not required, on the facts).

1911, *Nicholson v. Eureka L. Co.*, 156 N. C. 59, 72 S. E. 86 (certificate of survey of 1841, admitted without evidence of possession).

§ 2143. **Old Recorded Deeds and Old Copies.**

[*Note 2, par. 1; add:*]

1904, *Carter v. Wood*, 103 Va. 68, 48 S. E. 553 (a county-court entry of a deed in 1859, and a copy of the deed made in 1866-72 by one who knew nothing of its genuineness, excluded).

1907, *Dickinson v. Smith*, 134 Wis. 6, 114 N. W. 133 (an ancient copy of a recorded map, the copy coming from the register's custody, and generally reputed as correct, admitted).

[*Note 4, par. 1; add:*]

1904, *Arbuckle v. Matthews*, 73 Ark. 27, 83 S. W. 326 (certified copy of official record, made in 1885, of a purporting original land-patent certificate of 1860 not entitled to record, excluded; preceding case not cited).

1904, *Bentley v. McCall*, 119 Ga. 530, 46 S. E. 645 (a certified copy of the record, insufficient here under § 1651, *ante*; the record-book itself lost, and the record purporting to be of a deed of 1846; these facts were held insufficient to authenticate).

1907, *Ball v. Loughridge*, — Ky. —, 100 S. W. 275 (record of 1853 of unlawfully recorded power of attorney, not admitted; "this rule has never [!] been applied to a copy").

1908, *McCleery v. Lewis*, 104 Me. 33, 70 Atl. 540 (here the record-copy was over 50 years old, and was regular, but under the Maine rule (*ante*, § 1225) could not be used because the offeror was the grantee in the deed; excluded, but erroneously, on the ground that the original was not shown to have been executed; yet that is precisely the fact which the present doctrine purports to facilitate; moreover, the learned Court seems to have forgot that the grantee-rule (§ 1226, *ante*) is aimed merely to account for the original, and that, if the original is duly accounted for, a regular record-copy is admissible in Maine to prove execution,

[*Note 4 — continued*]

on the principle of § 1651; the ruling produces an insurmountable impossibility of proof where none need ever exist, nor was meant to, by any rule of law).

1906, *Murphy v. Cady*, 145 Mich. 33, 108 N. W. 493 (bill for accounting for pension moneys; exemplified copies of pension vouchers of about 1873, admitted under U. S. Rev. St. § 882, quoted *ante*, § 1680, held to admit the originals purporting to be signed by the party charged, without proof of the signatures on the latter; it is difficult to see why the exemplified copy was not sufficient, on the principle of § 1680, *ante*, without the aid of the ancient-document rule).

1905, *Lancaster v. Lee*, 71 S. C. 280, 51 S. E. 139 (deed of 1864, not legally recorded, and now lost; the record, sworn to by the transcribing clerk on the stand, was admitted to prove contents and apparently execution also).

1911, *Northrup v. Columbian Lumber Co.*, 5th C. C. A., 186 Fed. 770, 774 (certified copy of a deed to Georgia land irregularly recorded in South Carolina in 1868, admitted the original being lost).

[*Note 5, par. 1; add.:*]

*Ala.* St. 1911, No. 191, p. 192, Apr. 4, § 2 (certified copy of defectively executed conveyance of State lands, prior to Feb. 12, 1879, and recorded for 20 years in the probate court, admissible).

*Fla.* St. 1903, c. 5162, p. 97 (certified copy of a lost or destroyed deed defectively recorded for twenty years, admissible in proceedings to re-establish). 1907, *Campbell v. Skinner*, 53 Fla. 632, 43 So. 874 (statute held constitutional).

*Tex.* St. 1907, c. 165, p. 308 (amending Rev. Civ. St. § 2312; an instrument lacking in due acknowledgment or proof but recorded for 10 years or more, or a certified copy if the original is lost or not procurable, is admissible "without the necessity of proving its execution").

*Va.* St. 1912, c. 235, p. 524 (deeds etc. recorded before 1865 and made under a statute or decree providing for conveyance; if the proceedings under which it was made are "lost or destroyed or cannot be produced," the deed or a certified copy of the record, shall be evidence of the authority, due compliance, etc.); St. 1914, c. 100, p. 186 (repealing the foregoing).

*W. Va.* St. 1907, c. 76, p. 291, § 2 (certain judicial deeds recorded for 10 years or more, presumed to be made on due authority).

## § 2144. Authority to Execute.

[*Note 2; add.:*]

1912, *Butterfield v. Miller*, C. C. A., 195 Fed. 200, 208 (recital in an ancient deed of a power of attorney, held not sufficient, when the power is matter of record," without producing the original or a copy or accounting for failure to produce.)

[*Note 3; add.:*]

1908, *Koch v. Streuter*, 232 Ill. 594, 83 N. E. 1072 (deed of State public land trustees; State title from the United States, not presumed).

[*Note 4; add.:*]

1913, *Wilson v. Snow*, 228 U. S. 217, 33 Sup. 487 (a will was probated in 1858, but there is no record of the executrix having qualified; a deed was made in 1865, by a grantor as the executrix under a power to this will; held, that the fact of the grantor's authority to sell as executrix was sufficiently evidenced by the deed's recital of such authority, and by the circumstance of possession for 40 years under the deed; the opinion does not carefully distinguish the hearsay exception for deed-recitals and the rule for authenticating ancient

[*Note 4 — continued*]

deeds; either of them might suffice for the present case; but the opinion cites cases from both, without noting that there are two; it also ignores the limitations on the deed-recital rule, though citing *Carver v. Jackson*, *ante*, § 1573, which established them).

1907, *Dickinson v. Smith*, 134 Wis. 6, 114 N. W. 133 (plat and survey certificate, more than 30 years old, held sufficient evidence of necessary authority from the city council).

#### § 2145. Kinds of Documents covered by the Rule.

[*Note 2; add.:*]

1910, *Cole v. Lea*, 35 D. C. App. 355 (account-books).

1906, *McCreary v. Coggeshall*, 74 S. C. 42, 53 S. E. 978 (letter found among the papers of the addressee).

1905, *McGuire v. Blount*, 199 U. S. 142, 26 Sup. 1 (Spanish probate proceedings).

[*Note 2; add, at the end.:*]

Of course, the doctrine cannot avail to introduce a document which would *not be valid*, even if genuine:

1904, *O'Neal v. Tennessee C. D. & R. Co.*, 140 Ala. 378, 37 So. 275 (deed without acknowledgment or witnesses, and purporting to be signed by mark; the statute at that time requiring either attestation or acknowledgment for validity of a deed, the document was rejected).

#### § 2146. Presumption created; Statutory Denial of Genuineness.

[*Note 2; add.:*]

1904, *Bentley v. McCall*, 119 Ga. 530, 46 S. E. 645 (cited *ante*, § 2143, n. 4). 1907, *Chatman v. Hodnett*, 127 Ga. 360, 56 S. E. 439. 1909, *Leverett v. Tift*, 6 Ga. App. 90, 64 S. E. 317 (explaining *McArthur v. Morrison*).

#### § 2148. Authentication by Contents; in general.

[*Note 2, l. 2; add.:*]

So also the cases cited *ante*, § 2130, n. 3.

[*Note 2, at the end; add.:*]

1910, *People v. Adams*, 162 Mich. 371, 127 N. W. 354 (letters and telegrams of a seducer, admitted).

1906, *International Harv. Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93 (letter admitted, on the above principle).

Compare also the cases cited *ante*, §§ 87, 270, 2024, 2148, 2149.

But the *marks of cancellation on a will* found in the testator's custody may be presumed genuine: 1906, *Wikman's Estate*, 148 Cal. 642, 84 Pac. 212.

#### § 2149. Illiterate's Letter; Typewriting.

[*Note 1, l. 5; add.:*]

1906, *Sprinkle v. U. S., C. C. A.*, 150 Fed. 56, 59 (typewritten letter signed with a stamp or stencil, held not sufficiently authenticated on the facts; an example of over-strict ruling).

1906, *State v. Freshwater*, 30 Utah 442, 85 Pac. 447 (typewritten letters, sufficiently evidenced by contents, etc.; *Singleton v. Bremer*, *supra*, approved).

Compare also the cases cited *ante*, §§ 87, 270, 2024, 2148, 2149.

[*Text*, p. 2918, l. 5, at end of quotation 1; *add*-a new note 1a:]

(<sup>1a</sup>) *Accord*: 1909, *Whalen v. Gleeson*, 81 Conn. 638, 71 Atl. 908 (illiterate's letters by an amanuensis).

§ 2150. **Printed Matter ; (1) Newspapers.**

[*Note* 3, par. 1; *add*.:]

CANADA: *Alta*. St. 1913, 2d sess., c. 12, § 15 (newspaper libel; "the production of a printed copy of a newspaper" to be evidence of publication).

*Sask.* St. 1909, c. 16, § 15 (libel; printed copy of newspaper to be evidence of publication, of names of proprietor and publisher, and of place of publication).

UNITED STATES: *N. Y.* St. 1914, c. 113 (illegal advertisement; "the placing of an advertisement" etc. is evidence that the person named as vender etc. "caused or procured the same to be so placed" etc.).

§ 2152. **Postmark ; Brand.**

[*Note* 1; *add*.:]

1904, *Kirkland v. State*, 141 Ala. 45, 37 So. 352 (postmark in another State presumed genuine).

[*Note* 3; *add*, under *Accord*.:]

1906, *Beeman v. Supreme Lodge*, 215 Pa. 627, 64 Atl. 792 (postmark, used to show the time of arrival at a post-office).

[*Note* 4, l. 4; *add*.:]

1904, *Kirkland v. State*, 141 Ala. 45, 37 So. 352 (postmark in Florida, admitted to show that the witness was there).

The following rules might equally well be ruled judicially:

*Eng.* St. 1908, 8 Edw. VII, c. 48, §§ 8, 9 (post-office stamp to be evidence that an addressee of packet has refused it or is dead or cannot be found; also that the sum marked due is due).

§ 2153. **Reply-Letter received by Mail.**

[*Note* 1, par. 1; *add*.:]

1904, *Burton v. State*, 141 Ala. 32, 37 So. 435 (letter not shown to have been received in reply, excluded).

1910, *Barham v. Bank of Delight*, 94 Ark. 158, 126 S. W. 394.

1905, *Dorr Cattle Co. v. Chicago & G. W. R. Co.*, 128 Ia. 359, 103 N. W. 1003 (notice of quarantined cattle, received by mail, not presumed genuine).

1907, *American Bonding Co. v. Ensey*, 105 Md. 211, 65 Atl. 921 (letter received in reply, and purporting to be signed by the C. H. T. Co., admitted as genuine and duly authorized).  
1909, *Helwig v. Aulabaugh*, 83 Nebr. 542, 120 N. W. 162 (reply-letters purporting to come from defendant, followed by plaintiff's employment by defendant, admitted).

1906, *Taylor v. State*, 50 Tex. Cr. 381, 97 S. W. 474 (letter received by mail, but not a reply, excluded).

1906, *Leesville Mfg. Co. v. Morgan W. & I. Wks.*, 75 S. C. 342, 55 S. E. 768 (reply-letter presumed genuine).

1910, *Consolidated Grocery Co. v. Hammond*, 5th C. C. A., 175 Fed. 641 (letter received by mail, and purporting but not otherwise evidenced to have been elicited by a prior letter from the addressee, excluded).

1906, *Loverin & D. Co. v. Bumgarner*, 59 W. Va. 46, 52 S. E. 1000 (reply-letters admitted without proof of handwriting).

[*Note 1 — continued*]

The following statute carries the inference further :

*Eng. St.* 1908, 8 Edw. VII, c. 48, § 8 (in proceeding to recover goods sent by post and undelivered, the person from whom the packet "purports to have come" shall be presumed to be the sender).

#### § 2154. Reply-Telegram.

[*Note 2; add:*]

*Accord*: 1905, *Cobb v. Glenn B. & L. Co.*, 57 W. Va. 49, 9 S. E. 1005 (certain reply-telegrams not assumed genuine).

*Contra*: 1903, *Yeiser v. Cathers*, — Nebr. —, 97 N. W. 840, *semble*.

#### § 2155. Reply-Telephone.

[*Note 3; add:*]

1907, *State v. Usher*, 136 Ia. 606, 111 N. W. 811 (conversation by telephone with the defendant, identified by his voice, admitted).

1908, *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573 (detective's testimony to a telephone conversation with the accused, admitted, the detective subsequently recognizing the voice).

[*Note 4; add:*]

1907, *Holzhauser v. Sheeny*, 127 Ky. 28, 104 S. W. 1034 (admitted where the conversation's details helped to identify the party).

1908, *Barrett v. Magner*, 105 Minn. 118, 117 N. W. 245 (voice-recognition is not the exclusive means; here the plaintiff's conversation with a person purporting to be Z., at Z.'s office telephone-number, was admitted on the facts).

1907, *State v. Vickers*, 209 Mo. 12, 106 S. W. 999 (identification in part by voice).

[*Note 5, par. 1; add:*]

1907, *General Hospital Soc'y v. New Haven R. Co.*, 79 Conn. 581, 65 Atl. 1065 (the failure to identify the voice does not necessarily exclude).

1909, *Miller v. Leib*, 109 Md. 414, 72 Atl. 466 (conversation by telephone with a party called up and responding as the plaintiff, whose voice was not known to the speaker, admitted; following *Knickerbocker Ice Co. v. Gardiner D. Co.*, *infra*, n. 6).

1907, *Kansas City S. Co. v. Standard W. Co.*, 123 Mo. App. 13, 99 S. W. 765 (admissions heard over the telephone from one representing himself as defendant's agent, received).

1906, *Dunham v. McMichael*, 214 Pa. 485, 63 Atl. 1007 (telephone conversation alleged to be with the defendant, excluded, because neither the witness knew defendant's voice nor did defendant's admissions identify her; no authority cited).

[*Note 6, par. 1; add:*]

1912, *Union Construction Co. v. Western U. Tel. Co.*, 163 Cal. 298, 125 Pac. 242 (conversation with a purporting agent at the purporting office of the defendant, by telephone call in the usual way, admitted; careful opinion by Shaw, J.).

1907, *General Hospital Soc'y v. New Haven R. Co.*, 79 Conn. 581, 65 Atl. 1065 (on the facts, a conversation from an unidentified person in the office, apparently having charge, was admitted).

1907, *Godair v. Ham Nat'l Bank*, 225 Ill. 572, 80 N. E. 407 (conversation by telephone, purporting to come from G. in his office, received, though the voice was not identified).

1908, *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, 107 Md. 556, 69 Atl. 405 (testimony to sales of ice by defendant, based on telephone conversations with a person responding for the defendant and purporting to be a sales agent, admitted; approving the doctrine in the text above).

[Note 6 — *continued*]

1906, *St. Louis S. W. R. Co. v. Kennedy*, — Tex. Civ. App. — , 96 S. W. 653 (testimony of an offer of wages received by telephone, excluded).

[Note 7, par. 1; *add.*:]

1906, *Fitzgerald v. Benner*, 219 Ill. 485, 76 N. E. 709 (certain telephone inquiries of the opponent's agent, admitted as part of the *res gestæ*, on the principle of § 1777, *ante*).

1906, *Harrison G. Co. v. Pennsylvania R. Co.*, 145 Mich. 712, 108 N. W. 1081 (conversations by telephone, admitted, the identity and the authority of the speakers being otherwise shown).

[Note 7, par. 2; *add.*:]

Again, in *Gzowski v. Forst*, (1910) 22 Ont. L. R. 441, the plaintiff testified to a contract-conversation over the telephone with the defendant, then the defendant testified to a different version; witnesses who overheard the defendant's utterances, being present in the room, were received; here the only question could be whether the occasion was the same as that testified to by the plaintiff, and the defendant's testimony was some evidence of that.

### § 2158. Official Custody; General Principles, etc.

[Note 2; *add.*, under *Inadmissible*.:]

1905, *Junior v. State*, 76 Ark. 483, 89 S. W. 467 (magistrate's record of conviction, one witness having received it from the magistrate's successor, and another identifying the handwriting, excluded; no authority cited; *McCulloch, J.*, diss.; the ruling is unsound).

[Note 2; *add* a new par.]

Some Courts reach the result by declaring judicial notice of their own records, at least in the same suit, when produced: *post*, § 2579; but this is really a ruling that the custody is sufficient evidence of genuineness, for the real question is whether a particular piece of paper is what it purports to be.

[Note 3, par. 1, l. 9; *add.*:]

1906, *State v. Schaeffer*, 74 Kan. 390, 86 Pac. 477 (Federal revenue collector's records, proved by an examined copy).

1906, *Smithers v. Lowrance*, 100 Tex. 77, 93 S. W. 1064 (examined copy of land-office records, made by one to whom the land-commissioner pointed out the records in his office, admitted).

Compare the citations *ante*, § 1273 (examined copies).

### § 2159. Same: Application to Sundry Official Records.

[Note 1, par. 1; *add.*:]

*N. Y. St.* 1909, c. 65, p. 22, Feb. 17 (places *St.* 1884, c. 376, § 1, in C. C. P. as § 961c).

[Note 3, par. 3; *add.*:]

1905, *Lowry Nat'l Bank v. Fickett*, 122 Ga. 489, 50 S. E. 395; and cases cited *post*, § 2169.

### § 2162. Official Seal; Mode of Authenticating, etc.

[Note 2; *add.*:]

*Eng. St.* 1905, 5 Edw. VII, c. 15, § 52 (trade-marks; documents purporting to be orders of the Board of Trade and to be under Board seal or to be signed by its secretary etc., admissible without further proof).

*Alta. St.* 1910, 2d sess., Evidence Act, c. 3, § 41 (like *Ont. Rev. St.* 1897, c. 73, § 38).

[*Note 2 — continued*]

*Ont.* St. 1906, 6 Edw. VII, c. 31, § 27 (certified copy, by the secretary of the railway and municipal board, under seal of the board, of any document in custody or of record with the board, is admissible without proof of signature).

*Newf.* St. 1904, c. 3, Rules of Court 34, par. 6 (similar to Rules of 1892).

*Ont.* St. 1909, c. 43, § 39 (like R. S. 1897, c. 73, § 38).

*Sask.* St. 1907, c. 12, Evidence Act, § 39 (like *Ont. Rev. St.* 1897, c. 73, § 38).

*Yukon* St. 1904, c. 5, § 18 (like *Eng. St.* 14 & 15 Vict. c. 99, § 11, omitting "Wales"); *ib.* § 46 (like *N. Sc. Rev. St.* 1900, c. 163, § 48).

*Va.* St. 1908, c. 338, p. 598 (amending Code 1887, § 3334).

#### § 2164. Seal of Court, etc.

[*Note 5 :*]

*Transfer Adams v. Way*, Conn., to Note 4; and for "another State Court" read "a Federal Court").

#### § 2165. Seal of Notary.

[*Note 3, par. 1 ; add.:*]

1888, *Pape v. Wright*, 116 Ind. 508, 19 N. E. 462 (New York notary's jurat to a deposition, lacking seal, authenticated by certificate of the county clerk under seal).

1906, *Gharst v. St. Louis T. Co.*, 115 Mo. App. 403, 91 S. W. 453 (Michigan notary's jurat to a deposition, lacking a seal, authenticated by certificate of the circuit court clerk under seal).

1907, *Sheridan Co. v. McKinney*, 79 Nebr. 220, 112 N. W. 329 (a certificate lacking the date of expiration of the notary's commission as required by Comp. St. 1903, c. 73, § 14, is not self-authenticating; the recital of date being equally essential with the seal itself).

The *recital*, by the officer certifying a copy, that the notary's certificate of acknowledgment bore seal, may suffice, even though the notarial certificate as copied *shows no seal*: 1912, *Davis v. Seybold*, C. C. A., 195 Fed. 402 (collecting authorities).

[*Note 6 ; add.:*]

1904, *Kinkade v. Howard*, 18 S. D. 60, 99 N. W. 91 (lack of a notary's seal to a certificate of deposition does not exclude it, "if the authority of the officer is otherwise sufficiently shown," and if no express statutory requirement prescribes the contrary).

also *Ashcraft v. Chapman*, Conn., *Pape v. Wright*, Ind., *Gharst v. St. Louis T. Co.*, Mo., cited *supra*, n. 3.

[*Note 7 ; add.:*]

1907, *Washburn L. Co. v. Swanby*, 131 Wis. 1, 110 N. W. 806 (notary's certificate under seal to a deed without the State; additional evidence not required, under statute).

[*Note 8 ; add.:*]

1906, *Pardee v. Schanzlin*, 3 Cal. App. 597, 86 Pac. 812 (notary's certificate of jurat of affidavit, under seal, presumed genuine).

1912, *Nicholson v. Eureka Lumber Co.*, 160 N. C. 33, 75 S. E. 730 (Texas notary's seal with signature "Delia Sadler," held to presume lawfulness of appointment of a woman).

[*Note 9 ; add.:*]

1906, *Williams v. Williams*, 221 Ill. 541, 77 N. E. 928 (Virginia justice's jurat, with clerk of circuit court's certificate of justice's authority, admitted). 1907, *Bishop v. Hilliard*, 227 Ill. 382, 81 N. E. 403. 1913, *Tompkins v. Tompkins*, 257 Ill. 557, 100 N. E. 965 (holding

[*Note 9 — continued*]

that the foregoing line of decisions does not apply to a notary's authority to administer the oath in a deposition taken by commission; the court's appointment by commission is an implied authority to administer the oath; hence the foreign statutory authority need not be shown nor presumed).

§ 2166. **Sundry Official Seals.**

[*Note 1, at the end; add:*]

A *tax-receipt* must be authenticated under general rules: 1904, *Chastang v. Chastang*, 141 Ala. 451, 37 So. 799.

[*Note 3; add:*]

1910, *Wynne v. U. S.*, 217 U. S. 234, 30 Sup. 447 (certified copy of a vessel's enrolment, purporting to be signed and sealed by a deputy collector of customs, assumed genuine on the facts).

§ 2167. **Official Signatures.**

[*Note 4; add:*]

CANADA: *Dom. St.* 1903, 3 Edw. VII, c. 58, §§ 26, 27 (railway act; similar to *Ont. St.* 1906, c. 31, cited *infra*, except that under § 26 copies by the minister or inspecting engineer are also included).

*Alta. St.* 1910, 2d sess., Evidence Act, c. 3, § 27 (like *Ont. Rev. St.* 1987, c. 73, § 24). *ib.* § 33 (like *Ont. Rev. St.* c. 73, § 40; applying it to any judge of any Court of Canada, Alberta, and any other province and territory in Canada, and to the Board of Railway Commissioners of Canada).

*Br. C. St.* 1910, 10 Edw. VII, c. 30, § 89 (liquor licenses; signature presumed genuine).

*Ont. St.* 1904, 4 Edw. VII, c. 23, § 67 (copy of an assessment roll, certified by the clerk under seal of the municipal corporation, shall be received, "without proof of the seal or signature"). *St.* 1906, 6 Edw. VII, c. 31, § 26 (documents purporting to be signed by the chairman or secretary of the railway and municipal board are evidence "without proof of any such signature"); *ib.* § 27 (similar, for certified copies, by the secretary, of a document deposited with the board). *St.* 1909, c. 43, § 24 (like *R. S.* 1897, c. 73, § 24); *ib.* §§ 30, 31 (like *ib.* § 30, adding the railway commissioners and other officers); *ib.* § 41 (like *ib.* § 40).

*P. E. I. St.* 1907, 7 Edw. VII, c. 3, § 25 (liquor offences; prior conviction provable by magistrate's certificate, without proof of his signature or official character).

*Sask. St.* 1907, c. 12, Evidence Act, §§ 7, 8 (like *Ont. Rev. St.* 1897, c. 73, § 24). *St.* 1908, c. 14, § 116 (liquor licenses; attorney-general's certificate to be evidence, "without any proof of his appointment or signature"). *St.* 1913, c. 36 (amending the Evidence Act, *Rev. St.* 1909, c. 60, by inserting §§ 12 *a-d*; certain certificates of inspection etc., issued under the Canada Grain Act, to be received "without any proof of the signature" of the officers); *St.* 1913, c. 64, § 124 (similar, for provincial analyst's certificate of liquor analysis).

*Yukon St.* 1904, c. 5, § 7 (like *Dom. St.* 1893, c. 31, § 15); *ib.* § 8 (similar, for orders of the Yukon Territorial Secretary).

UNITED STATES: *Minn. St.* 1905, c. 305, § 38 (registration of title; owner's attested or acknowledged receipt for a duplicate in place of a lost original certificate; the signature shall be presumed genuine).

The following statute sanctions an unsafe practice: *Mass. St.* 1907, c. 225, p. 168 (facsimile of the signature of register of deeds, register of probate, or recorder of land court, "imprinted by him or by his assistant," on a certified copy, to "have the same validity as his written signature"). Either no signature at all should be required, or else a real signature; but a facsimile stamp is either a falsehood or else a childish and futile plaything, — in either case not a fit thing for the law to recognize.

[*Note 5, par. 1; add.:*]

1909, *Turner's Case*, 3 Cr. App. 103, 155, [1910] 1 K. B. 346 (signature of Director of Public Prosecutions, not noticed as genuine; "there happens to be no statute authorizing a Court to take notice of the signature of the Director of Public Prosecutions"); 1909, *Waller's Case*, 3 Cr. App. 213, 222, [1910] 1 K. B. 364 (similar).

1906, *State v. Hopkins*, 118 La. 99, 42 So. 660 (deputy coroner's signature, judicially noticed).

**§ 2168. Official Character and Title to Office.**

[*Note 4, par. 1; add.:*]

1904, *Leech v. Karthaus*, 141 Ala. 509, 37 So. 696 (certificate of acknowledgment by "W. S. Wells, Jr., N. P.," held sufficient).

1905, *Old Wayne M. L. Ass'n v. McDonough*, 164 Ind. 321, 73 N. E. 703 (a certified transcript signed with initials only of the judge's and clerk's Christian names suffices).

**§ 2169. Corporate Seal.**

[*Note 2; add.:*]

1905, *Collier v. Alexander*, 142 Ala. 422, 38 So. 244.

*Ala. St.* 1911, No. 52, p. 31, Feb. 20, § 1 (execution by president etc. presumes authority).

1906, *Bliss v. Harris*, 38 Colo. 72, 87 Pac. 1076 (corporate seal is presumed genuine, and the secretary's authority is presumed).

1907, *Bottomley v. Hall*, 18 Haw. 412 (deed bearing corporate seal, with signatures of president and secretary, admitted).

1908, *Elkhart H. Co. v. Turner*, 170 Ind. 455, 84 N. E. 812 (president's signature to note; authority not presumed).

1903, *Quackenboss v. Globe & R. F. Ins. Co.*, 177 N. Y. 71, 69 N. E. 223.

1914, *United Surety Co. v. Meenan*, — N. Y. —, 105 N. E. 106 (corporate seal, with signatures of president and secretary; authority presumed).

1906, *Deepwater Council v. Renick*, 59 W. Va. 343, 53 S. E. 552 (deed under seal, signed by the chief officers; authority presumed).

**§ 2180. Rules of Absolute Exclusion; Indecency.**

[*Note 1; add.:*]

1909, *Dunkin v. Hoquiam*, 56 Wash. 47, 105 Pac. 149 (rupture of bowels, in an action for personal injury; exhibition allowed, quoting the above text).

**§ 2183. Illegality; Documents, Chattels, etc.**

[*Note 1, par. 1, Accord; add.:*]

*Ga.*: 1899, *Dozier v. State*, 107 Ga. 708, 33 S. E. 418 (cited *post*, § 2264). 1904, *Springer v. State*, 121 id. 155, 48 S. E. 907 (pistol taken from the accused; this line of cases in Georgia does not carefully distinguish the present principle and that of § 2264, *post*). 1906, *Duren v. Thomasville*, 125 Ga. 1, 53 S. E. 814 (like *Williams v. State*).

*Haw.*: 1903, *Terr. v. Sing Kee*, 14 Haw. 586, 588 (liquor obtained by unlawful search is admissible).

*Ida.*: 1906, *State v. Bond*, 12 Ida. 424, 86 Pac. 43 (letter of the accused; mode of obtaining it, held immaterial).

*Kan.*: 1905, *State v. Schmidt*, 71 Kan. 862, 80 Pac. 948 (bottles of liquor seized without a warrant, admitted). 1910, *State v. Turner*, 82 Kan. 787, 109 Pac. 654 (revolver procured from defendant by threats).

*Md.*: 1906, *Lawrence v. State*, 103 Md. 17, 63 Atl. 96 (conspiracy to defraud; certain shares

[*Note 1 — continued*]

of stock, taken by the police from a satchel at the defendant's hotel or from the defendant's person under arrest, admitted, regardless of the illegality of procuring them).

*Mass.*: 1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127 (officers obtaining a knife, by a trespass and search in the defendant's house; admitted).

*Mich.*: 1911, *People v. Aldorfer*, 164 Mich. 676, 130 N. W. 351 (liquors seized under a search-warrant).

*Minn.*: 1905, *State v. Strait*, 94 Minn. 384, 102 N. W. 913 (bank books). 1906, *State v. Hoyle*, 98 Minn. 254, 107 N. W. 1130 (gambling apparatus obtained by officers' unlawful entrance, admissible).

*Mont.*: 1906, *State v. Fuller*, 34 Mont. 12, 85 Pac. 369 (defendant's shoes compared with footprints).

*Nebr.*: 1907, *Younger v. State*, 80 Nebr. 201, 114 N. W. 170 (shoes taken by force from the accused).

*N. Y.*: *People v. Adams*, *supra*, affirmed on writ of error in *Adams v. N. Y.*, U. S. cited *infra*.

*N. C.*: 1912, *State v. Wallace*, 162 N. C. 622, 78 S. E. 1 (letter found by a policeman searching defendant's house, admitted, following *Adams v. N. Y.*, U. S., *infra*).

*S. D.*: 1909, *State v. Madison*, 23 S. D. 584, 122 N. W. 647 (liquors found under an illegal warrant).

*Tenn.*: 1908, *Cohn v. State*, *Perkins v. State*, *Horton v. State*, 120 Tenn. 61, 109 S. W. 1149 (illegal sale of liquor, etc.; testimony obtained by unlawfully trespassing and making a peek-hole in a wall, admitted).

*Vt.*: 1906, *State v. Sutor*, 78 Vt. 391, 63 Atl. 182 (liquor offence; liquor, etc., obtained on a search-warrant, admitted, irrespective of the legality of the search).

*Wash.*: 1905, *State v. Royce*, 38 Wash. 111, 80 Pac. 268 (articles obtained by illegal search of the person are admissible).

[*Note 1, par. 2, Contra; add.*]

*Georgia*: 1907, *Hammock v. State*, 1 Ga. App. 126, 58 S. E. 66 (carrying a concealed weapon; a deputy sheriff arrested the defendant on information and searched him without a warrant for arrest or for search, and found a concealed weapon; the deputy's testimony was excluded; this is a flat repudiation of *Williams v. State*, although the opinion endeavors to distinguish it; the opinion terms the arrest "illegal," though the defendant was certainly committing a misdemeanor in fact in the deputy's presence, and the arrest was ordinarily legal; the opinion goes on the ground that there was a compulsory self-incrimination, but this is quite unsound, for the deputy took the pistol out of the defendant's pocket, and the defendant himself did no voluntary act at all; the opinion frankly avows "a public policy which would rather see the guilty go unpunished than have the guilt of the accused established" in this manner; Powell, J., the writer of the opinion, is one of our most accomplished living judges; but in a country so cursed by the use of concealed weapons the "public policy" thus declared is the worst kind of a policy; and it is undoubtedly doing just what it confesses to, viz. letting the guilty go unpunished). 1907, *Hughes v. State*, 2 Ga. App. 29, 58 S. E. 390 (repeating the ruling of *Hammock v. State*; the opinion, by Russell, J., professes "the utmost abhorrence and detestation of the practice of carrying deadly weapons"; but this term "utmost" is scarcely correct; for the learned Court obviously feels a still more intense abhorrence for a zealous police officer's attempts at suppression of a detestable crime without formalities which the event shows were quite needless). 1907, *Sherman v. State*, 2 Ga. App. 686, 58 S. E. 1122 (foregoing cases followed). 1907, *Smith v. State*, 3 Ga. App. 326, 59 S. E. 934 (selling liquor illegally; testimony by officers arresting in the act, and seizing whisky, without a warrant; the *Hughes* and *Hammock* cases approved but distinguished; the opinion is interesting as the exhibition of an able mind unsuccessfully struggling to be consistent). 1912, *Whitaker v. State*, 11 Ga. App. 208, 75 S. E. 258 (U. S. bankruptcy petition, excluded on this ground; but incorrectly). 1913, *Underwood v. State*, 13 Ga. App. 206, 78 S. E. 1103 (illegal sale of liquor; the accused was

[Note 1 — continued]

arrested without a warrant, his safe-keys forcibly taken from his pocket, his safe unlocked, and whisky found therein; excluded, following *Hammock v. State*; careful opinion by Hill, C. J.).

UNITED STATES: *Boyd v. U. S.*, *supra*, was for a while practically overruled by later cases: 1904, *Adams v. New York*, 192 U. S. 585, 24 Sup. 372 (seizure of papers under a search-warrant; *Boyd v. U. S.* is mentioned with respect, but *Com. v. Dana*, Mass., and the above line of cases, are expressly approved, and it is said that the Amendment is intended to "give remedy against such usurpations when attempted" and "to render invalid legislation or judicial procedure having such effect," but not to "exclude testimony which has been obtained by such means, if it is otherwise competent"), *Hale v. Henkel*, U. S. (cited *post*, § 2264). 1908, *U. S. v. Wilson*, C. C. S. D. N. Y., 163 Fed. 338 (trunk and contents of defendant seized by officers on defendant's premises; motion for return of property denied; as to later admissibility on trial of the evidence thus found, the Court says: "Any objection because of trespass will be overruled. . . . This proposition is stated by the Supreme Court of the United States in the case of *Adams v. N. Y.*, and is so well recognized that it cannot be the subject of much discussion"; whence may be inferred that the profession were not the only ones surprised by the later decision in *Weeks v. U. S.*, *infra*). 1910, *Holt v. U. S.*, 218 U. S. 245, 31 Sup. 2 (*Adams v. U. S.* approved). 1914, *Weeks v. U. S.*, 232 U. S. 383, 34 Sup. 341 (use of the mails for lottery; documents found by the police and marshal in the defendant's house, entered and searched without a warrant, excluded; *Adams v. New York* distinguished on the ground that there the point was "collateral," while here the defendant had before trial moved for the return of the documents and the trial Court refused to return those used in evidence; this distinction is vain; in effect, this decision violates the principle; see further comments by the present writer in the *Illinois Law Review*, IX, 43.)

[Note 1, par. 3; *add.*]

Compare the cases cited *post*, §§ 2264, 2265 (articles obtained by violation of the *privilege against self-crimination*).

Of course, in a proper proceeding, such as an *application for the return of documents or chattels unlawfully seized*, the illegality can be redressed: 1910, *U. S. v. Mills*, C. C. S. D. N. Y., 185 Fed. 318.

#### § 2184. Same: Documents Violating Stamp-Tax Laws.

[Note 6; *add.*]

1905, *Thompson v. Calhoun*, 216 Ill. 161, 74 N. E. 775.

1906, *Phillips v. Hazen*, 132 Ia. 628, 109 N. W. 1096.

1906, *Amos-Richia v. Northwestern M. L. Ins. Co.*, 143 Mich. 684, 107 N. W. 707.

1906, *King v. Phoenix Ins. Co.*, 195 Mo. 290, 92 S. W. 892.

But the Federal powers of legislation do extend to the *Territories*, and hence the tax-stamp laws are there enforced: 1903, *Makainai v. Goo Wan Hoy*, 14 Haw. 607, on rehearing, 683.

[Note 7; *add.*]

1907, *Bottomley v. Hall*, 18 Haw. 412 (post-stamping).

#### § 2190. Rules of Privilege; History of Testimonial Compulsion.

[Note 28; *add.*]

Mr. Kerly, in his *Historical Sketch of the Equitable Jurisdiction of the Court of Chancery* (1890, p. 45), has pointed out that the tradition as to the invention of the *subpoena* form is unfounded; it existed much earlier in other processes.

**§ 2191. Constitutional Guaranty of Compulsory Process.**

[*Note 1, par. 1; add.*]

*Wash. St.* 1909, c. 249, p. 907, § 55 (Criminal Code; compulsory process demandable for "all witnesses who may be necessary for his proper defence").

[*Note 2, par. 2, l. 2; add.*]

1906, *State v. Stewart*, 117 La. 476, 41 So. 798 (testimony of a proposed witness admitted to prevent a continuance; the constitutional right covers merely the right to process by subpoena, and not the further discretionary power of the Court to attach a desired witness for failure to obey the subpoena).

[*Note 2, par. 2, at the end; add.*]

The right to process does not include a *right of consultation* with the witness before trial: 1906, *State v. Goodson*, 116 La. 388, 40 So. 771 (defendants not allowed to obtain information from a co-indictee in jail).

The constitutional principle does not prevent the *limitation of number of witnesses*, wherever that is otherwise allowable (*ante*, § 1907).

**§ 2192. Duty to Give Testimony; General Principle.**

[*Text, p. 2966; add a footnote 1a, to the passage from Bentham:*]

<sup>1a</sup> Bentham's illustration came very nearly true in *R. v. Baines*, [1909] 1 K. B. 258, cited more fully *post*, § 2210, n. 2, and § 2371, n. 1, where the Prime Minister and the Home Secretary were subpoenaed to testify as to a breach of the peace committed at a meeting where they were present.

[*Text, p. 2967, l. 2; add, as a note 1 b to Israel v. State:*]

1 *Accord*: 1906, *Washington Nat'l Bank v. Daily*, 166 Ind. 631, 77 N. E. 53 (cited *post*, § 2193, n. 3; good opinion by Hadley, J.).

[*Note 1; add.*]

1906, *Clark, C. J.*, in *State v. Wheeler*, 141 N. C. 773, 53 S. E. 358.

**§ 2193. Testimonial Duty applied to Production of Documents.**

[*Note 3; add.*]

1908, *R. v. Daye*, 2 K. B. 333 (a sealed packet deposited with a banker is a subject for subpoena under a statutory term "produce documents"; this was the celebrated Lamoine diamond-formula fraud, and the packet was said to contain the pretended formula).

1904, *Dancel v. Goodyear S. M. Co.*, 128 Fed. 753, C. C. (U. S. v. Tilden followed). 1904, *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241 C. C. (following the rule of *U. S. v. Tilden*, on authority).

[*Note 3; add, at the end:*]

A statute may therefore create *new forms of process*: 1906, *Washington Nat'l Bank v. Daily*, 166 Ind. 631, 77 N. E. 53 (a statute empowering an assessor to obtain a writ of inspection of documents in possession of any person containing evidence of the unlawful omission of a third person from the taxable-property list is constitutional, the process being analogous to a subpoena *duces tecum*).

**§ 2194. Testimonial Duty applied to Premises, Chattels, etc.**

[*Note 5; add.*]

The above passage quoted with approval, by Powell, J.: 1910, *Crosby v. Potts*, 8 Ga. App. 463, 69 S. E. 582.

[Note 6, par. 1; add:]

*Accord*: 1908, *Gray v. State*, 55 Tex. Cr. 90, 114 S. W. 635 (murder; whether two bullet-holes, one in the deceased's back and one in his breast, were made by two bullets fired by the deft., or by a single bullet entering and leaving and fired from the front; if the former, two bullets would be found in the body; deft. applied for an order to perform an autopsy; deceased's body had been buried by his relatives, who refused to consent to an exhumation; the trial Court having refused the application, and a verdict of guilty being rendered, the judgment was set aside for that error; Ramsey, J., in an able and convincing opinion; "In legal reason, and based on public policy and enlightened justice, there can be no reasonable doubt as to what the Court should do in such a case as is here presented; . . . the power inheres in such a court; . . . if it can be said that there is no precedent for such an action, it can never be said again"; Brooks, J., diss., on the ground of the immateriality of the fact sought).

1906, *Mutual Life Ins. Co. v. Griesa*, C. C. Kan., 156 Fed. 398 (insured fell from the roof of a house and died; the issue was whether he had committed suicide by taking morphine and had intentionally fallen so as to conceal the suicide; the insurer's application for an order to exhume the body and to appoint a pathologist to examine it was granted: excellent opinion by Smith McPherson, J.).

1914, *State v. Clifford*, — Wash. —, 139 Pac. 650 (claim of alleged children of an intestate to inherit; the opposing administrator maintained that the intestate had been castrated in infancy, and that the claimants, children of his first wife, were therefore not of his paternity; on affidavits of physicians that an examination of the body would disclose with reasonable certainty whether he had been castrated, the trial Court ordered an exhumation, in proceedings to approve the administrator's report; an alternative writ of prohibition was denied, on technical grounds).

*Contra*: 1904, *McKnight v. Detroit & M. R. R. Co.*, 135 Mich. 307, 97 N. W. 772 (physician's action for services to injured passengers at the defendant's request; one of these passengers, having testified for the defendant, was asked by the defendant to exhibit his leg to the jury, but declined; held privileged; no authority cited in support).

Compare the cases cited *ante*, § 1862, and *post*, § 2221.

#### § 2195. Officers possessing Power to Compel Testimony, etc.

[Note 1; add:]

1906, *Ex parte Parker*, 74 S. C. 466, 55 S. E. 122.

1912, *Ex parte Wolters*, 64 Tex. Cr. 238, 144 S. W. 531.

1909, *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, 29 Sup. 115.

1913, *Sullivan v. Hill*, — W. Va. —, 79 S. E. 670 (legislative committee).

The power of a State to use testimonial process against a *foreign corporation* doing business within the State is noticed in *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. 178 (1908).

[Note 2; add:]

1907, *McIntyre v. People*, 227 Ill. 26, 81 N. E. 33.

1906, *Re Butler*, 76 Nebr. 287, 107 N. W. 572.

1906, *Ex parte Schoepf*, 74 Oh. 1, 77 N. E. 276, 279.

1904, *Dancel v. Goodyear S. M. Co.*, 128 Fed. 753, C. C. (subpoena *duces tecum*).

[Note 3, par. 1; add:]

1911, *Plunkett v. Hamilton*, *Hamilton v. Plunkett*, 136 Ga. 72, 70 S. E. 781 (police commission).

1912, *Witmer v. District Court*, 155 Ia. 244, 136 N. W. 113 (whether certiorari is a proper mode of trying the order of commitment).

[Note 3 — *continued*]

1904, *Olmsted v. Edson*, 71 Nebr. 17, 98 N. W. 415 (county judge). 1909, *Ex parte Button*, *Ex parte Hammond*, 83 Nebr. 636, 120 N. W. 203 (justice of the peace).  
1910, *Boston & Maine R. Co. v. State*, 75 N. H. 513, 77 Atl. 996.

[Note 7; *add*.:]

1911, *Long v. Hawken*, 114 Md. 234, 79 Atl. 190.  
1914, *Ex parte Hendersen*, — N. D. —, 145 N. W. 574.  
1912, *In re Greene*, 35 R. I. 67, 85 Atl. 552.  
1908, *Sewanee C. C. & L. Co. v. Williams*, 120 Tenn. 339, 107 S. W. 968.

### § 2196. Privilege Personal to Witness.

[Note 1; *add*.:]

1910, *McCray v. State*, 134 Ga. 416, 68 S. E. 62 (party held not entitled to claim the privilege against disgracing facts, where the witness had not claimed it).  
1875, *Blease v. Garlington*, 92 U. S. 1, 7 (under Rev. St. 1878, § 862, and Equity Rule 67, "the examiner before whom witnesses are orally examined is required to note exceptions; but he cannot decide upon their validity; he must take down all the examination in writing, and send it to the Court with the objections noted," as also when depositions are taken).  
1906, *Dowagiac Mfg. Co. v. Lochren*, C. C. A., 143 Fed. 211 (collecting the cases). 1912, *Young v. Welch Mfg. Co.*, D. C. Mass., 201 Fed. 563 (the rule in *Blease v. Garlington* is further subject to exception for matters improperly asked for on cross-examination beyond the scope of the direct examination; this is thoroughly unsound; it makes a fetish out of this discreditable Federal rule as to scope of cross-examination). Rev. St. § 869; Equity Rules 1912, Rules 51, 62. 1913, *State v. Lloyd*, 152 Wis. 24, 139 N. W. 514 (State fire-marshal).

[Note 3, par. 2, *add*.:]

1894, *Re Sims*, 54 Kan. 1, 37 Pac. 135. 1906, *State v. Carter*, 74 Kan. 156, 86 Pac. 138 (holding St. 1901, c. 233, to be void).  
1904, *Lawson v. Rowley*, 185 Mass. 171, 69 N. E. 1082 (justice of the peace).  
1906, *State v. Standard Oil Co.*, 194 Mo. 124, 91 S. W. 1062 (commissioner). 1911, *Ex parte Sanford*, 236 Mo. 665, 139 S. W. 376 (State board of equalization).  
1906, *Bank v. Johnson*, 143 Fed. 463, 466, C. C. A. (referee in bankruptcy).

### § 2199. Notice and Summons; Subpoena.

[Text, p. 2977, l. 4 of par. 2; at the sentence's end, *add* a new note 1 a:]

<sup>1a</sup> The *subject of testimony* must be in some way indicated:

1909, *In re Shaw*, C. C. S. D. N. Y., 172 Fed. 520 (a subpoena which does not notify the witness of the matter on which he is called to testify, by stating either the name of the parties or the subject of the investigation; a clause requiring him to tell "what you may know generally" is invalid). Compare the same principle for the subpoena *duces tecum* (*post*, § 2200, n. 6).

[Note 3; *add*.:]

The service cannot be made on the witness *by attorney*: 1906, *Re Depue*, 185 N. Y. 60, 77 N. E. 798.

Modern methods may well be applicable here: Ark. St. 1907, No. 260, p. 605, May 6, § 1 (service of subpoena by telephone, valid).

[Note 4; add:]

1906, *Ex parte* Terrell, — Tex. Cr. —, 95 S. W. 536 (reading over the telephone does not suffice).

Note in 22 Harvard Law Review 376.

[Note 5, l. 2; add:]

1859, *Goodpaster v. Voris*, 8 Ia. 334 ("The object of the summons is only to give notice and to call the witness in, and if he is already in court, he requires no further notice").

1836, *Leckie v. Scott*, 10 La. 412, 417 ("Any person within the verge of the court during the trial may be called upon to disclose the truth").

1831, *Farmer v. Storer*, 11 Pick. 241 (taxation of costs).

1886, *U. S. v. Sanborn*, 28 Fed. 299 (collecting the cases as to the right to fees). 1889, *Eastman v. Sherry*, 37 Fed. 844 (right to fees).

[Note 6; add:]

That a *judicial order*, apart from a subpoena, is a proper mode of compelling attendance, is sometimes denied: 1906, *Re Depue*, 185 N. Y. 60, 77 N. E. 798.

Whether a particular officer has power to compel testimony is often a question (*ante*, § 2195).

[Note 6; add:]

Cal. St. 1913, c. 157, p. 238, May 21 (amending P. C. § 1333).

1908, *In re Thaw*; *O'Mara v. Lamb*, 3d C. C. A., 166 Fed. 71 (writ held not to be of right, but of discretion; here refused for bringing to a bankruptcy proceeding a witness confined in a State asylum for criminal insane, the witness being presumably incompetent).

The witness may before trial be detained for appearance on the trial; and the power to commit for this purpose, in default of bail, is inherent in a court, irrespective of statutory grant.

1910, *Crosby v. Potts*, 8 Ga. App. 463, 69 S. E. 582 (liberal opinion, by Powell, J.).

## § 2200. Subpoena duces tecum for Documents.

[Note 4; add:]

1908, *Kincaide v. Cavanaugh*, 198 Mass. 34, 84 N. E. 307.

[Note 6; add:]

1866, *Lee v. Angus*, L. R. 2 Eq. 59 (a subpoena *d. t.*, in a suit concerning a mortgage, to produce accounts relating to rents, etc., "and all other books, accounts, letters, papers, and documents in your possession or power, in any wise relating to the affairs and concerns of the said plaintiffs, or either of them, or the said H. L., and all books, accounts, letters, papers, and documents received by you from H. E. S. as solicitor of M. C.," held too broad; Page-Wood, V. C.: "He must speak the truth within his knowledge; but he is not bound to make this burdensome search for evidence at his own expense").

1910, *Ex parte* Gould, — Mo. —, 132 S. W. 364 (grand jury inquiry into violations of the liquor law; subpoena *d. t.* to the telegraph operator at Baird ordering production of all messages filed with him bearing orders for delivery of intoxicating liquors to Baird, held too broad; this paralyzing of the grand jury's function is defended by much misplaced sentimental rhetoric).

1914, *In re Mohawk Overall Co.*, 210 N. Y. 474, 104 N. E. 924, 156 App. Div. 879 (burden-some scope of a subpoena *d. t.*, considered).

1908, *American Car & Foundry Co. v. Alexandria Water Co.*, 221 Pa. 529, 70 Atl. 867 ("An order to produce all papers concerning the matter in dispute is not sufficiently specific"; approving the text above).

1904, *Dancel v. Goodyear S. M. Co.*, 128 Fed. 753, 762, C. C. (an application for "all books

[Note 6 — continued]

of account, minutes," etc., etc., of the G. S. M. Co., and a long list of other documents named generally, held too broad on the facts). 1906, *Hale v. Henkel*, 201 U. S. 43, 26 Sup. 370 (a call for all the correspondence, etc., between the defendant's corporation and six others, all correspondence since its date of organization between itself and thirteen others, etc., held to be unreasonably broad; McKenna, J., diss.). 1906, *McAlister v. Henkel*, ib. 90, 26 Sup. 385 (here the subpoena was held specific enough). 1906, *U. S. v. American Tobacco Co.*, 146 Fed. 557, C. C. (a subpoena calling for the minute-books of a corporation for a period of three years and the copy-letter-books for a period of three and a half months, held not too broad). 1908, *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. 178 (notice held not too broad).

1907, *Re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790 (an order under St. 1906, No. 75, p. 79, directing a corporation to produce before the grand jury certain described classes of documents, held proper and not a violation of the constitutional provision against unreasonable searches).

Furthermore, on an application for a subpoena *d. t.*, production being contested on the ground of irrelevancy, the movant must show *facts sufficient to enable the Court to determine* whether the desired documents are material and relevant to the issues.

1907, *U. S. v. Terminal R. Ass'n. C. C. E. D. Mo.*, 154 Fed. 268 (collecting the cases).

[Note 8, l. 5; add:]

1807, *Burr's Trial*, Robertson's Rep., I, 136, 137, 182, 183, 184 (conceded by the parties, and agreed by Marshall, C. J., that the process of subpoena *d. t.* is "not a process of right," but "a motion to the discretion of the Court"). 1890, *Edison El. L. Co. v. U. S. El. L. Co.*, 44 Fed. 294, 45 id. 55, C. C. (the Court will not finally determine the materiality of the documents called for upon the refusal of the witness to produce, but will inspect and determine for itself). 1904, *Dancel v. Goodyear S. M. Co.*, 128 Fed. 753, C. C. (on a deposition *de bene* under U. S. Rev. St. § 863, a subpoena *duces tecum* does not issue from the clerk as a matter of course, but the application "is addressed to the discretion of the Court," and "before compelling the production . . . it will sufficiently inquire into the matter to determine if the evidence appears to be material"). 1906, *Dowagiac Mfg. Co. v. Lochren*, 143 Fed. 211, C. C. A. (collecting the cases). 1906, *Fairfield v. U. S.*, 146 Fed. 508, C. C. A. ("The duty of a witness to obey a subpoena is not conditioned by his own or by his counsel's opinion of the materiality of his testimony").

1907, *Re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790.

Here compare the general rule that *irrelevancy* is not a ground for a witness' claim of privilege (*post*, § 2210).

[Note 9; add:]

*Cal. C. C. P.* § 2064, as amended by St. 1907, c. 395 (quoted *post*, § 2210).

1913, *Shull v. Boyd*, 251 Mo. 452, 158 S. W. 313 (which the Court, not the witness, decides).

1904, *Dancel v. Goodyear S. M. Co.*, 128 Fed. 753, 762, C. C. (the Court may require preliminary proof of the witness' possession before issuing process).

1907, *Re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790 (foreign corporation, already admitted to do business in the State, and subpoenaed *d. t.* before a grand jury; its removal of the books out of the State, in anticipation of the inquiry, held no excuse).

The following statute provides for a special situation:

*N. Mex. St.* 1907, c. 84, p. 192, § 3 (in proceedings to take testimony for use in a court outside the Territory, "no witness shall be required to deliver up any book, paper, or writing to be annexed to the said deposition and taken out of the Territory").

[Note 10, par. 1; add:]

1906, *Nelson v. U. S.*, 201 U. S. 92, 26 Sup. 358 (corporate officers having custody of documents of the corporation are the proper persons to produce).

[*Note 10 — continued*]

1906, *Hale v. Henkel*, 201 U. S. 43, 26 Sup. 370 (the Court noticed a claim by a corporation-officer that he could not "collect the documents within the time allowed," and held that this merely would entitle him to demand further time). 1906, *U. S. v. American Tobacco Co.*, 146 Fed. 557, C. C. (a secretary held not liable to produce certain documents in the exclusive custody of the president of the corporation).

But of course a member of a *partnership* has a control over documents of the firm: 1906, *U. S. v. Collins*, 145 Fed. 709, D. C.

Whether under U. S. Rev. St. 1878, § 724 (quoted *ante*, § 1859, n. 6), authorizing an order, on motion, to "parties" to produce, the *officers of a corporation-party* are subject to such a process is an interesting question: 1907, *Cassatt v. Mitchell C. & C. Co.*, — C. C. A. —, 150 Fed. 32, 38 (order denied). Compare the reverse question *post*, § 2219, n. 8 (whether a subpoena *d. t.* is appropriate for a party).

[*Text*, p. 2980, par. 4, at the end; *add.*]

It seems highly desirable that Courts should for this purpose recognize a form of subpoena *ordering a court-official to go and fetch the corporation-documents, and forbidding the custodian to hinder*, but permitting the custodian to attend voluntarily with the books if he so prefers. The reason is this: Under the privilege of self-crimination, the custodian (clerk, secretary) may refuse to produce if the books tend to criminate himself as well as the corporation (*post*, §§ 2259, 2264), which will sometimes be the case; yet the corporation itself may not have the privilege (*post*, § 2259), or the prosecution may be willing to give immunity (*post*, § 2281) to the corporation but not to its officer; hence, so long as the subpoena has to be directed to the custodian when the object is merely to get the corporation-books, that object is likely to be defeated. A form of process should therefore be sanctioned which will obtain the corporation-books without involving process against the custodian-agent of the corporation.

#### § 2201. *Indemnity for Expenses; Tender in Advance.*

[*Note 6; add.*]

*Canada*: *Sask.* St. 1907, c. 12, Evidence Act, § 38 ("No person shall be obliged to attend or give evidence" in any proceeding "unless he is first tendered his legal fees for such attendance and necessary travel"). *Yukon* St. 1904, c. 5, § 39 (no person is compellable to attend in court, etc., unless on tender of fees "for such attendance and necessary travel"). *United States*: *Fla.* Rev. St. 1892, §§ 2867, 2875; St. 1893, c. 4120; St. 1903, c. 5132; 1906, *Pittman v. State*, 51 Fla. 94, 41 So. 385 (foregoing statutes construed, as to the necessity of tender of costs by the accused).

*Ida.*: 1906, *Anderson v. Ferguson-Bach S. Co.*, 12 Ida. 418, 86 Pac. 41 (right to compensation, considered).

*Kan.*: 1910, *State v. Kaemmerling*, 83 Kan. 387, 111 Pac. 441 (rule requiring tender not applied to a State action to enjoin a nuisance).

*N. Y.*: 1906, *Re Depue*, 185 N. Y. 60, 77 N. E. 798 (statute applied).

*N. C.* Rev. 1905, § 1298 (like Code 1883, § 1368).

*Vt.*: 1907, *Re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790 (in a grand jury inquiry, the State need not tender the fees and expenses of producing documents to a witness, here a corporation; in a criminal case, "a witness has no right to refuse to attend because his fees are not tendered").

[*Note 9; add.*]

A voluntary attendance without subpoena or demand of expenses does not entitle the fees to be *taxed* afterwards against the other party: 1909, *Atherton v. Atlantic C. L. R. Co.*, 82 N. C. 474, 64 S. E. 411.

[*Note 11; add.*]

1907, *Re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790 (applied to a subpoena *d. t.* to a corporation to produce documents; *West v. State*, Wis., approved).

§ 2203. **Same: Expert's Fees.**

[*Note 1; add.*]

*Can.*: 1905, *Butler v. Toronto Mutoscope Co.*, 11 Ont. L. R. 12 (medico-electric experts, called to give an opinion as to the capability of a machine to cause an injury, held not privileged to require extra fees before testifying).

*Mich.* St. 1905, No. 175 (forbids the payment of special fees even by the parties; cited more fully *ante*, § 562, n. 1).

*Wis.*: 1909, *Philler v. Waukesha Co.*, 139 Wis. 211, 120 N. W. 829 (expert must testify without extra compensation).

The *Scotch* law appears to justify the privilege of an extra fee: 1903, *Turnbull v. North British R. Co.*, 5 Ct. Sess. Cas. 5th ser. 944.

[*Note 2; add.*]

1907, *Stevens v. Worcester*, 196 Mass. 45, 81 N. E. 907 (an expert on mill rights, who had formed an opinion and recorded it in a memorandum, held compellable to examine and read the paper, though not to labor for forming an opinion).

1908, *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. 178 (extra expense of collecting documents of a foreign corporation; *semble*, not decided).

1909, *Philler v. Waukesha Co.*, 130 Wis. 211, 120 N. W. 829 (medical examination of an accused in jail).

[*Note 3; add.*]

1910, *Gordon v. Conley*, 107 Me. 286, 78 Atl. 365 (experts retained to investigate, etc.).

[*Note 5, par. 1; add.*]

N. C. Rev. 1905, § 2803 (like Code 1883, § 3756; adding that physicians in criminal actions in Iredell Co. shall be allowed five dollars per diem).

S. C. St. 1905, No. 457 ("physicians and surgeons bound over or summoned by the State to testify as experts in any case in the Court of General Sessions, or actually bound over at the instance of the defendant to testify as experts in any case of felony" in that Court, shall receive five dollars besides the usual witness fees; provided the judge certify the testimony to be material).

§ 2204. **Inability to Attend; in general.**

[*Note 1, at the end; add.*]

It would seem absurd to suppose that precisely the contrary objection should be raised, *i. e.* that the witness was entitled *not to be examined at his home*, on account of disturbance to his family, etc.; but such an objection was sustained in *McSwane v. Foreman*, 167 Ind. 171, 78 N. E. 630 (1906).

§ 2206. **Same: (b) Sex; Occupation, etc.**

[*Note 2; add.*]

1913, *In re Pierce*, 163 N. C. 247, 79 S. E. 507 (a lawyer has no exemption as such; fine opinion by Clark, C. J.).

§ 2207. **Same: Distance from Place of Trial.**[Note 1; *add*.:]

1902, *Re Hemstreet*, 117 Fed. 568, D. C. (bankruptcy; the effect of Bankruptcy Act, § 41, and Rev. St. § 876, determined; a witness need not leave his State to attend before a referee). 1906, *Re Cole*, 133 Fed. 414, D. C. (similar).

§ 2210. **Privilege; Irrelevant Matters.**[Note 1, par. 1; *add*.:]

1906, *Anin's Petition*, 17 Haw. 338 (before the grand jury).  
 1909, *Finn v. Winneshiek Dist. Court*, 145 Ia. 157, 123 N. W. 1066.  
 1906, *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552 (*Ex parte McKee* followed).  
 1909, *Ex parte Button, Ex parte Hammond*, 83 Nebr. 636, 120 N. W. 203 (not clear).  
 1910, *Boston & Maine R. Co. v. State*, 75 N. H. 513, 77 Atl. 996.  
 1904, *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241, 244 C. C. ("It seems to be settled that, ordinarily at least," no such privilege exists). 1906, *Dowagiac Mfg. Co. v. Lochren*, 143 Fed. 211, C. C. A. (collecting the authorities). 1906, *Nelson v. U. S.*, 201 U. S. 92, 26 Sup. 358, and cases cited *ante*, § 2200, n. 8 (documents).

The following case shows the sensible way of dealing with a witness summoned who has no relevant testimony:

1909, *R. v. Baines*, 1 K. B. 258 (subpoena to the Prime Minister and the Home Secretary to give evidence as to a breach of the peace by women suffragists; the subpoenaed persons were present on the occasion; but moved to set aside the subpoenas on the ground that they were "wholly unable to give any evidence which can possibly be relevant" and that the writs were served "for the purposes of vexation and to bring the defendants and their agitation into further notoriety"; held, that both the grounds set forth were in fact true, that "therefore it would be an idle waste of time and money to require them to go down to Leeds to give evidence," and that the subpoena should be set aside).

[Note 1, par. 3, l. 6; *add*.:]

1905, *Perry v. Rubber T. W. Co.*, 138 Fed. 836, C. C. (depositions; "the general rule is that the witness should be required to answer all questions which may possibly be material").

[Note 1, par. 3, at the end; *add*.:]

Distinguish also the judge's power to disallow any irrelevant question, under the modern English and Canadian practice (*ante*, § 986, n. 11).

[Note 2; *add*.:]

1904, *Rogers v. Superior Court*, 145 Cal. 88, 78 Pac. 344 (grand jury; privilege exists for matters not pertinent). Cal. St. 1907, c. 395, p. 735, Mar. 20 (a witness must attend "with any papers under his control lawfully required by the subpoena, and answer all pertinent and legal questions"; being C. C. P. § 2064 amended).  
 1905, *Fenn v. Georgia R. & E. Co.*, 122 Ga. 280, 50 S. E. 103 (refusal to answer irrelevant questions before a commissioner, privileged).

§ 2212. **Trade Secrets and Customers' Names.**[Note 1, par. 1; *add*.:]

CANADA: *Ont.* St. 1905, 5 Edw. VII, c. 13, § 30 (factory-inspectors; quoted *post*, § 2374, n. 5); St. 1906, 6 Edw. VII, c. 11, § 78 (mining-inspectors, etc.; quoted *post*, § 2374, n. 5); St. 1906, 6 Edw. VII, c. 30, § 231 (railway board; quoted *post*, § 2374, n. 5).  
 UNITED STATES: *Ia.*: 1909, *Finn v. Winneshiek Dist. Court*, 145 Ia. 157, 123 N. W. 1066 (tax assessment; plaintiff's books held not privileged, on the facts).

[Note 1 — continued]

*N. H.*: 1910, *Boston & Maine R. Co. v. State*, 75 N. H. 513, 77 Atl. 996 (tax-abatement; third person's private business, in general, not privileged; here, the value of stock in trade).  
*U. S.*: 1904, *Herreshoff v. Knietsch*, 127 Fed. 492, C. C. (rule for cross-examining to a secret invention in an interference case, considered). 1904, *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241, 245, C. C. (Cochran, J.: "It should be accepted, therefore, as correct law, that a witness should not be compelled to disclose trade secrets embedded in his head or in documents in his possession, when their disclosure will be prejudicial to him or his company, and they are not relevant to the controversy in the suit or action in which he is a witness, or otherwise admissible in evidence therein"; applied to a claim made on subpoena *d. t.* in a suit on a contract for exchange of shares of stock). 1910, *In re Grove*, 3d C. C. A., 180 Fed. 62 (infringement of patent on engines for torpedo-boat destroyers; some of the documents being apparently material, the Court ordered them to be produced before the examiner, subject to later determination by the Court).  
*Va.*: 1905, *Worrell v. Kinnear*, 103 Va. 719, 49 S. E. 988 (damages for breach of contract ordering the making of certain steel doors; the cost of manufacture being in issue, questions as to the plaintiff's amount of business, fixed charges, etc., were held privileged, as "unduly prying," on the suggestion that the sole business competitor of the plaintiff was in collusion with the defendant).

[Note 1, par. 4, l. 2; add:]

For the privilege as to information acquired by a *factory-inspector*, *mine inspector*, or *railway-commission*, see *post*, § 2374.

For the question of privilege as to *bankers*, *telegraphers*, *trustees*, *journalists*, etc., see *post*, § 2286.

[Text, p. 3002, l. 5, after "plain"; add a new note, 1a:]

(<sup>a</sup>) The arguments of policy against fostering such secrecy are powerfully set forth, from the point of view of the industrial scientist, by Mr. James Douglas, of New York, in a paper entitled "Secrecy in the Arts" (Trans. of the American Institute of Mining Engineers, July, 1907).

## § 2215. Political Votes.

[Note 2; add:]

*Br. C. St.* 1903-4, 3 & 4 Edw. VII, c. 17, § 99 (like Rev. St. 1897, c. 67, § 102); *ib.* § 160 (in proceedings where the scrutiny of ballots becomes necessary, "the mode in which any particular elector has voted shall not be discovered until he has been proved to have voted and his vote has been declared by a competent Court to be invalid").

*Ala. St.* 1911, No. 259, p. 249, Apr. 6, § 32 (primary elections; witness compellable "to answer if he voted . . . and to answer touching his qualifications"; and if not qualified, "he may be required to answer for whom he voted," with immunity from prosecution).

[Note 3; add:]

*Ill.*: 1909, *Buckingham v. Angell*, 238 Ill. 564, 87 N. E. 285.

*Ky.*: 1913, *Vansant v. McPherson*, 155 Ky. 34, 159 S. W. 630 (no privilege for a legal voter casting a ballot illegal because cast after the lawful hour).

*N. C. Rev.* 1905, § 4407 (in election contests, "no witness . . . shall be excused from discovering whether he voted at such election, . . . and if he was not a qualified voter, he shall be compelled to discover for whom he voted").

[Note 5; add:]

*Br. C. St.* 1903-4, § 160 (quoted *supra*, n. 2).

1909, *Buckingham v. Angell*, 238 Ill. 564, 87 N. E. 285.

For statutes designed to take away this privilege by granting immunity, see *post*, § 2281.

[*Note 6; add, under Accord:*]

1906, *State v. Matlack*, 5 Pen. Del. 401, 64 Atl. 259 (misconduct of election officers in misreading ballots at a primary election; waiver allowed).

1904, *Lane v. Bailey*, 29 Mont. 548, 75 Pac. 191 (good opinion by Callaway, C.).

**§ 2218. Party-Opponent: (a) Testimony on the Stand, etc.**

[*Note 3; add:*]

*Man. St.* 1906, 5 & 6 Edw. VII, c. 17, § 2 (amends Rev. St. 1902, c. 40, by adding further details as Rules 402 A, 402 B, 407 B; and by adding Rule 460 H, quoted *ante*, § 1890, n. 3).

*Newf. St.* 1904, c. 3, Rules of Court 28.

*Yukon Consol. Ord.* 1902, c. 17 (Judicature), Ord. XXI, RR. 200-224; *St.* 1904, c. 5, § 35. *Conn. Gen. St.* 1902, §§ 710, 732-737 (reproduces Gen. St. 1888, §§ 1099, 1060-1062, omitting the proviso that if discovery is obtained, testimony on the trial cannot be demanded).

*Ill. St.* 1905, May 18 (Municipal Court), §§ 32, 33.

*Ia. Code* 1897, §§ 3610, 3611.

*N. C. Rev.* 1905, §§ 865, 1351 (like Code 1883, §§ 580, 1630).

*Okl.*: 1906, *Re Wogan*, 103 Mo. App. 146, 77 S. W. 490 (a party held compellable to depose, under the Oklahoma statutes).

[*Note 6, l. 13; add:*]

whether the provision that, on refusal to give testimony or deposition, the party's *pleading may be rejected* and judgment entered, is constitutional: 1912, *Miles v. Armour*, 239 Mo. 438, 144 S. W. 424 (applying Rev. St. 1909, §§ 6361, 6389).

1908, *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 351, 29 Sup. 380 (applying Ark. Anti-Trust Act of 1905, § 9).

[*Note 6; add a new paragraph 3:*]

The statutes often provide that *judgment may be taken* against a party improperly refusing to answer such interrogatories; the validity of this provision has recently been doubted, but without good ground, in *Lawson v. Black Diamond C. M. Co.*, 44 Wash. 26, 86 Pac. 1120 (1906). Compare the similar rule for *refusal to produce documents* (*ante*, § 1210, n. 2).

**§ 2219. Same: (b) Production of Documents.**

[*Note 6, par. 1; add:*]

*Man. St.* 1906, 5 & 6 Edw. VII, c. 17, § 4 (amends Rev. St. 1902, c. 40, Rule 392, as to mode of service, and Rule 421, as to penalty for refusal to produce).

*Newf. St.* 1904, c. 3, Rules of Court 28.

*Yukon Consol. Ord.* 1902, c. 17 (Judicature), Ord. XX, RR. 190-199.

*Conn. St.* 1889, c. 22, Gen. St. 1902, §§ 732-737.

*Ga.*: 1904, *Carrington v. Brooks*, 121 Ga. 250, 48 S. E. 970 (Code applied). 1905, *Macon v. Humphries*, 122 Ga. 800, 50 S. E. 986 (a production under order is a waiver of the right to object to an improper order).

*N. C. Rev.* 1905, § 1656 (like Code 1883, § 578); Code 1883, § 1373, Rev. 1905, § 1657 (production on trial). 1906, *Whitten v. Western U. Tel. Co.*, 141 N. C. 361, 54 S. E. 289 (telegram in possession of counsel on trial, compelled to be produced without prior notice, under Code 1883, § 1373, Rev. 1905, § 1657).

[*Note 8, l. 1; add:*]

1906, *Banks v. Connecticut R. & L. Co.*, 79 Conn. 116, 64 Atl. 14 (under Gen. St. 1902, § 710, Gen. St. 1888, § 1099, cited *ante*, § 2218, n. 3, making an opponent compellable "as

[Note 8 — continued]

other witnesses," production of documents at the trial on motion is included; and such production at the trial is not "set about by the same limitations" as discovery of documents before trial under Gen. St. 1902, § 732, Gen. St. 1888, § 1062, allowing discovery, in its original phrasing, "as a court of equity might order"; such production may be obtained either by subpoena *duces tecum* or by motion for an order during trial; good opinion by Prentice, J.).

1911, American Lithographic Co. v. Werckmeister, 221 U. S. 603, 31 Sup. 676 ("subpoenas *duces tecum* may run to parties as well as to others," and U. S. Rev. St. 1878, § 724, does not alter this).

So also the original's production may be compelled without subpoenas, if it is *in court*, and the demandant is not relegated to secondary evidence:

1908, Kincaide v. Cavanaugh, 198 Mass. 34, 84 N. E. 307.

[Note 8, at the end; *add.*:]

Compare the reverse question, *ante*, § 2200, n. 10 (whether an order to produce on motion is appropriate for a third person).

§ 2220. **Same: (c) Corporal Exhibition.**

[Note 2; *add.*:]

1310, Batecok v. Conlyng, Y. B. 3 Ed. II, No. 24 (dower; inspection of widow by judges to determine age).

[Note 3; *add.*, under *England*.:]

1905, W. v. S., Prob. 231 (order of inspection made, but not obeyed).

For further details, see an article by Mr. D. M. Cloud, "Physical Examination in Divorce," 35 Amer. Law Rev. 698 (1901).

[Note 5, par. 1; *add.*:]

1906, Seaboard Air Line R. Co. v. Scarborough, 52 Fla. 425, 42 So. 706 (ejection from a train; a witness for the defendant having testified that he saw a passenger ejected at the time and place in question, the defendant requested that the plaintiff be produced in court for identification, and the trial Court refused; held, that though the trial Court might have discretionary power to do this, the defendant could have attained his purpose by process of subpoena, and was not injured).

[Note 9; *add.*:]

CANADA: *Manit.* St. 1906, 5 & 6 Edw. VII, c. 17, § 2 (similar to Ont. St. 1891, c. 11; amends Rev. St. 1902, c. 40, by adding Rule 407 A).

*Ont.* St. 1910, 10 Edw. VII, c. 26, § 7 (inserting as § 104b of the Judicature Act the above Rule of Court § 462); St. 1913, 3-4 Geo. V, c. 19, § 70, Judicature Act (re-enacts the foregoing).

UNITED STATES: *Ark.*: 1914, Triangle Lumber Co. v. Acree, — Ark. —, 166 S. W. 958 (injury in a logging machine; rule applied).

*Cal.*: 1907, Johnston v. Southern P. Co., 150 Cal. 535, 89 Pac. 348 (personal injuries; power to order physical examination, affirmed).

*Colo.*: 1908, Western Glass Mfg. Co. v. Schoeninger, 42 Colo. 357, 94 Pac. 342 (corporal injury; just before trial, the defendant demanded inspection by a physician; the plaintiff refused, on the ground that the lapse of 13 months since the time of injury made it unfair; held, the trial Court erred in refusing the order for inspection; model opinion, by Maxwell, J., holding that the power exists, that the trial Court's discretion controls, that prior request should be made, that the mode and conditions are determinable by the Court, and that on refusal the action may be dismissed or stayed). 1908, Denver C. T. Co. v.

[*Note 9 — continued*]

**Roberts**, 43 Colo. 522, 96 Pac. 186 (corporal injury; *Western G. M. Co. v. Schoeninger* followed).

**Hawaii**: 1904, *Fuller v. Rapid Transit Co.*, 16 Haw. 1, 12 (personal injuries; question not decided; but in any case the Court has discretion, and the request must be made before trial). 1910, *Campbell v. Hackfeld*, 20 Haw. 245 (not decided; here the plaintiff waived a prior objection to an order for examination).

**Ill.**: 1879, *Freeport v. Isbell*, 93 Ill. 381, 385 (personal injury; the plaintiff was allowed to be asked whether he would furnish some of his urine for chemical examination as to his alleged kidney disease caused by the fall in question; "it was his duty" to produce this "best evidence attainable," and his refusal was evidence against him). 1906, *Richardson v. Nelson*, 221 Ill. 254, 77 N. E. 583 (personal injury; the Court "has no power" to compel the plaintiff to submit to a medical examination). 1907, *Chicago v. McNally*, 227 Ill. 14, 81 N. E. 23 (similar; nor can the question be asked, whether the plaintiff is willing to submit to a physical examination). 1908, *Pronskevitch v. Chicago & Alton R. Co.*, 232 Ill. 136, 83 N. E. 545 (personal injury; the plaintiff having removed part of his clothes and shown his injury to the jury, this entitled the defendant to an examination "under reasonable restrictions"; held that the plaintiff's refusal to be examined out of the jury's presence was not unreasonable). 1911, *People v. Steward*, 249 Ill. 311, 94 N. E. 511 (said obiter that a statute might validly change the rule).

**Kan.**: 1904, *Atchison, T. & S. F. R. Co. v. Palmore*, 68 Kan. 545, 75 Pac. 509 (injury to the eyes; expert examination ordered). 1906, *Dickinson v. Kansas C. E. R. Co.*, 74 Kan. 863, 86 Pac. 150 (*Ottawa v. Gilliland* followed).

**Ky.**: 1901, *Louisville & N. R. Co. v. Simpson*, 111 Ky. 754, 64 S. W. 733 (following *Belt E. L. Co. v. Allen*). 1909, *Keller & B. Co. v. Berry*, — Ky. —, 121 S. W. 1009 (examination by physicians chosen by defendant, held properly refused). 1911, *Illinois Central R. Co. v. Beeler*, 142 Ky. 772, 135 S. W. 305 (personal injury; inspection ordered; general practice as laid down in *Belt E. L. Co. v. Allen*, affirmed).

**Mont.**: 1905, *May v. Northern P. R. Co.*, 32 Mont. 522, 81 Pac. 328 (personal injury; order compelling the plaintiff to submit to an examination by physicians appointed by the Court, held properly denied, mainly on the ground of lack of judicial power, following the *Massachusetts* Court; full review of the cases and arguments in a careful opinion by Holloway, J.). **Nev.**: 1909, *Murphy v. Southern Pacific R. Co.*, 31 Nev. 120, 101 Pac. 322 (power conceded; the trial Court's discretion to control).

**Okl.**: 1903, *Kingfisher v. Altizer*, 13 Okl. 121, 74 Pac. 107 (personal injury; plaintiff held not compellable to submit before trial to an examination; *U. P. R. Co. v. Botsford*, U. S., followed as binding on the Territorial Court). 1913, *Chicago, R. I. & P. R. Co. v. Hill*, 36 Okl. 540, 129 Pac. 13 (not decided; but *Kingfisher v. Altizer*, a Territory decision, is held to be no longer binding). 1913, *Atchison, T. & S. F. R. Co. v. Melson*, 40 Okl. 1, 134 Pac. 388 (*Kingfisher v. Altizer* followed; but this rule allows the party to be asked if he will consent).

**Tex.**: *Austin & N. W. R. Co. v. Cluck*, *supra*, affirmed on appeal in 97 Tex. Sup. 172, 77 S. W. 403. 1905, *Houston & T. C. R. Co. v. Anglin*, 99 Tex. 349, 89 S. W. 966 (like *C. R. I. & T. R. Co. v. Langston*).

**U. S.**: 1905, *Denver C. T. Co. v. Norton*, 141 Fed. 599, 609 (personal injuries; the inspection cannot be ordered, but the defendant may make the request and on refusal may comment thereon). 1909, *Chicago & N. W. R. Co. v. Kendall*, 8th C. C. A., 167 Fed. 62 (rule of *Botsford* case held not applicable where the plaintiff had waived the privilege by showing his knees; ruling more fully stated *ante*, § 6, n. 8).

**Utah**: 1908, *Larson v. Salt Lake City*, 34 Utah 318, 97 Pac. 483 (power denied, in the absence of statute; the opinions are a singular exhibition of that judicial "non possumus" attitude which is so blind to the true nature of law and judicial function).

**Wash.**: 1905, *Helbig v. Grays' Harbor E. Co.*, 37 Wash. 130, 79 Pac. 612 (further examination by a third physician, held not improperly refused).

[*Note 9*, at the end; *add*.:]

In the Federal Congress (59th Cong., 2d Sess., 1907) a bill was reported by the House of Representatives' Committee on Judiciary (H. R. 10, Report No. 7587, Feb. 9) "to authorize the courts of the United States to require a party to submit to a personal physical examination in certain cases"; but was not passed.

The report of the majority of the Committee says:

"The object of this bill is to confer a discretionary power upon Federal courts to order the plaintiff in actions brought to recover for personal injuries sustained to submit to a personal physical examination. The enactment of the bill is made necessary by the opinion of the court in *Union Pacific Railway Company v. Botsford* (141 U. S. 250). . . . Under this rule the Federal courts are not vested with any discretion whatever relative to such examinations, and the defendant is left in practice to offer as a matter of evidence the demand for an examination and its refusal by the plaintiff as reflecting upon the bona fides of the plaintiff's claim as to the nature and extent of such injuries. But this denies the defendant the equal opportunity with the plaintiff of calling a medical witness as to the character of the injuries, and to that extent at least is an injustice. . . . The most recent and exhaustive discussion of this subject is found in *Wigmore on Evidence* (1904), II, § 2220, in which the case of *R. Co. v. Botsford* is thoroughly discussed by the author [quoting]. . . . In view of the great weight of authority, . . . this bill is recommended to for passage as amended."

The opposing report of the minority says, in part:

"In many personal-injury cases the real condition of the implement or agency alleged to be defective is a matter of prime importance when the alleged defect is charged to be the direct cause of the injury complained of. Then, if the party complaining on account of any such defect and an injury attributed to it, is to be subjected before or at the trial to a physical examination for the benefit of his adversary, why is it not also provided that the thing, whatever it may be, alleged to be defective and by reason of the defect to have caused the injury, should not, by Congressional enactment, be kept within easy reach, unrepaired and unchanged, for the benefit of the sufferer from the personal injury? But nothing like that is proposed — this legislative scheme has no element of reciprocity in it. For instance, a passenger may be injured, as he claims, by reason of a defect in the car upon which he took passage. If this bill becomes the law he can be forced to submit to a physical examination, either at or before the trial, at the instance and for the benefit of the owner of the car, but the car may be taken at any time to the other side of the continent, and may be repaired and changed, or even destroyed, at the will of its owner, the other party to the controversy. It is not proposed to provide for preserving the status quo, with full opportunity to the injured party to have examined that which caused his injury. Then, not only men but women and children may be forced to submit to a physical examination for the benefit of an adversary. The 'discretion of the court' might be, and sometimes surely would be, a sorry substitute for the right which this bill would take away — the right to guard the afflicted body and the sensibilities from the unfriendly inquisition of a hired evidence seeker, not invariably learned, skillful, tender, respectful, or over-scrupulous. The bill is predicated to some extent, if not wholly, upon the assumption that the claimant on account of an alleged personal injury is lacking in honesty, and that attending surgeons and physicians are incompetent or dishonest or both. Not even the intemperate declaration of *Wigmore*, quoted with approval in the committee report, is at least with the minority conclusive upon the 'fraud' item . . . As to the cases and text writers cited, we have not examined them, and so do not know how fully or to what extent they warrant any conclusions deduced from them by those who rely upon them for support for the proposed legislation."

The only new argument brought out in this minority report is that the plaintiff in such cases is in fairness entitled reciprocally to an inspection of the defendant's chattels and premises to ascertain the cause of the injury and the data of negligence. This point is well taken. There ought to be no privilege on either side. But the simple answer is that

[Note 9 — continued]

in this view the minority should have insisted on adding such a provision to the bill. That the minority report proposed no such thing suggests strongly that they were against the bill on any terms.

Moreover, the report assumes that no such right of inspection is now in law available for the plaintiff. Yet the authorities cited *post*, § 2221, show that such a power has been recognized in Chancery for a century, and that modern American courts of law are beginning to recognize it in personal injury cases. How amply and naturally it is employed in modern English Courts may be seen by consulting the notes to Order 50, Rule 3, in Mackenzie & Chitty's "Yearly Supreme Court Practice."

[Note 13; add:]

*England* (divorce cases): *W. v. W.*, [1912] P. 78 (nullity for impotency; the respondent's refusal to submit to medical examination, taken as evidence; *B. v. B. supra* is not cited, and counsel say "The nearest case is *C. v. C.*, 1911, 27 Times L. R. 421"; but in *Dickinson v. Dickinson*, [1913] P. 198, Sir S. Evans, Pres., declares it "revolting" to find that where decrees were thus based on "inferred incapacity" the parties in later marriages have had children, and he ruled that absolute refusal of intercourse was of itself a ground for nullity; hence the inference of impotency will hereafter not be a mere "legal fiction," as Sir S. Evans termed it).

*United States* (personal injury cases): 1907, *Cedartown v. Brooks*, 2 Ga. App. 583, 59 S. E. 836 (careful opinions by Russell, J., and Powell, J., respectively, taking opposite views as to the propriety of the inference in a jurisdiction where the Court has power and discretion to make an order).

1909, *Murphy v. Southern Pacific R. Co.*, 31 Nev. 120, 101 Pac. 322.

1913, *Chicago, R. I. & P. R. Co. v. Hill*, 36 Okl. 540, 129 Pac. 13.

#### § 2221. Same: (d) Inspection of Premises and Chattels.

[Note 2; add:]

The *exhumation of a body*, when useful to ascertain facts in litigation, should of course be permitted; no privilege ought to be recognized:

1907; *Re Herbert Druce, Re London Cemetery Co.* (Nov. 16, Dec. 27; *London Times*, Nov. 9, 16, 19, 22, 28, 30, Dec. 3, 7, 10, 14, 17, 21, 28, 30, 31. The Druce Case was a case of alleged double life. The claimant, Geo. Hollamby Druce, was the son of Thomas Charles Druce, who had lived as a furniture dealer, and died in 1864. The claim was that T. C. D. was in reality the fifth Duke of Portland; that in 1816, as Lord John Bentinck, he had married Miss Crickmer, and had lived with her and maintained a household as Thomas Charles Druce, while also living as the Duke of Portland, and that as Duke he survived till 1879; there was plausible testimony to these facts; in 1898-1901 Mrs. Anna Maria Druce brought proceedings in the Probate Court to revoke probate of the will of T. C. D., on the ground that T. C. D. had not then died, and that the funeral of T. C. D. in 1864 was a mock one, and that T. C. D. in fact lived, as the Duke, till 1879; this suit was dismissed, the Court finding that T. C. D. did die in 1864; at the 1898 proceeding, Herbert Druce, son of T. C. D., and opposed to the claimant, had made affidavit, and in the 1901 proceeding he testified, that he had lived since his birth in 1846 with his father T. C. D., that in Sept. 1864 his father fell ill and on Dec. 28, 1864, died, that he saw his father's body lying in the coffin, and saw the body buried at Highgate Cemetery; yet the testimony for the claimant was explicit that the coffin had been specially made at the Duke's order, and that only lead had been placed within, to deceive the bearers; the test of this story would evidently be the condition of the coffin, and at the 1898 proceedings by Mrs. A. M. D. the judge of the Consistory Court, Dr. Tristram, intimated that he would grant a license to open the coffin, and upon a prohibition moved in the Probate Court on the

[*Note 2 — continued*]

ground that the Home Secretary alone had jurisdiction, the prohibition had been refused, conceding to the Consistory Court sole jurisdiction over the removal of bodies for re-interment or other purposes (ruling reported in 1898, L. R. 2. Q. B. 371; citing *In re Sarah Pope*, 15 Jur. 614, before Dr. Lushington); but now in 1907 the claim was indirectly got before the Court again by a prosecution, instituted by Geo. H. D., against Herbert D., for perjury in his affidavit and testimony of 1901; new testimony was at this trial adduced for the claimant, direct and conclusive, if true; and the opening of the grave seemed now to be the only way of testing the story; Herbert D., the proprietor of the grave, had at first refused to allow it to be opened, but his counsel now declared himself ready to consent; the magistrate, Mr. Plowden, expressed the opinion that the grave ought to be opened; H. D. assented and the Home Secretary gave a license; and a petition was filed in the Consistory Court by the London Cemetery Co. (including Highgate Cem.) and the Home Secretary, for a license to open the grave; no party seems to have opposed the order, though each counsel made a speech explaining why he did not oppose it; Dr. Tristram granted the order, to open the grave and "to examine and inspect the contents thereof, and to ascertain whether such last-mentioned coffin actually contains the human remains of the said T. C. D. or any human remains," etc.; on Dec. 30 the coffin, which was lead-lined, was opened, and was found to contain "the body of an aged and bearded man"; this ended the prosecution of H. D.; in the *Law Journal*, 1908, Jan. 11, vol. XLIII, p. 15, is a brief summary of the legal points arising at the trial, but the only reference to the exhumation is unfortunately erroneous, stating the ruling to be that there is no judicial authority to open a grave except for an inquest).

1907, *Mutual Life Ins. Co. v. Griesa*, C. C. Kan., 156 Fed. 398 (bill to cancel a life insurance policy on the ground of intention to suicide; order of exhumation of the body, for examination, granted, and privilege denied; case stated more fully *ante*, § 1862, n. 6, and 2194, n. 6).

1910, *Danahy v. Kellogg*, 126 N. Y. Suppl. 444 (action for death; order for exhumation to ascertain the cause of death, denied; case stated more fully *ante*, § 1862, n. 10).

1908, *Gray v. State*, 55 Tex. Cr. 90, 114 S. W. 635 (murder; to obtain evidence on the accused's allegation that he had shot the deceased in self-defence and not from behind, an order of exhumation of the body was held improperly refused by the trial Court; model opinion, by Ramsey, J., Brooks, J., diss.; stated more fully *ante*, § 2194).

1914, *State v. Clifford*, — Wash. —, 139 Pac. 650 (exhumation of an intestate's body, to ascertain whether castration had prevented paternity; stated more fully *ante*, § 2194, n. 6).

Compare the cases cited *ante*, § 2174, n. 6, and § 1862, n. 6.

[*Note 3; add:*]

The use of such orders of inspection in modern English practice may be seen in Mackenzie Chitty's "Yearly Supreme Court Practice," notes to Order 50, Rule 3.

### § 2223. **Facts Involving a Civil Liability, etc.**

[*Note 7, par. 2; add:*]

*Ont. St.* 1904, 4 Edw. VII, c. 10, § 21 (similar; quoted *post*, § 2281).

[*Note 9; add:*]

1910, *Boston & Maine R. Co. v. State*, 75 N. H. 513, 77 Atl. 996 (general principle affirmed).

### § 2230. **Husband or Wife; Paramour; Void Marriage.**

[*Note 1, last line; add:*]

1905, *State v. Hancock*, 28 Nev. 300, 82 Pac. 95.

[Note 2, par. 1; *add.*:]

1906, *State v. Rocker*, 130 Ia. 239, 106 N. W. 645 (murder; defendant being already married, the woman now living with him as wife was admitted against him).

### § 2231. Bigamous Marriage; Disputed Marriage.

[Note 2; *add.*:]

1905, *Murphy v. State*, 122 Ga. 149, 50 S. E. 48.

[Note 3; *add.*:]

1905, *Hoch v. People*, 219 Ill. 265, 76 N. E. 356 ("If the first marriage is admitted or is clearly proved, the alleged second wife is competent," except as to the first marriage).

[Note 4; *add.*:]

1906, *State v. Rocker*, 130 Ia. 239, 106 N. W. 645 (murder; a woman living with defendant as his wife, admitted against him, after evidence of his and of her former marriage to another).

### § 2232. Extrajudicial Admissions of Wife or Husband.

[Note 1; *add.*:]

*Accord*: 1904, *Halbert v. Pranke*, 91 Minn. 204, 97 N. W. 976 (husband's petition in bankruptcy, excluded).

1903, *Baker v. State*, 120 Wis. 135, 97 N. W. 566 (false pretences; defendant's husband's admissions, excluded).

*Contra*: 1886, *Cook v. State*, 22 Tex. App. 511, 3 S. W. 749 (wife's acts and utterances as a joint principal, admitted).

1905, *State v. Mann*, 39 Wash. 144, 81 Pac. 561 (arson by a husband as accessory to the wife; the wife's confessions as principal, admitted against the husband).

[Note 4; *add.*, under *Accord*.:]

1904, *Joiner v. State*, 119 Ga. 315, 46 S. E. 412 (wife's statements of husband's cruelty, to a third person in defendant's presence, admitted).

1904, *People v. Hossler*, 135 Mich. 384, 97 N. W. 754.

1908, *State v. Wooley*, 215 Mo. 620, 115 S. W. 417 (wife's written statement read aloud to the husband and assented to by him, admitted; distinguishing *State v. Burlingame*).

[Note 5; *add.*:]

The privilege is here to be claimed when answer is *offered*, and not when the discovery is first sought, if it is then demandable as from a party: 1904, *Olmsted v. Edson*, 71 Nebr. 17, 98 N. W. 415.

### § 2233. Hearsay; Production of Documents.

[Note 1; *add.*:]

But testimony obtained by *information gained from the wife* would not be privileged: 1905, *Com. v. Johnson*, 213 Pa. 432, 62 Atl. 1064. Compare §§ 2261, 2325, *post*.

[Note 2; *add.*:]

1906, *State v. Richardson*, 194 Mo. 326, 92 S. W. 649 (spontaneous declarations).

Distinguish the following: 1906, *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, 389 (perjury; the wife's testimony at the former trial, admitted on the issue of materiality).

§ 2235. **Husband or Wife not a Party; Sundry Applications of the Rule.**

[Note 1; add:]

But otherwise where the proceeding is a bill *against the wife herself*, to set aside a conveyance from the husband: 1899, *Re Fowler*, 93 Fed. 417.

1905 *Wiley v. McBride*, 74 Ark. 34, 85 S. W. 84.

[Note 3; add, under *Not Privileged*.:]

1904, *Pruett v. State*, 141 Ala. 69, 37 So. 343 (adultery; husband of the woman with whom it was charged, admitted).

1906, *Hill v. Pomelear*, 72 N. J. L. 528, 63 Atl. 269 (criminal conversation; plaintiff admitted to prove the marriage, under Rev. Pub. L. 1900, p. 363, § 5).

1913, *Powell v. Strickland*, 163 N. C. 393, 79 S. E. 872 (husband's suit for criminal conversation; husband admitted to testify to the adultery of the wife not a party).

1905, *State v. Nelson*, 39 Wash. 221, 81 Pac. 721 (adultery of N. with S.; the husband of S. admitted against N. for the State).

[Note 4; add:]

1912, *People v. Upton*, 169 Mich. 31, 135 N. W. 108 (battery upon O., after O. had assaulted defendant's wife; Mrs. O. admitted to testify for the defendant).

[Note 6; add:]

1913, *Strauss v. Hutson*, — Miss. —, 61 So. 594 (bill for discovery against husband and wife charging fraud against creditors; neither compellable to answer).

1905, *Weckerly v. Taylor*, 74 Nebr. 772, 105 N. W. 254 (creditor's bill against the debtor, his wife as assignee, and an insurer, to reach the proceeds of an accident policy; the husband not admitted for the plaintiff).

1893, *Norbeck v. Davis*, 157 Pa. 399, 405, 27 Atl. 712 (under St. 1887, P. L. 158, § 2b, P. & L. Dig. Witnesses, § 11, the wife is competent in interpleader proceedings as claimant against a creditor).

1904, *Re Domenig*, 128 Fed. 146, D. C. (under Pa. St. 1887, *supra*, the wife is competent in bankruptcy proceedings to prove her claim as creditor).

§ 2236. **Same: Co-Indictees and Co-Defendants.**

[Note 1; add:]

1908, *Canole v. Allen*, 222 Pa. 156, 70 Atl. 1053 (trespass done by husband and wife; the husband held to be improperly called by the plaintiff to prove the husband's act as the wife's agent).

[Note 2; add:]

1904, *Graff v. People*, 208 Ill. 312, 70 N. E. 299 (the wife of a co-indictee who had pleaded guilty before trial, admitted against the defendant).

[Note 5; add:]

1913, *Watson v. State*, — Ala. —, 61 So. 334.

§ 2237. **Testimony against Husband or Wife Deceased or Divorced.**

[Note 4; add:]

1906, *State v. Mathews*, 133 Ia. 398, 109 N. W. 616 (wife at the time of the homicide, but divorced before trial; not privileged).

1903, *Tompkins v. Com.*, 117 Ky. 138, 77 S. W. 712 (for occurrences subsequent to divorce; but this limitation is unsound).

[*Note 4 — continued*]

1908, *State v. Luper*, — Or. —, 95 Pac. 811 (perjury committed in obtaining the divorce).  
 1905, *Hartley v. Hartley*, 27 R. I. 176, 61 Atl. 144 (wife's bill for account against a divorced husband; plaintiff not allowed to testify to a property agreement made during marriage; erroneously following *Robinson v. Robinson*, R. I., *post*, § 2341, as authority).  
 1905, *Cole v. State*, 48 Tex. Cr. 439, 88 S. W. 341.  
 1905, *State v. Nelson*, 39 Wash. 221, 81 Pac. 721.

[*Text*, p. 3055, at end; *add.*:]

A *deponent's* qualifications should be determined at the *time* of the deposition's taking, not of the deposition's offer in evidence (*ante*, §§ 483, 1409). But a privilege should be determined at the time of its claim; for the basis of a disqualification is the testimonial trustworthiness of the person when actually speaking, while the basis of the privilege is the policy as affected by using the testimony. Hence, if a husband's deposition is taken at a time when the wife could be privileged to exclude it, nevertheless the privilege becomes unavailable if, by death or divorce intervening before offer of the deposition, the privilege has ceased at the time of the offer.<sup>6</sup>

<sup>6</sup> 1912, *Howard v. Strode*, 242 Mo. 210, 146 S. W. 792 (claim of widow's share in an estate; the plaintiff was married in 1883 to a man named H. H., whom she maintained to be the defendant's intestate L. J. H.; defendant maintained that the man married by the plaintiff in 1883 was not L. J. H., but was one T. J. M.; defendant offered the deposition of T. J. M., a non-resident, that he was that man, and therewith offered a decree of divorce from plaintiff granted to said T. J. M. since the date of the deposition and before its offer in evidence; the trial Court admitted the deposition; held that the divorce made T. J. M.'s testimony admissible).

### § 2239. Testimony admitted Exceptionally; At Common Law, by Necessity.

[*Note 4; add.*:]

1907, *Williams v. State*, 149 Ala. 4, 43 So. 720 (assault by a woman on her former husband; husband admitted).  
 1904, *State v. Harris*, 5 Pen. Del. 145, 58 Atl. 1042 (husband admitted against his wife, on a charge of assaulting him).  
 1912, *Ector v. State*, 10 Ga. App. 777, 74 S. E. 295 (under P. C. 1910, § 1037, par. 4, reproducing P. C. 1895, § 1011, par. 4, the husband may not testify against his wife on a charge of stabbing him; history of the legislation reviewed by Russell, J.).  
 1913, *State v. Anderson*, 252 Mo. 83, 158 S. W. 817 (assault with intent to kill the accused's wife; the wife admitted).  
 1907, *Miller v. State*, 78 Nebr. 645, 111 Nebr. 637 (wife admitted on a charge of husband's assault on herself and two others).  
 1905, *State v. Woodrow*, 58 W. Va. 527, 52 S. E. 545 (murder of defendant's baby, the shot passing through the baby's head and wounding the mother who was holding it in her arms; the mother excluded; a singular decision; *Poffenbarger and Sanders, JJ., diss.*).

[*Note 9, l. 5; add.*:]

1905, *Frazier v. State*, 48 Tex. Cr. 142, 86 S. W. 754 (useless opinion).

[*Note 9, l. 9; add.*:]

1904, *State v. McKay*, 122 Ia. 658, 98 N. W. 510 ("this is so plain that no amount of reasoning can make it any clearer").

## [Note 9 — continued]

1913, *Norman v. State*, 127 Tenn. 340, 155 S. W. 135 (rape under age of a woman whom defendant subsequently married so as to shield himself from prosecution; privilege held applicable; careful opinion, by Buchanan, J., but the result is none the less misguided).

## [Note 11; add:]

In various phrasings of law as to *pimping* by the husband (living on the wife's earnings as prostitute, enticing her for the purpose of prostitution, contracting for the purpose, "white slave trade"), the question of the privilege arises; the local statutory phrasings become important, but of course morally it is a shameless offence against wifehood:

*Director of Pub. Pros. v. Blady*, [1912] 2 K. B. 89 (charge of living on the earnings of his wife as prostitute; the wife held not admissible for the prosecution, because the offence was not against "the liberty, health, or person of the wife"; Lush, J., diss.; the reasoning of the majority might have been different and sound, but, upon its own phrasing, the English language is strangely interpreted).

*Ind. St.* 1911, c. 174, p. 439, Mar. 4 (pandering; cited more fully *ante*, § 488); 1911, *U. S. v. Rispoli*, 189 Fed. 271 (prosecution of the husband for persuading his wife to act as a prostitute ("white slave" trade), held that the privilege ceased).

## [Note 12; add:]

*Ala. St.* 1903, No. 9, p. 32 (husband charged with abandonment; "the wife shall be a competent witness against her husband").

1905, *Wester v. State*, 142 Ala. 56, 38 So. 1010 (abandonment of family; the wife allowed to testify for the State, under *St.* 1903, No. 9).

1902, *State v. Miller*, 3 Pennew. Del. 518, 52 Atl. 262 (under *St.* 1887, c. 230, 18 Laws, p. 447, quoted *ante*, § 488, a wife is admissible on a complaint against the husband for failure to support minors even when not under the age of ten).

1904, *State v. Bean*, 104 Mo. App. 255, 78 S. W. 640 (wife-abandonment; the wife admitted against the husband). 1869, *State v. Newberry*, 43 Mo. 429 (wife-abandonment; the wife's affidavit to an information, admitted).

1905, *Morgenroth v. Spencer*, 124 Wis. 564, 102 N. W. 1086 (*Bach v. Parmely* followed).

For the numerous modern statutes so providing, see *ante*, § 488.

## [Note 13, par. 1; add:]

1913, *Hunter v. State*, — Okl. Cr. App. —, 134 Pac. 1134 (failure to support a minor child; the wife admitted, under Rev. L. 1910, § 5882, making an exception for "a crime committed by one against the other"; eloquent opinion by Furman, J.).

For the numerous modern statutes expressly so providing, see *ante*, § 488.

## [Note 14, line 3; add:]

*Accord*: 1885, *Lord v. State*, 17 Nebr. 526, 23 N. W. 507.

*Not decided*: 1905, *State v. Nelson*, 39 Wash. 221, 81 Pac. 721.

## [Note 15; add:]

*Accord*: 1891, *Owens v. State*, 32 Nebr. 174, 49 N. W. 226 (incest).

1907, *Harris v. State*, 80 Nebr. 195, 114 N. W. 168 (rape under age, on the defendant's stepdaughter; the wife admitted).

## [Note 16; add:]

*Accord*: *La. St.* 1904, No. 41. 1906, *Richardson v. State*, 103 Md. 112, 63 Atl. 317 (but under a broad statute, *Pub. Gen. L.* 1904, art. 35, § 4).

*Contra*: 1906, *State v. Kniffen*, 44 Wash. 485, 87 Pac. 837.

[*Note 20; add:*]

*Not admissible:* 1905, *Bishop v. Bishop*, 124 Ga. 293, 52 S. E. 743 (in divorce for adultery, under Code § 5272, the husband and wife are disqualified, and in a proceeding for alimony pending suit for divorce for desertion, neither may testify to the other's adultery). 1913, *Anderson v. Anderson*, 140 Ga. 802, 79 S. E. 1124 (wife's suit for divorce for cruelty, with a cross-bill for adultery; the wife allowed to testify in support of her bill, but not in denial of the cross-bill; this case illustrates the absurd technicalities of the patchwork statutory treatment of this privilege).

*Admissible:* 1904, *Schaab v. Schaab*, 66 N. J. Eq. 334, 57 Atl. 1090 (under St. 1900, c. 150, §§ 2, 5, a wife may testify for her husband in an action for divorce for adultery, but is not compellable).

Compare the cases on divorce cited *post*, § 2245, n. 5.

[*Note 23; add, under Contra:*]

1912, *Molyneux v. Willcockson*, — Ia. —, 137 N. W. 1016 (forgery by the husband of money obligations in the wife's name; the exception held not applicable).

#### § 2240. Same: Under Statutory Exceptions.

[*Note 2; add:*]

1906, *Heckman v. Heckman*, 215 Pa. 203, 64 Atl. 425 (neither is competent under Pa. St. 1893, P. L. 345, in a suit in equity for reconveyance of the wife's separate estate).

[*Note 3; add:*]

1904, *First Nat'l Bank v. Wright*, 104 Mo. App. 242, 78 S. W. 686.

[*Note 5, l. 9; add:*]

1907, *Rust v. Oltmer*, 74 N. J. L. 802, 67 Atl. 337 (P. L. 1900, p. 363, Evidence, § 5, held not to exclude the wife's testimony on a count for alienation of affections).

#### § 2241. Whose is the Privilege.

[*Note 3; add:*]

1904, *Com. v. Barker*, 185 Mass. 324, 70 N. E. 203 (under Rev. L. 1902, c. 175, § 20, the wife may voluntarily testify against the husband in a criminal case).

[*Note 5; add:*]

1911, *State v. Stewart*, 85 Kan. 404, 116 Pac. 489 (holding only that the party's counsel may properly request or suggest to the judge that the husband-witness be informed of the privilege; whether the party may take advantage of an erroneous denial of the privilege, not decided).

#### § 2242. Waiver of the Privilege.

[*Note 1; add:*]

1903, *Davis v. State*, 45 Tex. Cr. 292, 77 S. W. 451.

[*Note 5; add:*]

1906, *People v. Chadwick*, 4 Cal. App. 63, 87 Pac. 384, 389 (but a failure to object at a former trial is not a waiver for a subsequent trial).

1913, *Hunter v. State*, — Okl. Cr. App. —, 134 Pac. 1134.

[Note 6; *add*.:]

The husband's *own testimony to his wife's statements*, in an issue where she is virtually an opposed party in interest, ought to be a waiver of the privilege, because in fairness she should have an opportunity to deny or explain.

*Contra*: 1910, *Fuller v. Robinson*, 230 Mo. 22, 130 S. W. 343 (alienation of affections).

[Note 8, par. 1; *add*.:]

1907, *Jones v. State*, 51 Tex. Cr. 472, 101 S. W. 993 (*Hoover v. State* followed).

### § 2243. Inference from Exercise of the Privilege.

[Note 1; *add*, under *Accord*.:]

1910, *Dickman's Case*, 5 Cr. App. 135 (under St. 1898, 61-2 Vict. c. 36, § 1, 6).

1903, *R. v. Hill*, 36 N. Sc. 253 (following *R. v. Corby*, *supra*, even where the defendant's counsel had already introduced the subject by explaining the wife's absence).

1906, *Mash v. People*, 220 Ill. 86, 77 N. E. 92 (prosecuting counsel's argument drawing an inference from the wife's claim, held to have been here excused by the defendant's counsel's prior similar impropriety).

1912, *Fannie v. State*, 101 Miss. 378, 58 So. 2 (Johnson *v. State* followed).

1905, *State v. Shouse*, 188 Mo. 473, 87 S. W. 480.

1905, *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247 (like *Johnson v. State*, Miss.).

[Note 1; *add*, under *Contra*.:]

1912, *Com. v. Spencer*, 212 Mass. 438, 99 N. E. 266 (defendant's failure to call his wife, held open to comment; like *People v. Hovey*).

1909, *Rhea v. Territory*, 3 Okl. Cr. 230, 105 Pac. 314 (where by law the defendant's wife may testify for him but he is privileged not to let the prosecution call her against him, the Court may tell the jury that the prosecution has no power to call her but that the defendant has, to prevent any inference from being drawn against the prosecution; and an inference may be drawn against the defendant).

1906, *McMichael v. State*, — Tex. Cr. —, 93 S. W. 723 (wife an eye-witness).

The following ruling seems correct: 1907, *State v. Brown*, 118 La. 373, 42 So. 969 (statement by the prosecuting attorney that the defendant's wife could testify neither for nor against the accused, held not improper).

### § 2245. Statutory Abolition, Express or Implied.

[Note 4; *add*.:]

1904, *Chaslavka v. Mechalek*, 124 Ia. 69, 99 N. W. 154 (rule of *Richards v. Burden* applied to a wife's and a husband's admissions).

*Contra*: 1904, *Lenoir v. Lenoir*, 24 D. C. App. 160, 165 (said *obiter* that Code 1901, § 1068, quoted *ante*, § 488, does not make the parties competent in a divorce case, thus preserving the rule of *Burdette v. Burdette*, 13 D. C. 469, *infra*, n. 7, and *Bergheimer v. Bergheimer*, 17 D. C. App. 381, in spite of the subsequent broad language of Code 1901; this result is unsound also as a matter of legal reasoning, for the Court mistakes the rule of Code 1901, § 964, quoted *ante*, § 2067, n. 10, to have some effect in disqualifying the parties, instead of merely requiring corroboration).

1905, *Bishop v. Bishop*, 124 Ga. 293, 52 S. E. 743 (divorce for adultery, and testimony to adultery in a proceeding for alimony pending suit for divorce for desertion).

[Note 8; *add*.:]

1909, *Ex parte Beville*, 58 Fla. 170, 50 So. 685 (habeas corpus for a wife committed for refusing to testify before the grand jury against her husband, on a matter not involving

[Note 8 — *continued*]

a crime against her person nor a marital communication; held compellable, under Rev. St. 1892, § 2863, and St. 1891, c. 4029, as heretofore interpreted; "the statute that removed the disqualification removed the privilege also"; careful opinion by Parkhill, J.; Whitfield, C. J., and Shackleford, J., diss.).

But not a statute abolishing "any disqualification known to the common law": 1909, *U. S. v. Meyers*, 14 N. Mex. 522, 99 Pac. 336 (one judge diss.).

[Note 9; *add.*:]

1911, *Acaster's and Leach's Case*, 7 Cr. App. 84 (under St. 1898, 61-2 Vict. c. 36, § 4, the wife of a defendant is compellable, without her consent, to testify; statutes carefully examined, in a convincing opinion by L. C. J. Alverstone); reversed on appeal in *Leach v. Rex*, [1912] A. C. 305, 7 Cr. App. 157 (construing St. 1898, 61-2 Vict. c. 36, § 4, "the wife or husband . . . may be called as a witness" etc.; wife held not compellable). On this topic, under modern English statutes, see the learned pamphlet of Herman Cohen, Esq., of the Inner Temple, "Spouse-Witnesses in Criminal Cases" (London, 1913); the preface says, "This little essay owes its origin to the argument of the Solicitor-General and Mr. (now Mr. Justice) Rowlatt in *Leach's Case*."

1913, *R. v. Allen*, N. Br. S. C., 14 D. L. R. 825 (wife not admissible against her husband, even though she consents, on a charge of obtaining money by false pretences).

1908, *State v. Orth*, 79 Oh. 130, 86 N. E. 476 (father's refusal to support children; mother's testimony held not admissible against him in a criminal case).

[Note 10; *add.*:]

1903, *Gosselin v. King*, 33 Can. Sup. 255, 263 (under Can. Evidence Act 1893, c. 31, § 4, the husband or wife of the accused is both admissible and compellable to testify for the prosecution against the accused; Mills, J., diss.).

1906, *Richardson v. State*, 103 Md. 112, 63 Atl. 317 (under Pub. Gen. L. 1904, art. 35, § 4, the husband or wife is admissible for the prosecution, though not compellable).

1913, *State v. Nieburg*, 86 Vt. 392, 85 Atl. 769.

[Note 11; *add.*:]

1904, *Reed v. Reed*, 70 Nebr. 775, 98 N. W. 76 (property rights).

[Note 12; *add.*:]

1911, *Harris v. Brown*, C. C. A., 187 Fed. 6 (Gen. St. 1909, Kansas, § 5915, C. C. P. § 321, held to abolish all marital incompetency except for marital communications).

## § 2250. Self-Crimination; History of the Privilege.

[Text, p. 3070, l. 2 from below:]

For "*obstante*," read "*obtenta*," as in l. 9 of note 18, *infra*. This correction is due to the courtesy of Mr. Justice Holmes.

[Note 26, col. 1, l. 5 from below; *add.*:]

Salvioli, "Manuale di storia di diritto italiano," 1903, 4th ed., §§ 390-393; Esmein, "History of Continental Criminal Procedure" (transl. Simpson; Continental Legal History Series, vol. V, 1913), pp. 79 ff.

[Note 43, par. 2, p. 3078; *add.*:]

It should be added that the peculiar stronghold of Chancery practice, its personal examination on oath to make discovery, is found established as early as the first part of the 1400 s, and that the opposition which went on during that century and the 1500 s to the increasing

[*Note 43 — continued*]

spread of the Chancellor's powers was probably due in part to this feature of its procedure, in which "the Chancery was naturally identified with the Church" and its methods with those of the Ecclesiastical and Star Chamber courts (1890, Kerly, "Historical Sketch of the Equitable Jurisdiction of the Court of Chancery," pp. 43-45).

[*Note 107, par. 1; add.:*]

Esmain, "History of Continental Criminal Procedure" (transl. Simpson; Continental Legal History Series, vol. V, 1913), pp. 224 ff.

[*Note 108, par. 4; add.:*]

A summary of the early constitutional legislation on the privilege is found in the opinion of Moody, J., in *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. 14 (1908).

### § 2251. Policy of the Privilege.

[*Note 1, add.:*]

Professor Henry T. Terry's article in the *Yale Law Journal*, XV, 127 (1906), "Constitutional Provisions against Forcing Self-Incrimination."

[*Note 16, add.:*]

The correct moral attitude toward the privilege has been well illustrated in a courageous and clear-thinking opinion, rendered in a case where outrageous fraud had been used at an election:

1907, *Lassing, J.*, in *Scholl v. Bell*, 125 Ky. 750, 102 S. W. 248: "The testimony shows many outrages and crimes done by the police, and yet, when these men were placed on the witness stand and interrogated as to what they knew, they invariably sheltered under the law forbidding self-incrimination; and, when the question as to whether the witness should or not be compelled to answer was certified to the chancellors, the witnesses were always protected by the ruling. Assuming the ruling to be correct, the conclusion which seems to have been drawn as to the innocence of the officers is not justified. The principle under discussion is a rule of evidence, to protect the witness from criminal prosecution or public exposure to shame because of his own testimony. It is a rule of necessity, beyond which it should not be extended. Its use should not be considered as affording the witness a certificate of good character. Here were police officers being interrogated as to existence of crimes they were paid to prevent, if possible; if not, to expose and punish afterwards; and yet they one and all refused to answer 'under advice of counsel.' Suppose a secret murder had been committed, and the police on that beat, when asked about it, should say, 'I decline to answer for fear of incriminating myself.' This, under the rule invoked, would protect the witness from answering; but how long would it justify his retention on the roll of the police? What would be thought of those who left the public safety in his hands longer than it would require to discharge him? Suppose a bank had been robbed, and the bookkeeper, the teller, and cashier, when interrogated, should say, 'I decline to answer under advice of counsel.' What would be thought of a board of directors who would afterwards leave the bank in the hands of such men? This is precisely the situation here. Peace officers, whose duty it was to prevent and expose crime, when called on to do so, sheltered under the rule against self-incrimination; and yet these men still wear the official uniform, still draw salaries from the public purse, and this is made possible only by the consent of those who are the apparent beneficiaries of their silence."

[*Note 18; add.:*]

A reaction against the excesses of the privilege is now to be seen, notably in Wisconsin: Herbert R. Limburg, "The Privilege of the Accused to Refuse to Testify" (*American Academy*

[Note 18 — continued]

of Political and Social Science, Phila., 1914, vol. LII, No. 141, p. 124); Wisconsin Branch of the American Institute of Criminal Law and Criminology, Report of Committee approving a Bill for a Constitutional Amendment (2d Annual Meeting, 1910, Journal of Criminal Law, etc., I, 808; 3d Annual Meeting, 1911, Journal of Criminal Law, etc., II, 870).

### § 2252. Constitutional and Statutory Phrasings, etc.

[Note 3; add:]

Eng. St. 1904, 4 Edw. VII, c. 15, § 12 (cruelty to children; quoted *ante*, § 488). S. v. S., [1907] p. 224 (divorce by a wife for impotency; cross-bill by the husband for adultery; cross-examination of the wife as to adultery with the co-respondent, held not allowable, under St. 20-21 Vict. c. 85, § 43, and 32-33 Vict. c. 68).

Lewis v. Lewis, [1912] P. 19 (similar).

Alta. St. 1910, 2d sess. c. 3, Evidence Act, § 8 (like Eng. St. 1869, 32-33 Vict. c. 68, § 3, except that instead of applying to any witness, it applies to "the husband or wife, if competent only under this Act").

Ont. St. 1904, 4 Edw. VII, c. 10, § 21 (amends Rev. St. 1897, c. 73, § 5; quoted *post*, § 2281).

Yukon St. 1904, c. 5, § 37 (like N. Sc. Rev. St. 1900, c. 163, § 37).

N. Mex. Const. 1910, Art. II, § 15 ("to testify against himself in a criminal proceeding").

[Note 3 — continued.]

N. J.: 1905, State v. Miller, 71 N. J. L. 527, 60 Atl. 202 (State v. Zdanowicz approved).

N. C. Rev. 1905, § 1635 (like Code 1883, § 1354).

The statutes carrying out these provisions usually occur in connection with clauses qualifying the accused to testify, and will be found *ante*, § 488.

The *Federal Amendment* of course applies in Federal trials only; 1905, *Ex parte Munn*, 140 Fed. 782 (the Federal Fifth Amendment cannot be invoked by one committed by a State court for refusal to answer).

But whether the U. S. Const. 14th Amendment made the provisions of the 5th Amendment in the present respect a *privilege and immunity of citizens of the United States* so as to be protected and reviewable by the Federal Supreme Court, as against a violation by the State, was for a while expressly left undecided.

1904, *Adams v. New York*, 192 U. S. 585, 24 Sup. 372.

1908, *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 28 Sup. 178. But it has now been settled that the privilege is not included in the guarantees of the U. S. Const. Fourteenth Amendment.

1908, *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. 14 (indictment for exhibiting to a bank examiner a false paper, namely, a record of a directors' meeting showing the defendants T. and C. to be present, etc.; the judge charged the jury that C.'s failure to take the stand to deny the testimony that they were present, etc., might be considered for the purpose "of drawing an inference of guilt"; the Federal Court held, in an opinion by Moody, J., (1) that the law of New Jersey, as there judicially construed, "permitted such an inference to be drawn"; (2) that the U. S. Const. Amendment V was not operative for State law; (3) that under the U. S. Const. Amendment XIV, preserving the "privileges and immunities of citizens of the U. S." against impairment by State law, the privilege against self-crimination was not included; (4) that it was also not included in the same Amendment's guarantee of "due process of law"; the opinion contains a careful summary of the legislative history of the privilege in the Colonies; Harlan, J., diss.).

[Note 6; add:]

1911, *Com. v. Cameron*, 229 Pa. 592, 79 Atl. 169 *semble*.

[*Note 8; add:*]

1913, *Karel v. Conlan*, 155 Wis. 221, 144 N. W. 266 (civil action for damages based on criminal conspiracy to libel — whatever that may mean; privilege sustained; but it is incomprehensible how the Court was induced to spend eight pages discussing as arguable such an elementary question, never judicially doubted for a century; it will not do for courts to re-open settled questions whenever ignorant or daring counsel stir up a dust by citing a score of irrelevant cases; note, too, that the opinion misunderstands the point ruled in *People v. Kelly*, N. Y., in stating that it held the privilege not applicable to a witness who was not a defendant; the *Kelly* case involved the effect of an immunity statute, as may be seen from the quotation *post*, § 2282).

[*Note 10; add:*]

Except for *criminal contempt*: 1912, *Merchants' S. & G. Co. v. Board of Trade*, 8th C. C. A., 201 Fed. 20, 28 ("It may be safely said that there is no case where . . . the Fifth amendment applies except where the contempt charged also constitutes a crime"; hence, the defendant may be examined, so long as he is not required to criminate himself otherwise than as being in contempt).

[*Note 11, par. 1; add:*]

1911, *Bentler v. Com.*, 143 Ky. 503, 136 S. W. 896.  
1909, *State v. Naughton*, 221 Mo. 398, 120 S. W. 53.  
1913, *State v. Cox*, 87 Oh. 313, 101 N. E. 135.  
1913, *Scribner v. State*, 9 Okl. Cr. 465, 132 Pac. 933 (Okl. Const. Bill of Rights § 27 applies to testimony before a grand jury).  
1911, *Com. v. Bolger*, 229 Pa. 597, 79 Atl. 113 (testimony before grand jury; the defendant's offer held not explicit enough in its statement of the alleged violation of the privilege).  
1905, *Re Hale*, 139 Fed. 496, 500, C. C. 1906, *Hale v. Henkel*, 201 U. S. 43, 26 Sup. 370.

[*Note 11, par. 2; add:*]

1913, *People v. Bladck*, 259 Ill. 69, 102 N. E. 243.  
1910, *Holt v. U. S.*, 218 U. S. 245, 31 Sup. 2.

#### § 2254. **Kinds of Facts protected; Civil Liability.**

[*Note 2; add:*]

For the peculiar statutes in *Canada* (Dominion and Ontario), abolishing the privilege as to civil liability in certain cases, see *ante*, § 2223, n. 7.

#### § 2256. **Criminal Liability; (a) Forfeiture.**

[*Note 8; add:*]

Whether *deportation* proceedings are criminal has not yet been finally settled: 1903, *U. S. v. Hung Chang*, 126 Fed. 400, 405 (deportation of a Chinese; the person arrested for deportation is not compellable to testify). 1904, *Ark Foo v. U. S.*, 128 Fed. 697, 63 C. C. A. 249, *semble* (similar). 1904, *U. S. v. Hung Chang*, 134 Fed. 19, 25, 67 C. C. A. 93 (deportation of aliens is not a criminal proceeding; the respondent alien's refusal to testify may be the subject of inference against him). 1906, *Low Foon Yin v. U. S.*, 145 Fed. 791, C. C. A. (proceedings for deportation of an alien are not criminal, so as to privilege the defendant). 1906, *Low Chin Woon v. U. S.*, 147 Fed. 727, C. C. A. (*Low Foon Yin v. U. S.* followed).

[*Note 8; add:*]

1908, *U. S. v. Tom Wah*, D. C. N. D. N. Y., 160 Fed. 207 (*Low Foon Yin v. U. S.* followed; the opinion remarks: "This precise question has been passed upon . . . in *Fong Yue Ting v. U. S.*"; but *quære* this statement).

[*Note 10; add:*]

1904, *Attorney-General v. Toronto J. R. Club*, 7 Ont. L. R. 248 (proceeding to revoke a club's charter and enjoin its continuance, for maintaining a betting-house; discovery refused, a forfeiture being involved).

[*Note 11; add:*]

1897, *Earl of Mexborough v. Whitwood U. D. Council*, 2 Q. B. 111 (privilege applied, in an action for forfeiture of a lease by breach of covenant against underletting; *Pye v. Butterfield* followed).

1904, *Miller v. Commissioners*, L. R. 2 Ire. 421 (conditional limitation, and forfeiture, distinguished).

But note that in *Canada*, under the statutes quoted *post*, § 2281, n. 5, abolishing the privilege in part, by the immunity method, the privilege is held to be no longer applicable to prevent discovery in civil cases involving penalties and forfeitures.

### § 2257. *Same: (b) Penalty.*

[*Note 3; add:*]

1892, *Boyle v. Smithman*, 146 Pa. 255, 274, 23 Atl. 397 (action to recover penalties for not posting a statement of business done, under a statute declaring that the defendant "shall forfeit and pay" one thousand dollars for each act; privilege applied).

[*Note 4, add a new par.:*]

*Contempt*: 1909, *Hammond Lumber Co. v. Sailors' Union*, C. C. N. D. Cal., 167 Fed. 809, 823 (a proceeding to punish for contempt of an injunction is a criminal proceeding, for the purposes of a claim of this privilege; cases collected).

[*Note 6; add:*]

1913, *Karel v. Conlan*, 155 Wis. 221, 144 N. W. 266 (libel; cited more fully *ante*, § 2252, n. 8).

[*Note 8; add:*]

1881, *Horstman v. Kaufman*, 97 Pa. 147 (discovery by a plaintiff in execution against a defendant for fraudulent concealment of property, refused, the conduct being a misdemeanor).

[*Note 10, par. 1; add:*]

1906, *Patterson v. Wyoming Valley District Council*, Pa. Super. Ct. (appeal dismissed without an opinion, confirming the decision of Head, J., published in advance sheets of 78 N. E. Rep., Oct. 19; in an attachment for contempt in the violation of an injunction against a boycott by a labor union, the production of the defendant's books was held not within the privilege).

1907, *Cassatt v. Mitchell C. C. Co.*, — C. C. A. —, 150 Fed. 32, 44 (whether in a civil action against a carrier for damages under U. S. St. 1887, c. 104, Feb. 4, § 8, the criminality of the same conduct under *ib.* § 10 allows the privilege to operate; not decided).

### § 2258. *Crime under Foreign Sovereignty.*

[*Note 3; add:*]

1913, *Buckeye Powder Co. v. Hazard P. Co.*, Conn. D., 205 Fed. 827 (State law of criminal libel).

[*Note 4; add:*]

1903, *People v. Butler St. F. & I. Co.*, 201 Ill. 236, 66 N. E. 349 (cited *post* § 2281, n. 11).  
1904, *State v. Jack*, 69 Kan. 387, 76 Pac. 911 (Kansas anti-trust law; the witness claiming

[Note 4 — *continued*]

that his business involved also interstate commerce, it was held that "the possibility that his answers might disclose violations of the Federal anti-trust law" was not a "real and probable danger," following *Brown v. Walker*, U. S.).

The doctrine of *Brown v. Walker*, that there must be a "real and probable danger" has since been thus developed: 1905, *Jack v. Kansas*, 179 U. S. 372, 26 Sup. 73 (information under the Kansas anti-trust act, in the Kansas District Court; held that the possibility that answers might be given which might also incriminate him under the Federal anti-trust act was too remote, the Kansas Court having ruled that matters constituting a violation of the Federal act would be immaterial in the proceeding in question; two judges dissenting; in this case, however, it would seem that the Federal Court erred in assuming, as it did, that under the U. S. 14th Amendment the witness should be protected from the Kansas Court even if there was a "real danger" of Federal prosecution). 1905, *Ballmann v. Fagin*, 200 U. S. 186, 26 Sup. 212 (a witness in a Federal Court refused to produce a book, and made the claim that it would criminate him either under the Federal bucket-shop act, Rev. St. § 5209, or under the Ohio bucket-shop act, alleging that several charges under the latter act were pending; held privileged, on the authority of *Jack v. Kansas*, *supra*; two judges dissenting). 1906, *Hale v. Henkel*, 201 U. S. 43, 26 Sup. 370 (anti-trust law; that a Federal immunity-statute would not protect a witness from possible prosecution under a State law in a State court is immaterial; approving *King of Sicilies v. Wilcox*, *supra*, n. 3, and distinguishing *U. S. v. Saline Bank*, *supra*, n. 3).

#### § 2259. Crime of a Third Person; Officers of a Corporation and Public Officials.

[Note 1; *add.*]

1906, *Washington Nat'l Bank v. Daily*, 166 Ind. 631, 77 N. E. 53, *semble* (cited *ante*, § 2193, n. 3).

Distinguish the rule that the witness alone, *not the party* to the trial, can claim the privilege (*post*, § 2270).

[Note 2; *add.*]

*Contra*: 1910, *Cumberland T. & T. Co. v. State*, 98 Miss. 159, 53 So. 489 (a corporation is not within the constitutional privilege; following *Hale v. Henkel*, but here Code § 5018 expressly gave immunity).

1909, *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, 1017 (a corporation "has no constitutional right to refuse to produce its books and papers").

1906, *Hale v. Henkel*, 201 U. S. 43, 26 Sup. 370 (on subpoena to the secretary-treasurer of a New Jersey corporation to produce corporate documents before a grand-jury investigating offences against the Federal anti-trust law, it was held, *Brewer, J.*, and *Fuller, C. J.*, diss., that conceding the officer to be "entitled to assert the rights of the corporation, . . . there is a clear distinction in this particular between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the State; . . . the corporation is a creature of the State, it receives certain special privileges and franchises, . . . [and may therefore not refuse to answer criminating questions] when charged with an abuse of such privileges"). 1907, *Cassatt v. Mitchell C. & C. Co.*, — C. C. A. —, 150 Fed. 32, 45 (whether a corporation is a "person" under either constitutional amendment; the "varying expressions of opinion" in *Hale v. Henkel* pointed out). 1907, *International Coal M. Co. v. Pennsylvania R. Co.*, 152 Fed. 557, C. C. (a corporation has not a privilege to refuse to disclose books in a proceeding to recover a penalty; following *Hale v. Henkel*). 1911, *Wilson v. U. S.*, 221 U. S. 361, 31 Sup. 538 (the defendant was president of a corporation; an indictment was found against him and other officers; a *subpoena d. t.* was issued against the corporation and served on the defendant, and also the

[Note 2 — continued]

secretary and directors; the defendant was the custodian of the books, which contained his own and corporate business; he refused to produce; the directors voted that he surrender the books to them for production, and he again refused; held (1) that the corporation, in view of the reserved visitatorial powers of the State, had no privilege against self-crimination; (2) that the defendant had no privilege to withhold the corporate books, even though the entries were made by him; (3) that his personal letters therein were privileged). 1911, *American Lithographic Co. v. Werckmeister*, 221 U. S. 603, 31 Sup. 676.

*Undecided*: 1907, *Re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790 (foreign corporation subpoenaed *d. t.* before a grand jury; not decided).

The decision in *Hale v. Henkel*, *supra*, may perhaps be supported on the ground that where the criminality of an act consists, for a corporation, essentially in the violation of its franchise or privilege, the feature of criminality is a merely incidental one; or on the ground that the power to create involves the power to forfeit. But the opinion does not face the argument *contra* based on the criminal capacity of a corporation. Moreover, the Court's opinion has left a vital point still unnoticed. That point is this: The privilege began, continued, and now exists at common law, independently of statute; the Constitution merely guarantees it against legislative alteration; did the Supreme Court, then, mean to say that a corporation was and is not within the privilege at common law? or did they mean to say merely that the Constitutional guarantee of it to all "persons" does not include corporations? If they meant the former, then no immunity needs to be given to, nor can be claimed by, a corporation; and Courts are free to exact everything from a corporation. But if they meant the latter, then the privilege stands, for corporations, until abolished by the Legislature; hence, if the Legislature has not abolished it, the corporation may still claim it. Hence also, if the Legislature in abolishing it has chosen (unnecessarily, to be sure) to grant immunity as an inseparable gift annexed therewith, the corporation will get the immunity when forced to relinquish the privilege. The importance of this distinction in the current attempts to investigate corporate conduct is obvious. But no certain light upon it is to be found in *Hale v. Henkel*. The opinion in *Wilson v. U. S.* adopts the former of these two views.

The corporation must of course *make its claim through its officer or counsel*, when called upon as an ordinary witness (*post*, § 2270, n. 1); but when the corporation is a party, and its officer is summoned as a witness, the claim by the corporation or its counsel, on its own behalf, must be distinguished from the officer's personal claim, — as in *Hale v. Henkel*, *McAlister v. Henkel*, *infra*, n. 3; compare § 2200, par. (4), *ante*, Supplement.

The privilege has been *legislatively abolished* for corporations in certain offences, since the decision in *Hale v. Henkel*, *supra*:

in *California*, for public utilities (St. 1907, C. 14, § 55).

in *Michigan*, for certain cases (St. 1911, No. 2, quoted *post*, § 2281).

in *Mississippi*, for certain cases (St. 1912, c. 251, cited *post*, § 2281).

in *Missouri*, for public service corporations (St. 1913, p. 556, Mar. 17; quoted *post*, § 2281).

in *New York*, for investigations by the conservation department: St. 1911, c. 647, p. 1496, § 25, and St. 1912, c. 444, § 4 (cited more fully, *post*, § 2281).

in *Oregon*, for public utilities inquiries (St. 1911, c. 279, p. 483, § 59).

in the *Federal* courts, for anti-trust offences, etc. U. S. St. 1906, June 30, c. 3920, Stat. L. vol. 34, p. 798 (under the acts of Feb. 11, 1893, Feb. 14, 1903, Feb. 19, 1903, and Feb. 25, 1903, quoted *post*, § 2281; "immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath").

in *Wisconsin*, for railroad corporations, in certain cases (St. 1905, c. 447, § 1, quoted *post*, § 2281, n. 5).

[Note 3, par. 1; *add*.:]

*Mich.*: 1904, *Re Moser*, 138 Mich. 302, 101 N. W. 588 (the president of a corporation held bound to produce the corporate books for a period ante-dating his interest in the corporation; since he had "no right to attempt to avert real danger from others, no matter how closely he may be associated with them"; moreover, "when as agent for another he chooses to make entries on the books of that other," the books may be produced from the other's possession).  
*Mo.*: 1909, *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, 1017.

*Okl.*: 1913, *Burnett v. State*, 8 Okl. Cr. 639, 129 Pac. 1110 (president and cashier of an insolvent bank corporation, held bound to hand over the bank's book to the State bank commissioner; following *Wilson v. U. S. infra*; but here the plea alleged that the books "might" incriminate the defendants).

*U. S.*: 1890, *Re Peasley*, 44 Fed. 271, 275, C. C. (the treasurer of a corporation, held not privileged to withhold the corporate books on the ground that their contents might criminate the corporation). 1906, *Hale v. Henkel*, 201 U. S. 43, 26 Sup. 370 (the constitutional privilege "is limited to a person who shall be compelled in any criminal case to be a witness against himself; and if he cannot set up the privilege of a third person, he certainly cannot set up the privilege of a corporation"; here the witness was subpoenaed personally before a grand jury investigating by presentment against the corporation). 1906, *McAlister v. Henkel*, 201 U. S. 90, 26 Sup. 385 (similar to *Hale v. Henkel*; here the witness was subpoenaed before the grand jury on a charge and complaint against the corporation).

1911, *Wilson v. U. S.*, 221 U. S. 361, 31 Sup. 538 (cited more fully *supra*, note 2).

[Note 3; par. 2, l. 3:]

For "§ 2193," read "§ 2200, n. 10."

[Note 4; *add*.:]

1914, *Com. v. Phoenix Hotel Co.*, 157 Ky. 180, 162 S.W. 823 (prosecution for illegal sale of game; the defendant's hotel manager's claim of privilege, on the ground that facts showing the defendant's guilt would show his own also, was sustained).

1907, *Ex parte Hedden*, 29 Nev. 352, 90 Pac. 737 (corporation books in the custody of A. J. L. auditor, were summoned by subpoena on A. J. L. to be produced before the grand jury, whereon A. J. L. was ordered by the president to hand over the books to J. F. H. general superintendent; held that J. F. H., not being legal custodian, was not privileged to withhold the books on the ground that the matters contained therein would criminate himself. *McAlister v. Henkel* distinguished; but what does the opinion mean by saying, in this day and generation, that the privilege "was reaffirmed in Magna Charta"?)

1906, *McAlister v. Henkel*, 201 U. S. 90, 26 Sup. 385 (a corporate officer may plead the privilege to resist production of books where the books contain criminating transactions of his own and are "to all intents and purposes his own books"). 1911, *Wilson v. U. S.*, 221 U. S. 361, 31 Sup. 538 (cited *supra*, note 2).

The following ruling is distinguishable:

1909, *Manning v. Mercantile Securities Co.*, 242 Ill. 584; 90 N. E. 238 (the defendants were officers of a corporation, in a winding-up proceeding by stockholders charging criminal fraud in the business; a receiver being appointed, the chancery court ordered the defendants to hand over the corporation books to the receiver, but the defendants failed to do so, and on citation for contempt, answered alleging that the books contained matter incriminating them; held, that the privilege did not here protect them, under the principles of §§ 2264 and 2271, *post*).

Courts ought to recognize a form of subpoena which will obtain the corporate books *without summoning the corporation-custodian*; as more fully noticed *ante*, § 2200, par. 4 (Suppl. 1907).

Of course, the privilege may here, as elsewhere, be *taken away* by grant of immunity; *e.g.* as in Wis. St. 1905, c. 447, § 2 (quoted *post*, § 2281, n. 5; abolishes the privilege for officers, etc., of railroad corporations in certain cases).

[*Note 5; add:*]

Haw. St. 1913, No. 42, p. 48, Mar. 28, § 6 (Financial Commission for Hawaii Co., privilege abolished, but "an official paper or record produced by such witness is not within such privilege").

1909, *State v. Pence*, 173 Ind. 99, 89 N. E. 488 (under a statute requiring a druggist to keep applications for liquor sold, the defendant was held entitled to refuse to produce the incriminating applications on order of a court for a grand jury, and an indictment founded thereon was abated).

U. S. Rev. St. 1878, § 859 ("an official paper or record produced" by a witness before Congress "is not within said privilege"; quoted more fully *post*, § 2281).

[*Note 5; add:*]

Whether a report required by law to be filed is within the privilege from another point of view, is noticed *post*, § 2264, note 12a.

### § 2260. Facts "tending to criminate."

[*Note 7; add:*]

1905, *Ex parte Conrades*, 112 Mo. App. 21, 85 S. W. 150 (ordinance to investigate mercantile books in order to discover possible assets evading taxation; privilege held not applicable to the defendant's books at large without a specific claim as to incriminating facts).

1906 *Noyes v. Thorpe*, 73 N. H. 481, 62 Atl. 787 (bill of discovery against the publisher of a libel, which was also a criminal one; the defendant held privileged not to produce the original manuscript nor to disclose the name of the author).

1906, *Ex parte Merrell*, 50 Tex. Cr. 193, 95 S. W. 1047 (liquor sales).

1906, *Rudolph v. State*, 128 Wis. 222, 107 N. W. 466 (bribery; cited more fully *post*, § 2281 *a*, n. 15).

### § 2261. Facts furnishing a Clue to the Discovery of Criminal Facts.

[*Note 4; add, under Accord:*]

1906, *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552, *semble*.

1904, *Re Briggs*, 135 N. C. 118, 47 S. E. 403 (question No. 3 here put was similar to that considered in *Ward v. State*, Mo., *supra*; the opinion of Clark, C. J., for the Court, overruling the claim of privilege, does not allude to this question; but Walker, J., specially concurring, says: "We all agree, as I understand, that the first three questions did not tend to criminate the witness," citing *Ward v. State*).

### § 2264. Production or Inspection of Documents and Chattels.

[*Note 1; add:*]

1906, *Hale v. Henkel*, 201 id. 43, 26 Sup. 370 (cited more fully *infra*, note 11a).

But it seems clear that the witness must at least answer the preliminary question whether he *has possession* of the book asked for; this may be inferred from the principle of § 2271, *post*, and from the analogy of the civil party's privilege against discovery (*ante*, § 1859, n. 14, § 2200, nn. 7, 8, § 2219), and the rule of § 2260, *ante*, can seldom avail to override this result: *Contra, semble*, per Holmes, J., in *Ballmann v. Fagin*, 200 U. S. 186, 26 Sup. 212 (1905).

[*Note 2, par. 1; add:*]

Cal.: 1909, *People v. LeDoux*, 155 Cal. 535, 102 Pac. 517 (papers taken on an unauthorized search, admitted; *Adams v. New York*, U. S., followed; *Boyd v. U. S.* distinguished).

D. C.: 1912, *U. S. v. Halstead*, 38 D. C. App. 68 (taking of a bankrupt's books, by a receiver under court order; privilege not violated).

Ga.: 1906, *Duren v. Thomasville*, 125 Ga. 1, 53 S. E. 814 (liquor seized by unlawful search; *Williams v. State* followed); but now see the later cases cited *infra*, note 77).

[Note 2 — continued]

*Ill.*: 1904, *Swedish-American Tel. Co. v. Fidelity & C. Co.*, 208 Ill. 562, 70 N. E. 768 (here the privilege was held not violated by an order which merely authorized inspection of the books by the applicant-party while in the defendant's possession). 1909, *Manning v. Mercantile Securities Co.*, 242 Ill. 584, 90 N. E. 238 (officers of a corporation having custody of corporation documents, ordered to hand them over to a receiver appointed in winding-up proceedings, held in contempt for refusal and not to be protected by the privilege, because "the possession of the receiver is the possession of the Court"; but the opinion unsoundly announces that "the appellants could be fully protected by the Court from the use of such evidence against them while the books are in the hands of the receiver"; for the writ of sequestration is like a search-warrant and involves no testimonial process against the officers).

*Kan.*: 1905, *State v. Schmidt*, 71 Kan. 862, 80 Pac. 948 (bottles of liquor, seized from the defendant's possession by an officer without a warrant, admitted).

*La.*: 1904, *State v. Aspara*, 113 La. 940, 37 So. 883 (clothing taken from defendant in jail, exhibited).

*Md.*: 1906, *Lawrence v. State*, 103 Md. 17, 63 Atl. 96 (documents taken by the police from the defendant's satchel or from his person under arrest, admitted; *Boyd v. U. S.* not followed as to its *obiter* statements, but *Adams v. New York, U. S.*, *infra*, n. 11a, followed; *Blum v. State, Md.*, *infra*, n. 11, distinguished, as involving "virtually compulsory process for the production of evidence in the immediate proceeding in which it was offered").

*Minn.*: 1905, *State v. Strait*, 94 Minn. 384, 102 N. W. 913 (defendants were bankers in partnership, and on voluntary assignment in bankruptcy a trustee took possession of the banking books; held that the defendants were not entitled to claim the privilege to prevent the use of the books before the grand jury on subpoena to the trustee; *Boyd v. U. S.* distinguished). 1911, *State v. Rogne*, 115 Minn. 204, 132 N. W. 5 (scrap iron taken by the sheriff from the defendant's premises; privilege not applicable).

*Mo.*: 1908, *State v. Jeffries*, 210 Mo. 302, 109 S. W. 614 (defendant's shoes; "it is immaterial how they were obtained").

*Mont.*: 1906, *State v. Fuller*, 34 Mont. 12, 85 Pac. 369 (the majority opinion in *Boyd v. U. S.*, disapproved).

*N. Y.*: *People v. Adams*, *supra*, affirmed on writ of error in *Adams v. New York*, 192 U. S. 585, 24 Sup. 372 (1904), (stated *infra*, n. 11a).

*Pa.*: 1910, *Com. v. Ensign*, 228 Pa. 400, 77 Atl. 657 (insolvent banker's receipt of deposits; his books delivered by him to the U. S. bankruptcy trustee in involuntary bankruptcy, and obtained from the trustee, admitted).

*S. D.*: 1908, *State v. Vey*, 21 S. D. 612, 114 N. W. 719 (unsealed letter handed by accused to sheriff in jail, and kept by sheriff; admitted).

*Vt.*: 1905, *State v. Krinski*, 78 Vt. 162, 62 Atl. 37 (illegal keeping of liquors; articles seized under an illegal warrant, admitted; distinguishing *State v. Slamon, Vt.*, *infra*, n. 11, and approving *Adams v. U. S.*, *U. S.*, *infra*, n. 11a). 1905, *State v. Barr*, 78 Vt. 97, 62 Atl. 43 (like *State v. Krinski*, *supra*).

*Wash.*: 1905, *State v. Royce*, 38 Wash. 111, 80 Pac. 268 (burglary; a pawn ticket taken from the defendant's person on search by the arresting officers, admitted; *Gindrat v. People, Ill.*, followed).

Distinguish also the rule that a subpoena for documents must be *reasonably specific* in its terms, in order to be entitled to obedience (cases cited *ante*, § 2200, n. 6).

Compare the rule admitting documents *obtained by illegal search* (*ante*, § 2183); that rule and the present one are often involved in the same case.

[Note 9; *add.*:]

Of course, on an *application for the return of documents or chattels unlawfully seized* by the officer, the doctrine of *U. S. v. Boyd* can properly be given full effect.

1911, *U. S. v. Mills*, C. C. S. D. N. Y., 185 Fed. 318.

[*Note 11; add:*]

Ga.: 1907, *Hammock v. State*, 1 Ga. App. 126, 58 S. E. 66 (carrying concealed weapons; practically repudiating, for this State, the foregoing cases; cited more fully *ante*, § 2183, n. 1).

1907, *Hughes v. State*, 2 Ga. App. 29, 58 S. E. 390 (similar).

1907, *Sherman v. State*, 2 Ga. App. 686, 58 S. E. 1122 (similar). 1907, *Smith v. State*, 3 Ga. App. 326, 59 S. E. 934 (selling liquor illegally; the *Hammock Case* distinguished; see the citation *ante*, § 2183, n. 1). 1913, *Underwood v. State*, 13 Ga. App. 206, 78 S. E. 1103 (cited more fully *ante*, § 2183, n. 1).

Okl.: 1911, *Gillespie v. State*, 5 Okl. Cr. 546, 115 Pac. 620 (cited more fully *post*, § 2273, n. 3).

[*Text*, p. 3127, last line; *add:*]

That case, however (*Boyd v. U. S.*), in later Federal opinions, has in effect been pared down, and for practical purposes repudiated (in respect to the *obiter* statements in the majority opinion, above noted), by rulings which hold decisively (1) that the Fourth Amendment does not prevent the use of documents and chattels obtained by search-warrant, and (2) that furthermore the use of documents produced under compulsion of subpoena, for which the privilege under the Fifth Amendment has been taken away by an immunity-statute, cannot be objected to on the ground of the Fourth Amendment.<sup>11a</sup>

<sup>11a</sup> 1893, *Tucker v. U. S.*, 151 U. S. 164, 168, 14 Sup. 299 (defendant's affidavit, voluntarily filed, for the summoning of witnesses in his behalf, admitted to contradict him, and held not to be a violation of the privilege nor of U. S. Rev. St. 1878, § 860, quoted *post*, § 2281).

1904, *Adams v. New York*, 192 U. S. 585, 24 Sup. 372 (facts stated *supra*, n. 2, in *People v. Adams*, N. Y., brought here on writ of error; the Federal Court referred to the opinion of the majority in *Boyd v. U. S.* with apparent approval of its statement as to the history of the two Amendments; but held that here there was no violation of either Amendment, — not of the Fifth, because "he was not compelled to testify concerning the papers or make any admission about them," nor of the Fourth, because the search was not wrongful; and that in any event the effect of the Fourth does not "extend to excluding testimony which has been obtained by such means, if it is otherwise competent"; thus practically drawing the fangs of the erroneous *obiter dictum* in the majority opinion of *Boyd v. U. S.*).

1904, *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. 563 (order to an officer of a defendant corporation to testify and produce certain contracts of the corporation before the Commission; the privilege of the Fifth Amendment being obviated by the immunity of St. 1893, under § 2281, *post*, the Court held that the Fourth Amendment did not stand in the way; "testimony given under such circumstances presents scarcely a suggestion of an unreasonable search or seizure"; this squarely contradicts in effect the *obiter dictum* of the majority opinion in *Boyd v. U. S.*).

1906, *Hale v. Henkel*, 201 U. S. 43, 26 Sup. 370 (similar, for corporation documents produced upon subpoena before a grand jury, by an officer entitled to the immunity-clause of St. 1903, Fed. 25, quoted *post*, § 2281; of the *Boyd case*, it is said that "subsequent cases treat the Fourth and Fifth Amendments as quite distinct, having different histories, and performing different functions"; this seems to signify plainly that the *obiter* statements of the majority opinion in the *Boyd case* are no longer approved by the Federal Supreme Court; Harlan and McKenna, JJ., concurring, emphasize the fact that a corporation may not be within the Fourth Amendment at all).

1908, *U. S. v. Wilson*, C. C. S. D. N. Y., 163 Fed. 338 (cited more fully *ante*, § 2183).

1910, *In re Tracy & Co.*, D. C. S. D. N. Y., 177 Fed. 532 (refusing to restrain a trustee in bankruptcy from delivering to the district attorney for use in prosecution the bankrupt's

[Text, p. 3127 — continued]

books taken possession of by the receiver, delivered by him to public accountants, and taken by the district attorney from them under subpoena with the trustee's connivance; there need not have been any hesitation about this case).

1912, *Johnson v. U. S.*, 228 U. S. 457, 33 Sup. 572 (where a bankrupt's books have been transferred to the trustee under § 70 of the Bankruptcy Act, without any reservation of rights in the court's order, then the trustee's use of the books, either before the grand jury or before the trial jury, on a charge of fraudulent concealment of assets, is not a violation of the privilege; opinion per Holmes, J.: "A party is privileged from producing the evidence, but not from its production"; "A man cannot protect his property from being used to pay his debts by attaching to it a disclosure of crime").

1913, *U. S. v. Harris*, D. C. S. D. N. Y., 164 Fed. 292 (motion for receiver asking for order that bankrupt deliver books of account to the receiver; order framed directing delivery, but protecting them against any use other than for civil litigation over the estate; the Court very properly hesitates over the order; but why was it assumed that without such an order the receiver could not get lawful possession of the books? Are not the books a part of the business property and is not the receiver entitled to enter in possession and turn out the bankrupt? A man who buys a horse and stable from another is entitled to go to the stable and take the horse without waiting for a court order).

1914, *Weeks v. U. S.*, 232 U. S. 383, 34 Sup. 341 (cited more fully *ante*, § 2189, n. 1; it probably does not restrict the effect of the prior rulings, so far as the present principle is concerned).

[Text, p. 3128, par. (a), at the end; add:]

An interesting question is here presented by those laws which require, from persons in a particular *business*, the *filing of a report* or schedule in the hands of some public officer. Are we to say that this is a compulsory testimonial disclosure, and that therefore the report need not be prepared and filed at all, so far as concerns matters tending to criminate? Or are we to say that if the purpose of the report is primarily to assist in the public administration, it must be prepared and filed, and that then its use in a criminal prosecution, if attempted, can be barred by the privilege? The latter seems the more practical view. But the cases have thus far been decided on individual grounds, usually either that of waiver or that of official duty.<sup>12a</sup>

<sup>12a</sup> Compare the statutes cited *post*, § 2281, and the following cases: 1903, *People v. Butler S. F. & I. Co.*, Ill., cited *post* § 2281, n. 11 (trusts).

1888, *State v. Smith*, Ia., cited *ante*, § 2259, n. 5 (pharmacist). 1888, *State v. Cummins*, Ia., cited *ante*, § 2259, n. 5 (pharmacist).

1900, *People v. Henwood*, 123 Mich. 317, 82 N. W. 70 (St. 1899, No. 183, § 25, requiring druggists to file with the prosecuting attorney a sworn report of liquors sold, held not to violate the privilege, in so far as a failure to file a report was charged as the offence of the druggist). 1904, *People v. Robinson*, 135 Mich. 511, 98 N. W. 12 (druggist; a report voluntarily filed was held admissible).

1894, *St. Joseph v. Levin*, 128 Mo. 588, 31 S. W. 101 (pawnbroker; like *People v. Henwood*, Mich).

1910, *People ex rel. Ferguson v. Reardon*, 197 N. Y. 236, 90 N. E. 829 (a tax-statute applicable to brokers provided that transfers of stock should be taxed, that each broker should keep an account-book entering such transfers made by him, that the failure to pay the tax should be an offence, and that the failure to make entries of transfers should be an offence; the Comptroller's agent demanded inspection of the relator's books, but he refused; held, that he was privileged. The opinion proceeds on erroneous reasoning, for it treats the pro-

[Text, p. 3128 — continued]

ceeding as an attempt to "force the relator to produce before the Comptroller his books," which it was not. The mere inspection by the agent could not be in any sense a compulsion of the relator to testify. The only compulsory self-crimination could have been the relator's making an entry exhibiting that he had transferred stock without paying tax; but as the offence could consist only in subsequent non-payment, it is difficult to see how the entry could have been a crime. The non-entry would have been an offence; but the agent's inspection and discovery of a non-entry would not have been a self-criminating production by the broker).

1901, *State v. Donovan*, N. D., cited *ante*, § 2259, n. 1 (druggist).

An analogous case is presented by those laws which require a person whose vehicle, machinery, or other property has caused an injury, to make an oral disclosure to an official, at the time, of his name and address or of other circumstances of the injury. Here it would seem that the policy of the privilege, at least (*ante*, § 2251), is not infringed, i.e. the danger of encouraging the police and prosecuting officers to rely upon the accused's self-disclosure, instead of searching completely to amass all the evidence of an offence; for a disclosure under such statutes is made freshly on the spot, if at all, and no motive is afforded for slackness in the search for evidence and for relying upon a later disclosure by the accused at the pleasure of the prosecuting officers. Moreover, the failure to make such a disclosure may block all subsequent efforts to discover the offender, and thus the privilege, if it annuls such statutes, may do the most harm to justice of which it is ever capable. On the other hand, it is difficult to avoid the conclusion that *logically* the principle of the privilege applies, for the statutory rule is in effect the same as if it required the doer of any crime to make immediate report of his name and address; and the former item at least is plainly a fact "tending to criminate." It would seem that the only safe legislation of this sort would limit itself to requiring the vehicle-operator to stop; omitting any requirement as to self-disclosure of name and address; for if he stops, the police or the bystanders can then observe the vehicle-number and may even arrest him and search him (*supra*, note 2), which fully answers the needs of justice. And to make the non-stopping a crime is not to violate the privilege, any more than to make the non-bearing of a numbered tag is a violation.<sup>126</sup>

<sup>126</sup> The cases hitherto are few, and the opinions inadequate:

1912, *Ex parte Kneedler*, 243 Mo. 632, 147 S. W. 983 (St. 1911, p. 328, § 12, provided that any operator of a motor vehicle "who knowing that injury has been caused to a person or property due to the culpability of the said operator or to accident, leaves the place of said injury or accident without stopping and giving his name, residence," etc., to the injured person, or a police officer, etc., shall be guilty of a felony; held not unconstitutional; (1) the mere fact of identity is "no evidence of guilt"; "in the large majority of cases, such accidents are free from culpability"; this reasoning is fallacious, and ignores the principle of § 2260, *ante*; (2) even if the statute violates the privilege, the question should be raised on the trial for the offence, and not by habeas corpus, as here).

1913, *People v. Rosenheimer*, 128 N. Y. Suppl. 1093, 130 N. Y. Suppl. 544, 209 N. Y. 115, 102 N. E. 530 (a statute providing that a person operating a motor vehicle, who, knowing that injury has been caused by the operator's culpability, leaves the place without stating his name, address, etc., shall be guilty of a felony, does not in requiring such disclosure violate

[Text, p. 3128 — continued]

the privilege, and an indictment for such a felony is valid; reversing two intermediate rulings; approving *Ex parte Kneedler*, Mo.; one judge diss. in the Court of Appeals; the opinions do not adequately dispose of the question).

### § 2265. Bodily Exhibition.

[Note 2; add:]

1910, *State v. McKowen*, 126 La. 1075, 53 So. 353 (defendant's refusal to write the word "incurable," as a test of his spelling, allowed to be considered; but here he had presumably waived his privilege by taking the stand).

1906, *State v. Church*, 199 Mo. 605, 98 S. W. 16 (examination of defendant in jail by physicians without objection by defendant, held not to violate the privilege).

1905, *State v. Miller*, 71 N. J. L. 527, 60 Atl. 202 (defendant called upon by officers to place his hand upon a bloody mark, for comparison; allowed, the accused having voluntarily complied).

[Note 3; add:]

1906, *Moss v. State*, 146 Ala. 686, 40 So. 340 (shoes taken off voluntarily by the accused in prison, at an officer's request, and handed to him; admitted).

1904, *Shaffer v. U. S.*, 24 D. C. App. 417, 425 (accused allowed to be identified by a photograph of him taken while under arrest).

1912, *Terr. v. Chung Ning*, 21 Haw. 214, 219 (examination of defendant's person by ordering him to remove his trousers, "which he did without objection," held not a violation of the privilege).

1905, *State v. Arthur*, 129 Ia. 235, 105 N. W. 422 (burglary; shoe measurements admitted, made with shoes given up by the defendant to the sheriff at his direction; *State v. Height* distinguished, because the defendant's voluntary surrender of the shoes was a waiver).

1906, *State v. Graham*, 116 La. 779, 44 So. 90 (sheriff's measurements of shoe-tracks, by putting the accused's feet in them, without resistance by him, admitted).

1909, *Downs v. Swann*, 111 Md. 53, 73 Atl. 653 (photographing and measuring of arrested persons not yet convicted, for purposes of identification, is not a violation of the privilege; collecting the authorities).

1908, *Magee v. State*, 93 Miss. 865, 46 So. 529 (compelling the accused to put his foot in a track, to identify him, held not a violation of privilege; careful opinion by Whitfield, C. J.).

1906, *State v. Ruck*, 194 Mo. 416, 92 S. W. 706 (accused compellable to stand up for identification by a witness). 1909, *State v. Newcomb*, 220 Mo. 54, 119 S. W. 405 (rape under age; physician's examination of defendant's private parts, while under arrest, by order of the justice, held a violation of the privilege). 1913, *State v. Horton*, 247 Mo. 657, 153 S. W. 1051 (physician's examination for venereal disease by order of police captain, held a violation of the privilege, on the erroneous ground that failure to object is not a waiver).

1906, *State v. Fuller*, 34 Mont. 12, 85 Pac. 369 (shoes of defendant, compared by the sheriff with footprints; privilege not violated; here the defendant voluntarily gave them to the officer, but the opinion expressly declares this immaterial).

1905, *Krens v. State*, 75, Nebr. 294, 106 N. W. 27 (testimony to comparisons of shoe-tracks, made with shoes taken from the accused, allowed).

1879, *State v. Ah Chuey*, 14 Nev. 79 (the defendant was compelled "to exhibit his arm so as to show certain tattoo marks"; held, not a violation of privilege; "no evidence of physical facts can be held" to be within the privilege; best opinion, by Hawley, J.; Leonard, J., diss.). 1910, *State v. Petty*, 32 Nev. 384, 108 Pac. 934 (the defendant, pleading sadistic insanity, and having called an expert who had examined him, the Court's order appointing three other physicians to examine him in the county jail for the same purpose, was held proper).

## [Note 3 — continued]

1905, *State v. Miller*, 71 N. J. L. 527, 60 Atl. 202 (doctor's testimony to wounds on the accused's hands, observed after the accused's clothes were taken off in jail, admitted; here it did not appear that the exhibition was not voluntary, but the Court laid down the same rule for a forcible stripping).

1907, *People v. Furlong*, 187 N. Y. 198, 79 N. E. 978 (*People v. Truck* followed). 1908, *People v. Strollo*, 191 N. Y. 42, 83 N. E. 573 (search and examination by the police, held not a violation of privilege on the facts).

1912, *State v. Thompson*, 161 N. C. 238, 76 S. E. 249 (the constable told the accused to shoulder the gun, aim it, etc., and he did so; held admissible, following *State v. Graham*).

1906, *State v. Sanders*, 75 S. C. 409, 56 S. E. 35 (placing defendant's foot in a track, with his consent, held not a violation of the privilege). 1913, *State v. McIntosh*, 94 S. C. 439, 78 S. E. 327 (like *State v. Atkinson*; admitted).

1906, *Turman v. State*, 50 Tex. Cr. 7, 95 S. W. 533 (rape; held improper "for the State to require appellant to place the cap on his head for the purpose of identification by the prosecutrix," although he had voluntarily taken the stand; *Benson v. State* ignored; this Court seems disposed to make it hard for an accused not to be acquitted). 1907, *Powell v. State*, 50 Tex. Cr. 592, 99 S. W. 1005 (photographs of defendant's hand, taken with his consent and after warning, admitted).

1910, *Holt v. U. S.*, 218 U. S. 245, 31 Sup. 2 (the accused's putting on of a blouse, to see whether it was his; held, not privileged).

## § 2268. Criminating Questions not forbidden.

## [Note 2; add:]

1905, *Re Knickerbocker Steamboat Co.*, 139 Fed. 713, C. C. (the party claiming privilege "must say so in unmistakable language and give the reasons for shielding himself").

1908, *U. S. v. Price*, *U. S. v. Haas*, C. C. S. D. N. Y., 163 Fed. 904 (the now defendants had been subpoenaed to appear before the grand jury; they appeared and were informed of the subject of inquiry and of their privilege, and were sworn; they protested against being sworn, claimed privilege as to the few preliminary questions asked, and were then dismissed; held (1) that they were not in the position of defendants but of ordinary witnesses, and (2) that as witnesses their privilege was not violated; careful opinion by Hough J.).

1907, *Re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790 (the witness must appear and make claim; he cannot refuse to obey a subpoena *d. t.* and also claim privilege).

*Contra*: 1911, *State v. Thorne*, 39 Utah 208, 117 Pac. 58 (no relevant authority cited; does the privilege justify us in tenderly swathing accused persons in cotton wool?).

## [Note 3, col. 2, l. 8 from the top; add:]

*Contra*: 1897, *Earl of Mexborough v. Whitwood U. D. Council*, 2 Q. B. 111 (forfeiture of lease; leave to administer interrogatories, denied; foregoing cases not cited).

## [Note 3; add, at the end:]

For a consideration of the effect of this doctrine on the *immunity-statutes*, see *post*, § 2281a.

## [Note 4; add:]

So also for inquiries by a *grand jury*; the witness must take the oath before the privilege can be claimed:

1913, *State v. Cox*, 87 Ohio 313, 101 N. E. 135.

## [Note 5; add, in accord with the Text:]

1900, *Re Green*, 86 Mo. App. 216 (cited *infra*, n. 6).

1904, *Ex parte Sauls*, 46 Tex. Cr. 209, 78 S. W. 1073 (*habeas corpus*; the relators were ar-

[*Note 5 — continued*]

rested under a search-warrant for liquor illegally kept, and on arraignment before the justice they objected to being sworn at all; held that "they could refuse to be sworn as well as to testify"; "there might be a different question raised if the parties were testifying in a case other than their own").

[*Note 6; add:*]

*Contra*: 1900, *Re Green*, 86 Mo. App. 216 (citation under statute against a former administrator, with interrogatories charging concealment, embezzlement, etc.; the defendant's situation being "analogous to that of a defendant in a criminal suit," "he cannot be called by the opposite party as a witness").

[*Note 7; add:*]

1903, *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552 (interrogatories to a witness in a proceeding against E. for discovery of property embezzled from an estate; interrogatories allowed; distinguishing *Re Green*, n. 6, *supra*).

So too before a *grand jury*: 1902, *U. S. v. Kimball*, 117 Fed. 156, 163.

### § 2269. Judge's Warning to the Witness.

[*Note 3; add:*]

1904, *Ivy v. State*, 84 Miss. 264, 36 So. 265 ("the better practice" requires a warning).

1906, *State v. Mungeon*, 20 S. D. 612, 108 N. W. 552 (incest; the prosecutrix being unwilling to testify, the Court's refusal to advise her of the privilege, on demand of defendant's counsel, was held not improper).

1913, *State v. Lloyd*, 152 Wis. 24, 139 N. W. 514 (examination before the State fire-marshal; warning held not necessary).

### § 2270. Who may Claim the Privilege, etc.

[*Note 1, par. 1; add:*]

1905, *State v. Cogley*, 128 Ia. 114, 103 N. W. 99.

1906, *McAlister v. Henkel*, 201 U. S. 90, 26 Sup. 385 (a corporation cannot claim for its officer as witness). Compare the cases cited *ante*, § 2196.

[*Note 1, par. 2; add:*]

1906, *Hale v. Henkel*, 201 U. S. 43, 26 Sup. 370, *semble*.

[*Note 2, par. 1; add, under Accord:*]

*Accord*: 1906, *State v. Mungeon*, 20 S. D. 612, 108 N. W. 552 (cited *ante*, § 2269, n. 3).

*Contra*: 1906, *State v. Barker*, 43 Wash. 69, 86 Pac. 387 (said *obiter*, without citing authority, that an attorney, who was signalling a witness to claim privilege, might "interpose suitable and timely objections" to the questions).

[*Note 3; add, under Accord:*]

1907, *Beauvoir Club v. State*, 148 Ala. 643, 42 So. 1040 ("the party cannot review the action of the Court here").

1890, *State v. Van Winkle*, 80 Ia. 15, 45 N. W. 388. 1905, *State v. Cogley*, 128 Ia. 114, 103 N. W. 99.

1907, *Taylor v. U. S.*, 152 Fed. 1, 7, C. C. A. (*Morgan v. Halberstadt* followed).

Compare the cases cited *ante*, § 2196.

[*Note 4; add:*]

1913, *State v. Cox*, 87 Oh. 313, 101 N. E. 135.

[Note 5; add:]

*Contra*: 1878, *People v. Brown*, 72 N. Y. 571, 573.  
1905, *State v. Shockley*, 29 Utah 25, 80 Pac. 865 (the reasoning in this opinion is fallacious; Barch, C. J., diss.).

[Note 6, par. 1; add:]

How an erroneous ruling of this sort ought to be treated is shown in *Pendleton v. U. S.*, 1909, 216 U. S. 305, 30 Sup. 315 (the Philippine trial judge, in his finding, having noted that "the accused did not use his right to testify in his own favor," and the Philippine Supreme Court in denying a new trial having explicitly declared that "this Court in deciding the cause did not take said fact into consideration, but rendered the decision in accordance with the proofs," the Federal Supreme Court held that the original error, if any, "was not repeated in the Supreme Court and is not a ground of legal complaint").

[Note 6, par. 3; add:]

1885, *Mackin v. People*, 115 Ill. 312, 3 N. E. 222.  
1903, *Lindsey v. State*, 69 Oh. 215, 69 N. E. 126 (good opinion by Spear, J.); and the cases cited *ante*, § 2252, n. 11, par. 2.  
1909, *Pendleton v. U. S.*, 216 U. S. 305, 30 Sup. 315 (where the prosecuting attorney in the Philippines summoned the accused to answer questions, but the answers were not "afterwards used in any way").  
1913, *State v. Lloyd*, 152, Wis. 24, 139 N. W. 514.

Of course the improper compulsion of an accused by a *justice of the peace* to answer an incriminating question does not entitle the accused to plead immunity when tried before a jury, even though such answer cannot be used against him:

1912, *Scribner v. State*, 9 Okl. 465, 132 Pac. 933. 1913, *Faucett v. State*, — Okl. —, 134 Pac. 839.

[Note 6, par. 4; add:]

1905, *State v. Faulkner*, 185 Mo. 673, 84 S. W. 967.  
Of course, a false statement made in answer to questions which the witness *could by privilege have refused to answer* but did not refuse to answer, leaves him liable to perjury:  
1908, *People v. Cahill*, 193 N. Y. 232, 86 N. E. 38.  
But, of course, also, an answer confessing under compulsion that an *answer on a former examination* was false cannot be used on a trial for perjury in the former answer:  
1912, *State v. Thornton*, 245 Mo. 436, 150 S. W. 1048.

[Note 6; add, as par. 5:]

How far a judicial order overruling a claim is *interlocutory* only and therefore not *subject to appeal*, is considered in *Alexander v. U. S.*, 201 U. S. 117, 26 Sup. 356 (1906).  
*Doyle v. London Guarantee & A. Co.*, 204 U. S. 509, 27 Sup. 313 (1907).

For the course of proceeding in a *prosecution for the offence of wilful refusal to testify*, see *U. S. v. Praeger*, — C. C. A. —, 149 Fed. 474, 484 (1907; court-martial).

## § 2271. Who may Determine the Claim; Judge and Witness.

[Note 3; add:]

1899, *Kelly v. Colhoun*, L. R. 2 Ire. 199 (libel).

[Note 4; add:]

1913, *Empire Life Ins. Co. v. Einstein*, 12 Ga. App. 380, 77 S. E. 209 (rule in *Burr's Case* followed).

1909, *Manning v. Mercantile Securities Co.*, 242 Ill. 584, 90 N. E. 238 (*R. v. Boyes and Brown v. Walker* followed; here the officers of a corporation were held not to state a ground of

[Note 4 — continued]

privilege in refusing to hand the corporation books to a receiver, because some of the contents could not be incriminating and no specific facts showing the criminating portions were named).

1905, *Wilson v. Ohio F. Ins. Co.*, 164 Ind. 462, 73 N. E. 893 (rule in *U. S. v. Burr* applied to a claim by the principal of a bond in an action against the surety).

1904, *Re Moser*, 138 Mich. 302, 101 N. W. 588 (rule of *U. S. v. Burr* approved; *Moore, C. J.*, diss.). 1906, *Re Mark*, 146 Mich. 714, 110 N. W. 61 (rule in *U. S. v. Burr* applied).

1909, *Ex parte Gauss*, 223 Mo. 277, 122 S. W. 741 (rule in *Burr's Trial*, applied).

1909, *McGorray v. Sutter*, 80 Oh. 400, 89 N. E. 10 (rule in *Burr's Trial* approved; here on *habeas corpus*; explaining the earlier case of *Warren v. Lucas*, 10 Oh. 336).

1907, *Ex parte Andrews*, 51 Tex. Cr. 79, 100 S. W. 376.

1904, *Re Hess*, 134 Fed. 109, D. C. (a bankrupt pleading the privilege for his books "should be required to bring the books and papers . . . before either the Court or the referee," the Court to "pass upon the probability of danger"). 1906, *U. S. v. Collins*, 145 Fed. 709, D. C. (witness' claim held not sufficient on the facts). 1906, *U. S. v. Collins*, 146 Fed. 553, D. C. (rule applied to a party summoned to produce documents before a grand jury).

1907, *Re Consolidated Rendering Co.*, 80 Vt. 55, 66 Atl. 790 (rule of *State v. Thaden*, Minn., approved).

#### § 2272. Effect of Making Claim, as to Inferences, etc.

[Note 1; add:]

1894, *Kops v. Reg.*, App. Cas. 650 (under N. S. Wales St. 1892, 55 Vict. No. 5, § 6, the judge may comment on the accused's failure to explain by his own testimony the evidence against him; and the provision against being "compellable" to testify does not forbid the drawing of inferences).

1904, *R. v. Maguire*, 35 N. Br. 609 (the judge's comment on the accused's failure to show an alibi, held on the facts a comment violating Dom. St. 1893, c. 31. § 4, *supra*).

1908, *Mudge's Case*, 1 Cr. App. 62 (inference made from accused's failure to take the stand, under St. 1898, quoted *ante*, § 488). 1909, *Kirkham's Case*, 2 Cr. App. 253 ("People who set up an alibi, and do not go into the box, are not entitled to come here and rely upon that defence"). 1909, *Hampton's Case*, 2 Cr. App. 274. 1909, *Theodorus' Case*, 3 Cr. App. 269.

[Note 2; add:]

*Ind. St.* 1905, p. 584, § 235 (re-enacts Rev. St. 1897, § 1889).

*Mass.*: 1909, *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755 (comment allowable, except when prohibited by statute; see citation *infra*, note 3).

*N. C. Rev.* 1905, § 1634 (like Code 1883, § 1353).

[Note 3; add:]

*Mass.*: 1909, *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755 (inference and comment allowable, except as expressly prohibited by statute; going upon the cases in Maine, New Jersey, and England, and upon the inapplicable Massachusetts cases cited *post*, § 2273, notes 6, 8; an extraordinary ruling).

*N. J.*: 1906, *State v. Banusik*, — N. J. L. —, 64 Atl. 994 (comment by the judge). 1906, *State v. Twining*, 73 N. J. L. 683, 64 Atl. 1073, 1135 (comment by the judge). 1908, *State v. Callahan*, 76 N. J. L. 426, 69 Atl. 957. 1908, *State v. Skillman*, 76 N. J. L. 474, 70 Atl. 83. 1909, *State v. Callahan*, 77 N. J. L. 685, 73 Atl. 235 (Court of Errors and Appeals prior opinion explained).

1908, *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. 14 (*State v. Twining*, N. J., *supra*, held not to raise a question under U. S. Const. Amendment XIV, and to be rightly decided so far as New Jersey law was controlling).

[Note 5; *add*.:]

- 1904, *O'Dell v. State*, 120 Ga. 152, 47 S. E. 577. 1904, *Minor v. State*, 120 Ga. 490, 48 S. E. 198.  
 1910, *People v. McMahon*, 244 Ill. 45, 91 N. E. 104.  
 1904, *State v. Rambo*, 69 Kan. 777, 77 Pac. 563.  
 1904, *State v. Robinson*, 112 La. 939, 36 So. 811.  
 1911, *Com. v. Richmond*, 207 Mass. 240, 93 N. E. 816 (sensible opinion by Rugg, J., the best on the subject).  
 1907, *People v. Cahill*, 147 Mich. 201, 110 N. W. 520.  
 1907, *State v. Kelleher*, 201 Mo. 614, 100 S. W. 470.  
 1905, *State v. Williams*, 28 Nev. 395, 82 Pac. 353.  
 1909, *Sturgis v. State*, 2 Okl. Cr. App. 362, 102 Pac. 57.  
 1912, *Com. v. Green*, 233 Pa. 291, 82 Atl. 250.  
 1907, *State v. Bennett*, 21 S. D. 396, 113 N. W. 78.  
 1892, *Wilson v. U. S.*, 149 U. S. 68, 13 Sup. 765.  
 1892, *State v. Chisnell*, 36 W. Va. 667, 15 S. E. 412.

For the only proper mode of treating an erroneous ruling on this point, see *Pendleton v. U. S.*, 1909, 216 U. S. 305, 30 Sup. 315 (cited more fully *ante*, § 2270, n. 6, par. 1).

[Note 6, col. 1; *add*.:]

- 1904, *Thomas v. State*, 139 Ala. 80, 36 So. 734.  
 1904, *State v. Levy*, 9 Ida. 483, 75 Pac. 227 (sensible opinion by Sullivan, C. J.). 1911, *State v. Gruber*, 19 Ida. 692, 115 Pac. 1.  
 1905, *Miller v. People*, 216 Ill. 309, 74 N. E. 743 (Court comment forbidden).  
 1905, *State v. Seery*, 129 Ia. 259, 105 N. W. 511.  
 1906, *People v. Provost*, 144 Mich. 17, 107 N. W. 716 (careful opinion, by McAlvay, J., reviewing the various rules). 1906, *People v. Murphy*, 145 Mich. 524, 108 N. W. 1009.  
 1905, *State v. DeWitt*, 186 Mo. 61, 84 S. W. 956 (revising *State v. Robinson*).  
 1911, *State v. Carlisle*, 28 S. D. 169, 132 N. W. 686.  
 1904, *State v. Deatherage*, 35 Wash. 326, 77 Pac. 504.

In some cases, it may be proper *not* to stop the counsel's argument, but merely to give an instruction later: 1909, *Com. v. People's Express Co.*, 201 Mass. 564, 88 N. E. 420.

[Note 6, last line; *add*.:]

to which add another State:

*Kan. C. C. P.* § 215 (Gen. St. 1897, c. 102, § 218), quoted *ante*, § 488. 1904, *State v. Rambo*, 69 Kan. 777, 77 Pac. 563 (here the Court with fervid scholastic zeal applied this intellectual thumbscrew, and set aside the verdict because the jurors in their deliberations were unable to fetter their native reasoning powers to suit the statute). 1906, *State v. Brooks*, 74 Kan. 175, 85 Pac. 1013 (discusses the meaning of the term "considered" in the statute, and finds no violation of it in this case).

The actual effect, in experience, on the minds of jurymen, of forbidding the inference, may be gathered from Mr. (Assistant District Attorney) Arthur Train's useful book, "The Prisoner at the Bar" (1906), pp. 160-164.

[Note 7; *add*.:]

1905, *Powers v. State*, 75 Nebr. 226, 106 N. W. 332 (adultery with the wife of C.; the wife's claim of privilege, when called by the prosecution to prove the adultery, held to permit no inference as to the defendant's guilt; no authority cited).

[Note 8; *add*.:]

1904, *Boyd v. State*, 84 Miss. 414, 36 So. 525 (by a majority).  
 1911, *Parrott v. State*, 125 Tenn. 1, 139 S. W. 1056. 1913, *Smithson v. State*, 127 Tenn. 357, 155 S. W. 133.

[Note 9; add:]

Moreover, his *testimony at a prior trial* may also be now offered against him, as an admission, even though he does not on this trial take the stand, — on the principle of § 1051, *ante*: 1905, *Miller v. People*, 216 Ill. 309, 74 N. E. 743 (three judges dissenting, but without ground, and citing no authority).

[Note 11; add:]

Nor, of course, does it forbid the prosecution's giving of *notice to produce* under §§ 1202, 1209, *ante*, required as preliminary to proof by copy. This is so elementary that Lord Eldon would have lamented the decay of sound principle under the blight of democracy could he have read the contrary statement in the opinion in *McKnight v. U. S.* (1902), 115 Fed. 972.

§ 2273. *Same: Inference from not Producing Evidence, distinguished.*

[Note 1; add:]

1904, *R. v. Aho*, 11 Br. C. 114 (a statement in the charge that the onus is on the accused to account for his presence at the place, etc., the accused not taking the stand, is proper). 1906, *R. v. Burdell*, 11 Ont. L. R. 440 (failure to account for possession of stolen goods). 1909, *R. v. Guerin*, 18 Ont. L. R. 425 (*Riddell, J.*, who had commented on some uncontradicted testimony to a conversation with the accused: "I have heard the same kind of statement by trial judges over and over again before 1892, and it never was thought an impropriety or an unfair thing to do at that time when the mouth of the accused was 'closed'").

1914, *Cutler v. State*, — Ariz. —, 138 Pac. 1048 (rape under age).

1909, *Mills v. State*, 133 Ga. 155, 65 S. E. 368 (but there is no presumption of law).

1907, *Lipsey v. People*, 227 Ill. 364, 81 N. E. 348. 1910, *People v. McMahon*, 244 Ill. 45, 91 N. E. 104 (the defendant not having taken the stand, the prosecutor's form of argument as to uncontradicted evidence, "Is there a man or a woman on earth that ever came in here and contradicted her in the least? No, sir," was held "near the danger line"; this ruling goes too far in hampering legitimate argument). 1912, *People v. Donaldson*, 255 Ill. 19, 99 N. E. 62 (absence of contradiction may be noticed in argument).

1904, *Griffiths v. State*, 163 Ind. 555, 72 N. E. 563 (larceny).

1911, *State v. Kimes*, 152 Ia. 240, 132 N. W. 180.

1909, *State v. Labore*, 80 Kan. 664, 103 Pac. 106 (absence of contradictory evidence in general).

1908, *Com. v. Johnson*, 199 Mass. 55, 85 N. E. 188 (failure to call witnesses to occupation, etc.). 1909, *Com. v. People's Express Co.*, 201 Mass. 564, 88 N. E. 420 (defendant corporation's failure to call its own employees is open to inference).

1906, *Perkins v. Terr.*, 17 Okl. 82, 87 Pac. 297 (larceny, but here the opinion so perversely construes the principle as practically to shut the mouth of the prosecution in discussing the accused's failure to produce evidence in general).

1914, *State v. Knapp*, — S. D. —, 144 N. W. 921.

1905, *State v. Smokalem*, 37 Wash. 91, 79 Pac. 603.

1907, *Lam Yee v. State*, 132 Wis. 527, 112 N. W. 425 (rape; defendant's failure to call witnesses to deny his gonorrhea).

So also where other persons were present and one was possibly the doer, their denials of their guilt allow an inference that the defendant was the only possible doer, and this is distinct from the inference from his failure to deny:

1911, *Com. v. Richmond*, 207 Mass. 240, 93 N. E. 816.

[Note 2; add:]

Compare the rule as to presumptions in general (*post*, § 2511).

[*Text*, p. 3149, par. (3), l. 3, in parenthesis; *insert*:]  
marital privilege, § 2243.

[*Note 3*, l. 14; *add*:]

1911, *Gillespie v. State*, 5 Okl. Cr. 546, 115 Pac. 620 (letters written by the defendant and in his possession, called for by the prosecutor as a part of his case on trial, and the call objected to; held improper).

1906; *Grunberg v. U. S.*, 145 Fed. 81, 89, C. C. A. (failure to produce invoices, etc.).

[*Note 3*, at the end; *add* a new par.:]

The prosecution's *request* or *notice to produce* a document in the accused's possession of which the prosecution desires to produce a copy, is of course not of itself a violation of the privilege, for it is directed to another purpose, viz. to satisfy the rule for using a copy, and is indispensable for that purpose: Cases cited *ante*, § 1209, n. 2.

[*Note 4*; *add*:]

1906, *R. v. Blais*, 11 Ont. L. R. 345 (the judge's comment on the accused's failure to call F., jointly indicted but separately tried, and competent for either party, held not a violation of Can. St. 1893, c. 31, § 4, quoted *ante*, § 488).

1912, *McElwain v. Com.*, 146 Ky. 104, 142 S. W. 234 (inference allowed).

1906, *State v. Drake*, — Or. —, 87 Pac. 137 (conspiracy to kidnap; failure to call an incompetent co-defendant not on trial; the Court need not instruct the jury not to draw inference).

[*Note 5*; *add*, under *Accord*:]

1913, *State v. Larkin*, 250 Mo. 218, 157 S. W. 600 ("We conclude that the case of *State v. Graves* [cited *infra*] . . . ought to be overruled and no longer followed in this behalf"; careful and sensible opinion by Faris, J.; this opinion was rendered in Div. No. 2).

1905, *Powers v. State*, 75 Nebr. 226, 106 N. W. 332. 1907, *Russell v. State*, 77 Nebr. 519, 110 N. W. 380 (but the inference does not necessarily apply to every fact not explicitly denied by a party taking the stand).

1904, *Balliet v. U. S.*, 129 Fed. 689, 695, 64 C. C. A. 201 (the principle is conceded, but here the trial judge's language in the instruction was held too broad).

1911, *State v. Mattivi*, 39 Utah 334, 117 Pac. 31.

[*Note 5*; *add*, under *Contra*:]

1906, *State v. Miles*, 199 Mo. 530, 98 S. W. 25 (rule of *State v. Graves* followed, but here held not applicable). 1909, *State v. James*, 216 Mo. 394, 115 S. W. 994 (following *State v. Graves*; cited more fully *post*, § 2276, n. 5).

It should be understood in other States that the foregoing Missouri rule was unsound, both in principle and in policy, and is now abandoned, by *State v. Larkin*, *supra*.

[*Note 6*; *add*:]

1903, *Tines v. Com.*, — Ky. —, 77 S. W. 363.

1912, *State v. Dodson*, 23 N. D. 305, 136 N. W. 789.

[*Note 8*, par. 1; *add*, under *Accord*:]

1910, *R. v. Ellis*, 2 K. B. 747 (false pretences by an art-dealer to a customer; in a civil suit for fraud in the same transaction, the now defendant had absented himself abroad at the trial and failed to testify; held admissible).

1909, *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755 (*Com. v. Smith* approved, but on the extraordinary theory noted *ante*, § 2272, note 3).

1908, *Wilson v. State*, 54 Tex. Cr. 505, 113 S. W. 529.

[Note 8, par. 1; *add*, under *Contra*:]

1905, *Newman v. Com.*, — Ky. —, 88 S. W. 1089 (failure to testify on application for bail; no authority cited; could not the Court at least notice its own opposed ruling in *Taylor v. Com.*, *supra*?).

1907, *Masterson v. St. Louis Transit Co.*, 204 Mo. 507, 103 S. W. 48 (one judge diss.). 1909, *Garrett v. St. Louis Transit Co.*, 219 Mo. 65, 118 S. W. 68 (the same judge again dissenting).

§ 2275. **Waiver; (a) by Contract.**

[Note 2; *add*:]

1904, *Swedish-American Tel. Co. v. Fidelity & C. Co.*, 208 Ill. 562, 70 N. E. 768 (a contract between a liability insurance company and the insured, giving to the former the right of inspection of the latter's books, is a waiver of the constitutional guarantee against unreasonable searches and seizures).

§ 2276. **Same: (b) by Volunteering Testimony on the Stand.**

[Note 2; *add*:]

1906, *State v. Bond*, 12 Ida. 424, 86 Pac. 43 (murder of B.; the wife of B., defendant's paramour, was also indicted but separately tried; the wife held privileged, when called by the State, not to answer as to her complicity).

[Note 5; *add*:]

ENGLAND: St. 1898, 61-2 Vict. c. 36, § 1 (accused may testify on his own behalf; quoted in full *ante*, § 488; sub-section (e): "A person charged and being a witness in pursuance of this Act may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged").

1909, *Chitson's Case*, 2 Cr. App. 325, 2 K. B. 945 (rape under age; cross-examination of the accused as to his statement to the woman of his intercourse with another woman, allowed). 1909, *Rowland's Case*, 3 Cr. App. 277, [1910] 1 K. B. 458 (under St. 1898, § 1 (e), an accused who declines to give evidence for himself but afterwards gives evidence for a co-defendant may be cross-examined to his own case).

CANADA: 1904, *R. v. Grinder*, 11 Br. C. 370 (larceny; after cross-examination of the accused, the trial judge asked him to write a specimen of his handwriting, to compare with a memorandum in evidence; held inadmissible).

Alta.: 1913, *R. v. Hurd*, Alta. S. C., 10 D. L. R. 475 (cross-examination to prior conviction; not decided).

UNITED STATES: Ala.: 1906, *Miller v. State*, 146 Ala. 686, 40 So. 342 (*Smith v. State* followed). 1906, *Davis v. State*, 145 Ala. 69, 40 So. 663 (liquor-selling).

Cal.: 1909, *People v. Smith*, 9 Cal. App. 644, 99 Pac. 1111 (murder; questions about another revolver excluded; the extent to which the cross-examination of the accused is muzzled in this State is a travesty of principle).

Fla.: 1906, *Pittman v. State*, 51 Fla. 521, 41 So. 385 (the rules for cross-examination to motives, etc., apply to an accused as to other witnesses).

Ida.: 1897, *State v. Larkins*, 5 Ida. 200, 47 Pac. 945 (cited *ante*, § 1890, n. 2).

Ky.: 1908, *Welch v. Com.*, — Ky. —, 108 S. W. 863 (cross-examination to motive; privilege allowed; unsound). 1914, *Com. v. Phoenix Hotel Co.*, 157 Ky. 180, 162 S. W. 823 (voluntary testimony at a former trial of a separate but similar charge, held not a waiver).

La.: 1912, *State v. Oden*, 130 La. 598, 58 So. 351 (liquor-selling; cross-examination to other sales since the one charged, allowed, *semble*).

Mich.: 1904, *People v. Gray*, 135 Mich. 542, 98 N. W. 261 (cross-examination to the defendant's false swearing as surety on a bond, allowed to affect credibility). 1912, *People v. Fritch*, 170 Mich. 258, 136 N. W. 493.

[*Note 5 — continued*]

*Minn.*: 1908, *State v. Kight*, 106 Minn. 371, 119 N. W. 56 ("the general rule applicable to all witnesses" applies).

*Mo.*: 1905, *State v. Miller*, 190 Mo. 463, 89 S. W. 377. 1909, *State v. James*, 216 Mo. 394, 115 S. W. 994 (following *State v. Graves*, and clinching the absurd rule which allows a defendant to take the stand and say "I did not do it" and then stop, free from cross-examination or comment). 1909, *State v. Myers*, 221 Mo. 598, 121 S. W. 131 (liberal rule followed). 1910, *State v. Keener*, 225 Mo. 488, 125 S. W. 747 (liberal rule followed). 1910, *State v. Mitchell*, 229 Mo. 683, 129 S. W. 917 (*State v. Miller* followed).

*Mont.*: 1904, *State v. Rogers*, 31 Mont. 1, 77 Pac. 293.

*Nev.*: 1905, *State v. Lawrence*, 28 Nev. 440, 82 Pac. 614 (cross-examination to convictions of felonies to affect credibility, allowed). 1913, *State v. Urie*, 35 Nev. 268, 129 Pac. 305.

*N. Y.*: 1911, *People v. Brown*, 203 N. Y. 44, 96 N. E. 367 (voluntary testimony, held to permit cross-examination as to prior testimony inadmissible under the confession-rule; erroneous on principle; see *ante*, § 821, n. 4).

*N. C.*: Rev. 1905, § 1634 (like Code 1883, § 1353). 1910, *State v. Simonds*, 154 N. C. 197, 69 S. E. 790 (manslaughter; cross-examination to illicit intercourse with the woman on whom deceased was calling, allowed).

*N. D.*: 1909, *State v. Nyhus*, 19 N. D. 326, 124 N. W. 71 (rape; questions to the accused as to former misconduct with a woman, excluded).

*Or.*: 1908, *State v. Deal*, 52 Or. 568, 98 Pac. 165 (cross-examination to the circumstances of an alleged exculpation, allowed). 1914, *State v. Jensen*, — Or. —, 140 Pac. 740 (assault with intent to rape; cross-examination of defendant to misconduct with a woman in another State, excluded).

*Pa.*: this State has now permitted the following vicious piece of legislation to slip in and thus tenderly to make it easier for astute defenders of villains to juggle their clients out of legal danger: St. 1911, Mar. 15, p. 20 (An accused taking the stand "shall not be asked and if asked shall not be required to answer any question tending to show that he has committed or been charged with or been convicted of any offense other than the one where-with he shall then be charged, or tending to show that he has been of bad character or reputation"; unless he has offered evidence of his good character or has testified against a co-defendant).

*S. D.*: 1909, *State v. La Mont*, 23 S. D. 174, 120 N. W. 1104 (rape under age; cross-examination of defendant to other acts of intercourse with women of his family, excluded; the opinion does not distinguish the different questions involved).

*U. S.*: 1904, *Balliet v. U. S.*, 129 Fed. 689, 695, 64 C. C. A. 201 (*Fitzpatrick v. U. S.* followed). 1906, *Sawyer v. U. S.*, 202 U. S. 150, 26 Sup. 575 (murder on a vessel; cross-examination allowable "with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime"). 1912, *Powers v. U. S.*, 223 U. S. 303, 32 Sup. 284 (in particular, may be cross-examined as to former sworn statements).

*Ut.*: 1905, *State v. Shockley*, 29 Utah 25, 80 Pac. 865 (murder in robbery; cross-examination as to other crimes, held improper; the ruling really proceeds on the principle of § 1810, *ante*, for the claim of privilege was conceded on all the questions but one; Bartch, J., dissenting, points out that Utah Rev. St. § 5015 is practically ignored by the majority; the decision makes confusion in the law, and helped to set free a confessed villain).

1910, *State v. Vance*, 38 Utah 1, 110 Pac. 434 (the above criticism on the Shockley case, and that of § 21, n. 12, *ante*, reviewed and answered; see the further comments *ante*, § 21, n. 12). 1911, *State v. Thorne*, 39 Utah 208, 117 Pac. 58 (rule c).

*Wash.*: 1913, *State v. Peeples*, 71 Wash. 451, 129 Pac. 108.

[*Note 6; add:*]

1907, *Hays v. State*, 51 Tex. Cr. 111, 100 S. W. 926 (defendant may be recalled for questions preliminary to impeachment by self-contradiction).

[Note 6; *add*, at the end:]

The practical fairness and utility of construing the waiver liberally against the accused is noted, from the standpoint of experience, in Mr. (Assistant District Attorney) Arthur Train's important book, "The Prisoner at the Bar" (1906), pp. 163, 164.

[Note 7; *add*:]

1906, *Re Mark*, 146 Mich. 714, 110 N. W. 61 (testimony at an *ex parte* complaint as witness, held not a waiver on subsequent trial of the accused before the committing magistrate).

But of course his voluntary testimony on the former occasion may *itself be used* (subject to the rule for confessions, *ante*, § 852) on the subsequent occasion: cases cited *infra*, n. 10.

Compare the rule for using an inference from *former failure to testify* (*ante*, § 2270).

[Note 8; *add*:]

*Contra*: 1908, *State v. Simmons*, 78 Kan. 872, 98 Pac. 277; this is the sounder view.

[Note 9, par. 1; *correct*:]

for "§ 2273," read "§ 2272."

[Note 9; *add*:]

Under U. S. Rev. St. 1878, § 860 (quoted *post*, § 2281; now repealed) and U. S. St. 1898, c. 541, § 7 (bankruptcy; quoted *post*, § 2281) providing that no testimony given in certain cases shall be used against the witness thereafter, the defendant does not, by taking the stand, waive the privilege so as to permit the use against him (either by an independent offer of evidence or by his own cross-examination) of *former answers made by him* in a situation covered by either of those statutes:

1908, *Jacobs v. U. S.*, 1st C. C. A., 161 Fed. 694, 698 (cross-examination of a bankrupt, on a trial for fraudulent concealment, to his former answers on examination before the referee; held not allowable under St. 1898, c. 541, § 7). 1908, *Alkon v. U. S.*, 1st C. C. A., 163 Fed. 810 (conspiracy by a bankrupt; cross-examination to his testimony before the referee, held not allowable, under Rev. St. § 860).

These rulings are apparently the only ones so far. On the present point of waiver, they seem decidedly unsound.

[Note 10, par. 2; *add*:]

1907, *Weaver v. State*, 83 Ark. 119, 102 S. W. 713 (affidavit for continuance).

1907, *People v. Willard*, 150 Cal. 543, 89 Pac. 124 (petition for *habeas corpus*, and testimony of the defendant on the hearing, admitted).

1911, *State v. Kimes*, 152 Ia. 240, 132 N. W. 180.

1907, *State v. Taylor*, 202 Mo. 1, 100 S. W. 41; and instances cited *ante*, § 278, n. 3.

The principle of waiver has also been invoked by some Courts to admit facts obtained by the accused's *voluntary surrender of chattels or submission to bodily inspection* (*ante*, §§ 2264, 2265).

### § 2277. Waiver: Cross-examination to Accused's Character, distinguished.

[Note 1; *add*:]

*Ark.*: 1905, *Smith v. State*, 74 Ark. 397, 85 S. W. 1123 ("subject to impeachment like any other witness"). 1905, *Carothers v. State*, 75 Ark. 574, 88 S. W. 585 (cross-examination to subornation of a witness).

*Cal.*: 1908, *People v. Oliver*, 7 Cal. App. 601, 95 Pac. 172 (the accused on cross-examination may be asked as to prior convictions for felony, in spite of P. C. § 1025, prohibiting allusion to a former conviction when used to affect the sentence under § 196 *ante*; re-affirming *People v. Arnold*, *supra*, and holding that the re-enactment of P. C. § 1093 in 1905 as P. C. § 1025 did not change the rule).

[Note 1 — continued]

1911, *People v. Walker*, 15 Cal. App. 400, 114 Pac. 1009 (prior conviction of felony may be asked).

*Ind. Terr.*: 1906, *McCoy v. U. S.*, 6 Ind. Terr. 415, 98 S. W. 144 (a defendant "is subjected to the same rules governing as to [sic] other witnesses").

*Ia.*: 1911, *State v. Brandenburger*, 151 Ia. 197, 130 N. W. 1065 (cross-examination to past marital misconduct, allowed).

*Ky.*: 1906, *Henderson v. Com.*, 122 Ky. 296, 91 S. W. 1141 (cross-examination to conviction for felony, allowed).

1910, *Smith v. Com.*, 140 Ky. 599, 131 S. W. 499.

*Md.*: 1906, *Lawrence v. State*, 103 Md. 17, 63 Atl. 96 (rule of *Guy v. State* applied).

*Mich.*: 1906, *People v. DeCamp*, 146 Mich. 533, 109 N. W. 1047 (record of conviction).

*Miss.*: 1905, *Williams v. State*, 87 Miss. 373, 39 So. 1006 (cross-examination to prior conviction).

*Mo.*: In line 8, col. 2, p. 3160, "is forbidden," *should read*, "was forbidden until the statute of 1895."

After *State v. Smith*, 125 Mo., *insert*: St. 1895, p. 284, Rev. St. 1899, § 4680 (quoted *ante*, § 488; allows a witness' conviction of crime to be proved by cross-examination).

After *State v. Dyer*, 139 Mo., *add*: 1903, *State v. Blitz*, 171 Mo. 530, 71 S. W. 1027 (defendant may be cross-examined to prior convictions). 1903, *State v. Thornhill*, 174 id. 364, 74 S. W. 832 (similar; compare the rule of §§ 987, 1270, *ante*). 1905, *State v. Spivey*, 191 id. 87, 90 S. W. 81 (similar; but the question should ask directly for the conviction, and not merely as to being in the penitentiary, etc.). 1905, *State v. Woodward*, *ib.* 617, 90 S. W. 90 (compare the rule of § 1270, *ante*; general moral character may be used). 1906, *State v. Beckner*, 194 id. 281, 91 S. W. 892 (general moral character may be used). 1907, *State v. Barnett*, 203 Mo. 640, 102 S. W. 506 (*State v. Beckner* followed).

*Nebr.*: 1905, *Nickolizack v. State*, 75 Nebr. 27, 105 N. W. 895 (rape under age; cross-examination to improper conduct with another child excluded; the opinion shows no clear perception of the questions involved).

*Nev.*: 1905, *State v. Lawrence*, 28 Nev. 440, 82 Pac. 614 (cross-examination to convictions of felony, allowed; "the defendant was in a double capacity, that of defendant and that of witness"; *State v. Cohn* not cited).

*Okl.*: 1907, *Harrold v. Terr.*, 18 Okl. 395, 89 Pac. 202 (he is "subject to be cross-examined the same as any other witness").

*Okl.*: 1911, *Cowan v. State*, 5 Okl. Cr. 313, 114 Pac. 627 (cross-examination to prior conviction for felony or offence of moral turpitude, allowable).

*Or.*: 1903, *State v. Miller*, 43 Or. 325, 74 Pac. 658 (the cross-examination is restricted to "matters concerning which he has testified in the first instance"). 1910, *State v. Lem Woon*, 57 Or. 482, 107 Pac. 974 (*state v. Bartmess* followed).

#### § 2279. Expurgation of Criminality; (a) by Acquittal, etc.

[Note 1, par. 2; *add*.:]

*Contra*: 1912, *Scribner v. State*, 9 Okl. 465, 132 Pac. 933.

1913, *Faucett v. State*, — Okl. —, 134 Pac. 839.

The *erroneous compulsion* of an incriminating answer, by a justice of the peace or a coroner, does not have the effect of an acquittal, so as to be pleaded in immunity on the trial before a jury:

*Scribner v. State*, *Faucett v. State*, Okl., *supra*.

#### § 2280. Same: (b) by Executive Pardon.

[Note 3; *add*.:]

*Contra*, and demonstrating the unsoundness of the view taken above in the text: 1914, *Ex parte Muncy*, — Tex. Cr. —, 163 S. W. 29 (the relator, a boy of 12, was summoned

[Note 3 — continued]

before the grand jury inquiring into the death of the relator's father, who had been murdered, either by the boy or by his mother; the boy claimed privilege; the prosecuting attorney promised immunity, which promise the trial judge by order affirmed; the boy accepted and testified, incriminating his mother; later, on *habeas corpus* by the mother, the boy again refused, on the ground that he had revoked his acceptance of immunity; held (1) that the judge and prosecuting attorney had authority to guarantee immunity; (2) that the relator's later retraction was immaterial, because his original consent was immaterial; Davidson, J., diss.; elaborate opinions, with full examination of Texas precedents; the majority opinion of Harper, J., seems conclusive).

**§ 2281. Expurgation of Criminality by Statutory Amnesty or Indemnity;**  
(1) **Statutes forbidding Prosecution, etc.**

[Note 5; add:]

ENGLAND: St. 1905, 5 Edw. VII, c. 7, § 2 (investigation into corrupt transactions by war-contractors in South Africa; immunity clause similar to that of St. 1863 for a person making "a full and true disclosure," etc.).

CANADA: *Alberta*: St. 1910, 2d Sess., c. 3, Evidence Act, § 7 (like Can. St. 1893, c. 31, § 5, as amended, except that the last clause gives immunity "in any civil proceeding or in any proceeding under any act or ordinance in force in Alberta").

*British Columbia*: St. 1903-4, 3 & 4 Edw. VII, c. 17, § 231 (election petitions; substantially like Rev. St. 1897, c. 67, § 228; but the certificate is to state merely that the witness "had answered all such questions or such question"); ib. §§ 292, 293 (corrupt practices at elections; substantially like Dom. Rev. St. 1886, c. 158, §§ 9, 10). St. 1906, 6 Edw. VII, c. 23, § 155 (fraud in registration of land-title; no person shall be privileged by this act from discovery in any civil proceeding, "but no such affidavit shall be admissible against any such person in evidence in any penal proceeding"). St. 1908, 8 Edw. VII, c. 15, § 73 (Factories Act offences; cited *ante*, § 488). St. 1912, 2 Geo. V, c. 17, § 6 (Forest Board; witness not to be privileged, but no answer made shall be admissible in evidence in any proceeding, except for perjury).

*New Brunswick*: St. 1905, c. 7, § 41 (offences under the factory act; defendant's privilege abolished; quoted *ante*, § 488). St. 1911, 1 Geo. V, c. 11, §§ 15, 16 (elections; certificate of full disclosure to protect a witness; like Ont. St. Rev. St. c. 9, § 189).

*Nova Scotia*: St. 1913, c. 37 (inserting a new § 45 *a* in Rev. St. 1900, c. 163, Evidence Act; the new section is identical with Can. St. 1893, c. 31, § 5, as amended by St. 1898, c. 53).

*Ontario*: 1904, St. 1904, 4 Edw. VII, c. 10, § 21 (amends Rev. St. 1897, c. 73, § 5, quoted *ante*, § 2252, n. 3, by enacting as in Dom. St. 1893, c. 31, § 5, unamended, *supra*, identically down to the proviso, except by omitting the word "other"; then continuing: "provided, however, that if with respect to any question the witness objects to answer upon the ground that his answer may tend to criminate him, and if but for this section the witness would therefore have been excused from answering such question, then, although the witness shall be compelled to answer, yet the answer so given shall not be used or receivable in evidence against him on the trial of any proceeding under any act of the Legislature of Ontario"). St. 1906, 6 Edw. VII, c. 47, § 18 (in trials for liquor offences, where a witness was violating the law, the judge may on certain conditions "by certificate in that behalf exempt such witness from prosecution for such unlawful act"). 1904, Attorney-General v. Toronto J. R. Club, 7 Ont. L. R. 248 (using premises as a betting-house; on motion for production of documents by the defendant's president, held that the privilege applied, under Ont. Rev. St. 1897, c. 73, § 5, quoted *ante*, § 2252, and that Can. Dom. St. 1893, c. 31, § 5, as amended in 1898 and 1901, quoted *supra* in this note, was not applicable in Ontario). 1906, Chambers v. Jaffray, 12 Ont. L. R. 377 (claim of privilege by a defendant in libel resisting discovery; the above statute 1904, c. 10, § 21, held to apply to parties in

[*Note 5 — continued*]

such situation, and not only to ordinary witnesses, so as to take away the privilege). St. 1908, 8 Edw. VII, c. 4, § 49 (election offences; method of immunity provided). St. 1909, c. 43, § 7 (like St. 1904, c. 10, § 21, with slight changes). St. 1913, 3-4 Geo. V, c. 43, § 191 (municipal elections; St. 1903, 3 Edw. VII, c. 19, § 255, re-enacted with amendments).

*Prince Edward Island*: St. 1910, c. 3, § 46 (election trials; witness compellable, but no answer made after claim of privilege "shall be used in any criminal proceeding against any such person," except for perjury, if the trial judge gives a certificate that claim was made and full and true answer given).

*Saskatchewan*: St. 1907, c. 12, Evidence Act, § 26 (like Can. St. 1893, c. 31, § 5, as amended by St. 1898, c. 53).

1913, *Bartleman v. Moretti*, Sask. S. C., 9 D. L. R. 805 (the Canada Evidence Act, § 5, identical with Sask. Evid. Act, Rev. St. c. 60, § 27, "entirely displaces and removes the reason for not ordinarily allowing discovery in actions for the recovery of penalties"; here, a forfeiture of money paid under a land contract).

*Yukon*: Consol. Ord. 1902, c. 76, § 110 (liquor offences; like Man. Rev. St. 1902, c. 101, § 202); ib. § 115 (liquor offences; provision similar to Can. Rev. St. 1886, c. 158, §§ 9, 10).

UNITED STATES: *Alabama*: St. 1907, No. 31, p. 105, § 3 (railroad passes; witness before grand jury compellable, but "no witness shall be prosecuted," etc.). St. 1909, No. 191, Spec. Sess. p. 63, Aug. 25, § 12 (liquor prohibition; witnesses compellable before the grand jury, "but a witness must not be prosecuted for any offense as to which he testifies before the grand jury"). § 15 (no agent or principal, etc., shall be excused by reason of the privilege from testifying against principal or agent, etc., but no such testimony "shall in any manner in any prosecution be used as evidence directly or indirectly against him," nor shall he be "thereafter prosecuted for any offense so disclosed by him"). § 21, par. 13 (similar, for a person testifying in any proceeding for seizure of liquors, "excepting one who answers claiming some right, title, or interest in the liquors so seized"). § 29½ (similar blanket clause for any person "who testifies with respect to any unlawful act under this statute," etc., St. 1911, No. 259, p. 249, Apr. 6, § 32 (dispensary liquor law; like § 12 of St. 1909)). St. 1911, No. 479, p. 421, Apr. 4, § 29 (primary elections; answer compellable as to an illegal vote, and "if he make full true answers which may tend to criminate him, he shall not be prosecuted for voting at such election").

*Arkansas*: St. 1911, c. 1, Spec. Sess., p. 495, June 29, § 94 (tax commission; witnesses compellable to answer, but "no person shall be prosecuted," etc., for any matter "concerning which he may testify," etc., except for perjury).

*California*: St. 1905, Mar. 10, c. 95 (amending St. 1893, Feb. 23, § 32, *supra*, by substituting the following: "If such person demands that he be excused from testifying on the ground that his testimony may incriminate himself, he shall not be excused, but in that case the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person so testifying, except for perjury in giving such testimony, and he shall not thereafter be liable to indictment or presentment by information, nor to prosecution or punishment for the offence with reference to which his testimony was given. No person shall be exempt from indictment, presentment by information, prosecution or punishment for the offence with reference to which he may have testified as aforesaid, when such person so testifying fails to ask to be excused from testifying on the ground that his testimony may incriminate himself, but [*sic?* and] in all such cases the testimony so given may be used in any prosecution or proceeding, civil or criminal, against the person so testifying. Any person shall be deemed to have asked to be excused from testifying under this section, unless, before any testimony is given by such witness, the judge, foreman or other person presiding at such trial, hearing, proceeding or investigation shall distinctly read this section to such witness, and the form of the objection by the witness shall be immaterial if he in substance makes objection that his testimony may criminate himself, and he shall not be obliged to object to each question, but one objection shall be sufficient to protect the witness from prosecution for any offence concerning which he may testify upon such trial, hearing, pro-

## [Note 5 — continued]

ceeding or investigation"). St. 1907, c. 14, § 55 (public utilities act; witness compellable, but "no person shall be prosecuted" etc.). St. 1911, c. 14, p. 18, Dec. 23, § 55 (public utilities commission; witnesses to be compellable, but no person shall be prosecuted etc. for "any act, transaction, matter, or thing concerning which he shall under oath have testified or produced documentary evidence," except for perjury, and except that this shall be construed "as in any manner giving to any public utility immunity of any kind").

*Connecticut*: St. 1911, c. 128, p. 1387, July 11, § 9 (public service corporations; witness compellable to testify etc. before the commission; but if he objects and is compelled, "he shall not be prosecuted for any matter concerning which he has so testified").

*Florida*: St. 1905, No. 45, § 2 (bribery of officials; privilege abolished for the briber; "but if he does testify, nothing said by him in his testimony shall be admissible in evidence in any civil or criminal action against him"). St. 1905, No. 29 (bribery, gaming, and liquor offences; privilege abolished, but "no person shall be prosecuted or subjected to any penalty or forfeiture, for or [on] account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced or given [*sic?* omit] shall be received against him upon any criminal investigation or proceeding").

*Georgia*: St. 1906, c. 451, § 1, amending Cr. C. 1895, § 629 (in election offences, any offender not on trial shall be competent and compellable; "and nothing then said by such witness shall at any time be received or given in evidence against him in any prosecution" except for perjury therein). St. 1906, c. 450, § 3 (stock gambling offences; "no person shall be excused" from testifying to an offence hereunder, "but any discovery made by a witness upon such examination shall not be used against him in any penal or criminal prosecution, and he shall be altogether pardoned of the offence so done or participated in by him").

*Hawaii*: St. 1913, No. 42, p. 48, Mar. 28, § 6 (Financial Commission for Hawaii Co.; witnesses compellable, but "no prosecution can afterwards be had against him for any offense concerning which he has testified"). St. 1913, No. 101, p. 142, Apr. 23, § 6 (bastardy; the mother to be compellable, "but no prosecution shall afterwards be had against her" for any matter testified to).

*Idaho*: St. 1905, Mar. 7, p. 416 (bribery; no person testifying for the State is to be excused, but "no person shall be prosecuted or punished on account of any transaction, manner, or thing concerning which he may be so required to testify or produce evidence," except for perjury therein). St. 1911, c. 15, p. 30, Feb. 18, § 10 (liquor prosecutions; witness compellable, "but no person shall be prosecuted or punished on account of any transaction or matter or thing concerning which he shall be compelled to testify," nor shall his testimony be used etc.).

*Indiana*: St. 1905, c. 53, § 12 (privilege abolished for witnesses before the railroad commission; "the claim that any such testimony may tend to criminate the person giving it shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"). St. 1905, c. 129, § 54 (privilege abolished for witnesses before investigations by common councils, for offences under this act or ordinances thereunder; "but such testimony shall not be used against such witness in any criminal prosecution"). St. 1905, p. 481, § 3 (bribery at elections; a guilty person is compellable, "but such evidence shall not be used against him in any prosecution for such or any other offence growing out of the matters about which he testifies, and he shall not be liable to trial by indictment or information or punished for such offence"). St. 1905, p. 584, Criminal Code, §§ 236, 237, 250 (re-enact Rev. St. 1897, §§ 1890, 1891, 1904, *supra*). St. 1905, p. 584, Criminal Code, § 253 (substitutes for "discovery . . . under oath" the word "evidence," in re-enacting Rev. St. 1897, § 1907, *supra*). St. 1907, c. 243, p. 490, Mar. 11, § 11 (anti-trust law, civil remedies; witness who is officer etc. of corporation, to be compellable, but his "testimony shall not be used against such witness or party in any criminal prosecution"). St. 1907, c. 282, p. 627, Mar. 12, § 49 (primary elections, accomplice "informing and testifying shall not be thereafter prosecuted for his guilt in con-

[*Note 5 — continued*]

nection with the transaction"). St. 1913, c. 192, p. 556, Mar. 12, § 8 (State fire-marshal's powers; witness compellable, but "such evidence or testimony shall not be used" etc., nor shall such witness "be thereafter prosecuted for any crime concerning which he has been compelled to testify").

*Iowa*: St. 1907, c. 50, § 4 (primary elections; privilege denied, but "any matter so elicited shall not be used against him, and said witness shall not be prosecuted," etc.); c. 73, § 3 (political contributions by corporations; privilege denied, "and no person having so testified shall be liable" etc.). St. 1907, c. 112, § 3 (railroad passes, privilege denied, "but no person having so testified shall be liable" etc.); c. 183, § 2 (corrupt offers to agents etc.; privilege denied, but "no person shall be liable to any criminal prosecution" etc.). St. 1913, c. 15, p. 20, Apr. 17 (bids for public supplies; witnesses compellable, but not to be prosecuted). St. 1913, c. 21, p. 25, Apr. 19 (similar, for contracts with municipal governments).

*Kansas*: St. 1897, c. 265, § 10 (anti-trust law; "any person subpoenaed or examined shall not be liable to criminal prosecution for any violation of this act about which he may testify; neither shall the evidence of such witness be used against him in any criminal proceeding"). St. 1905, c. 209 (gambling offences; phrasing of above statute changed, and a proviso added negating exemption from perjury-penalty). St. 1905, c. 340, § 10 (railroad rate inquiries by the Railroad Commissioners; the claim of privilege shall not be allowed, but the testimony "shall not be used against such person" in criminal trials, "nor shall he be liable to criminal prosecution for or on account of any transaction, matter, or thing concerning which he may so testify"). St. 1907, c. 259, p. 410, Mar. 9 (anti-trust laws, civil remedies; defendant compellable to answer, but answers shall not be used in a criminal prosecution, nor shall he be "liable to criminal prosecution for any offense about which his answers or books or papers produced would be evidential"). St. 1909, c. 164, p. 302, Feb. 23, § 7 (intoxicating liquors; witness compellable, but "no person shall be prosecuted" for any matter thus compelled to be testified to, and no such testimony shall be used against him). St. 1911, c. 237, p. 412, Mar. 3, § 12 (removal of public officers; like St. 1909, c. 164). St. 1911, c. 238, p. 417, Mar. 14, § 17 (public utilities commission; witnesses compellable, but "no person having so testified shall be prosecuted . . . on account of any transaction, matter, or thing concerning which he may have testified or produced any documentary evidence," except for perjury).

*Kentucky*: 1911, *Bentler v. Com.*, 143 Ky. 503, 136 S. W. 896 (Stats. 1899, § 1973, applied, and held constitutional).

*Maryland*: St. 1908, c. 122, p. 123, Apr. 25 (amending Pub. G. L. Art. 33; adding §§ 174, 175; to the Elections law; witness to be compellable, "but his answer, or the thing produced by him, shall not be used in any proceeding against him," except for perjury).

*Michigan*: St. 1907, No. 182, p. 244, June 18 (political contributions by insurance companies; witnesses compellable, but "no person shall be prosecuted or subjected to any penalty or forfeiture" for any matter so testified to, and no testimony so given shall be used against him, etc.). St. 1907, No. 312, p. 417, June 28, § 27 (railroad commission; witnesses compellable, but "no person, having so testified shall be prosecuted" etc., except for perjury). St. 1911, No. 2, p. 4, Feb. 25 (amending St. 1899, No. 255, § 11 — anti-trust law — by inserting § 11a; witness to be compellable, but "no person shall be prosecuted" etc. for any matter to which he may testify at such trial, and "no testimony so given by him" shall be used against him etc.; "provided that immunity shall extend only to a natural person who in obedience to a subpoena gives testimony under oath or produces evidence documentary or otherwise under oath"; also excepting perjury).

*Minnesota*: St. 1905, c. 192 (illegal sale of liquor; on examination of witnesses before a justice, "no testimony given upon such a hearing shall be in any manner used to the prejudice of the witness giving the same").

*Mississippi*: 1910, *Cumberland T. & T. Co. v. State*, 98 Miss. 159, 53 So. 489 (Code § 5018, giving immunity to corporations producing documents upon trial for violation of the anti-

[*Note 5 — continued*]

trust laws, applied). St. 1912, c. 251, p. 318, Mar. 13 (repealing Code 1906, § 5018, which exempted corporations from immunity on production of documents, etc.).

*Missouri*: St. 1907, p. 382, Mar. 19 (pools and trusts; amending Rev. St. 1899, § 8983; by adding that witnesses are compellable, but "no such witness shall be liable to prosecution" etc. for any matter "concerning which he may testify or produce books or papers"). St. 1907, p. 383, Mar. 19 (amending Rev. St. 1899, c. 143, § 8989; by substituting after "stenographer," that witnesses are compellable, but "no such witness shall be liable" etc. as in the foregoing statute). St. 1913, p. 549, Mar. 29 (pools and trusts; repealing Rev. St. 1909, art. 1, c. 98, and substituting; § 10311 makes witnesses compellable, but "no person shall be subject to prosecution" etc. as in St. 1907, p. 382, Mar. 19, *supra*). St. 1913, p. 556, Mar. 17 (public service commission; by § 125, witnesses are compellable, but "no person shall be prosecuted" etc. for any matter "concerning which he shall under oath have testified or produced documentary evidence," except for perjury; and this is not to give "unto any corporation immunity of any kind").

*Montana*: St. 1913, c. 52, p. 88, Mar. 4, § 22 (public service commission; witnesses compellable, but "no person having so testified shall be prosecuted" etc. for any matter "concerning which he may have testified or produced any documentary evidence," except for perjury).

*Nebraska*: St. 1905, c. 162, § 21 (trusts and monopolies; in proceedings under this act, no person shall be excused on the present grounds); *ib.* § 22 (immunity clause similar to that of Comp. St. § 5343d, *supra*). St. 1907, c. 90, p. 311, § 2 (k) (State railway commission; witness compellable, "but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding"). St. 1913, c. 154, p. 393, § 152 (State insurance board; witnesses compellable, "but no person shall be prosecuted for any act concerning which he shall be compelled so to testify," except for perjury; this is the nearest of all the various phrasings used). St. 1913, c. 179, p. 535, § 19 (State commissioners of State institutions; witnesses compellable, but "evidence given by any witness" etc. "shall not be used" against him, but he shall not be exempt from perjury, etc.).

*Nevada*: St. 1909, c. 44, p. 73, § 17 (State railroad commission; witnesses compellable, but "no person having so testified shall be prosecuted" etc., except for perjury).

*New Jersey*: St. 1906, c. 206, § 6 (bribery, etc., at elections; privilege abolished, but, "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may so testify or produce evidence, documentary or otherwise," and the testimony is not to be used against him in a criminal proceeding). St. 1906, c. 208, § 5 (bribery in general; privilege abolished; but "no person called to testify in any proceedings under this act shall be liable to a criminal prosecution, either under this act or otherwise, for any matters or causes in respect to which he shall be examined or to which his testimony shall relate, except to a prosecution for bribery committed in such testimony"). St. 1911, c. 188, p. 329, § 32 (election offences; witness compellable, "but the testimony so given shall not be used," etc., and "a person so testifying shall not thereafter be liable" etc., and "may plead or prove the giving of testimony accordingly in bar" etc.).

*New Mexico*: St. 1909, c. 83, p. 222, § 29 (game and fish laws; "any participant in a violation thereof, when so requested by the district attorney" etc., may testify, "and his evidence so given shall not be used against him in any prosecution for such violation"). St. 1912, c. 78, p. 137, § 6 (State corporation commission; witnesses compellable, but "such testimony or evidence shall not be used" against him).

*New York*: Consol. L. 1909, c. 20, St. 1909, c. 25, as amended St. 1910, c. 394, p. 724 (general business law; witnesses to be compellable, but "no person shall be prosecuted or subjected to any penalty or forfeiture" for any matter testified to; and no such testimony shall be used, etc.). Consol. L. 1909, c. 40, St. 1909, c. 88, § 583 as amended by St. 1910, c. 395, p. 725 (inserting a new § 584; conspiracies; like the foregoing St. 1910, c. 394). Consol. L. 1909, c. 31, St. 1909, c. 36, as amended by St. 1909, c. 514, § 3 (bureau of industries and immigration; inserting a new § 154; "no person shall be prosecuted" etc., except

[*Note 5 — continued*]

for perjury). St. 1911, c. 647, p. 1496, § 25 (conservation department; witnesses compellable, but "no person shall be prosecuted," etc., except for perjury; but this is not to give "unto any corporation immunity of any kind"). St. 1912, c. 444, p. 883, § 4 (amending St. 1911, c. 647, by inserting § 35; conservation department; like St. 1911, c. 647, § 25). St. 1913, c. 236, p. 425 (amending Consol. L. c. 40, St. 1909, c. 88, by adding a new § 395; bucket-shop offences; witnesses compellable, but "no person shall be prosecuted" etc., and such testimony shall not be used against him, etc.). St. 1914, c. 360, § 3 (amending § 22 of St. 1909, c. 17, by changing the number to § 16; debtor's assignment for creditors; no witness or party to be excused, etc., but "such answer shall not be used against him in any criminal action or proceeding"). St. 1914, c. 518, § 31 (personal loan brokers; a violator of the Act is compellable; but "the testimony so given shall not be used" etc., "nor shall a person so testifying be thereafter liable to indictment" etc.)

*North Carolina*: Rev. 1905, § 2459 (like St. 1897, p. 85, c. 35; the other statutes of 1895 and 1897, *supra*, cannot be traced in Rev. 1905; but the rule of St. 1895, c. 159, is covered by Rev. 1905, § 4407, *infra*). Rev. 1905, § 1688, Code 1883, § 2843 (in gaming offences, the privilege ceases; but the testimony "shall not be used against him in any criminal prosecution" therefor). Rev. 1905, § 1637 (like Code 1883, § 1215). Rev. 1905, § 1638, St. 1893, c. 461, § 5 (in lynching investigations the privilege ceases, "but no discovery made by such witness upon any such examination shall be used against him in any court or in any penal or criminal prosecution, and he shall when so examined as a witness for the State be altogether pardoned of any and all participation in any crime of lynching concerning which he is required to testify." Rev. 1905, § 3201, repeats this, the last clause being slightly broader). Rev. 1905, § 1620 (like Code 1883, § 1349). Rev. 1905, § 4280, Code 1883, § 2646 (privilege abolished for offences concerning unlawful sale of liquor, keeping of games of chance, giving of entertainments, etc., near the State University; but the testimony "shall not be used against him in any criminal prosecution on account of such participation"). Rev. 1905, § 4407 (privilege ceases for a voter not qualified, on inquiry as to his vote; but "any witness making such discovery shall not be subject to criminal or penal prosecution for having voted at such election"). 1904, *Re Briggs*, 135 N. C. 118, 47 S. E. 403 (Cr. Code, § 1215, applied).

*North Dakota*: St. 1909, c. 128, p. 138, § 17 (fish and game law; "the participant in the violation thereof may testify as a witness against any other person violating the same, without incriminating himself in so doing. The evidence so given shall not be used" etc. This is a good example of how not to phrase such an Act).

*Ohio*: St. 1904, Apr. 23, p. 332 (liquor offences; Rev. St. § 7285, *supra*, repealed; instead, "if a person called to testify" in such a case "disclose any fact tending to criminate himself in any manner punishable by said sections or act, he shall thereafter be discharged from all liability to prosecution or punishment for such matter of offence"; this seems to be the best formula yet invented for the purpose). St. 1906, Apr. 2, p. 313 (amending St. 1898, Apr. 19, the anti-trust law, by adding § 6a; the privilege is abolished, "but no individual shall be prosecuted or subjected to any penalty for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise"). St. 1910, p. 100, Apr. 14 (Gen. Code, § 12824; bribery; a new § 12824-1 inserted; an offender is to be compellable against another offender, "but no individual shall be prosecuted" etc. for any matter on which he may testify etc.). St. 1910, p. 210, May 13 (abortion, under Gen. Code, § 12412; enacting a new § 12412-1; the woman not to be prosecuted for complicity, if she testifies).

*Oregon*: St. 1909, c. 3, p. 15, § 52 (corrupt electoral practices; witnesses compellable, but no such evidence "shall be offered or used against him," etc., "or any evidence that is the direct result of such evidence or information," except for perjury therein). St. 1911, c. 279, p. 483, § 59 (public utilities commission; witnesses compellable, but "no person having so testified shall be prosecuted" etc., except for perjury, and this only when "in obedience to a subpoena" he "gives testimony under oath").

## [Note 5 — continued]

*Pennsylvania*: St. 1913, No. 136, May 9, p. 198 (examination of judgment debtor: the debtor to be compellable, "but he shall not be prosecuted" etc., except for perjury). St. 1913, No. 241, May 28, p. 358 (the rule of two witnesses etc. to overcome a responsive answer "is hereby abolished"; saving the rule for proof to reform or overthrow a written instrument).

*Rhode Island*: St. 1911, c. 714, p. 132 (life insurance rebates; witnesses compellable, "but no person shall be prosecuted" etc., and "no testimony so given or produced shall be received against him," etc.).

*South Dakota*: St. 1909, c. 224, p. 348, § 11 (anti-trust law; witnesses compellable, "but the testimony so taken shall not be used" etc.).

*Tennessee*: St. 1897, c. 14, § 6 (election offences; an offender may be compelled to testify at any trial, etc., but the testimony shall not be used, etc., and "a person so testifying shall not thereafter be liable . . . for the offence with reference to which his testimony was given, and may plead or prove" the giving of it in bar). 1904, *Lindsay v. Allen*, 113 Tenn. 517, 82 S. W. 648 (St. 1897, c. 14, § 6, in its compulsory clause, does not apply to a commissioner's examination in a contested election proceeding). St. 1913, 2d Extra Sess., c. 1, p. 659, § 12 (liquor offences; witness compellable, but "no disclosure or discovery made by such person shall be used against him" etc.); § 13 (an accomplice testifying "shall be exempt from prosecution" for the offence).

*Texas*: St. 1903, Mar. 31, c. 94, § 15, p. 119 (anti-trust law; a witness is compellable to testify and "shall not be liable for prosecution"). 1907, *Ex parte Andrews*, 51 Tex. Cr. 79, 100 S. W. 376 (foregoing statute held applicable by its terms to an examination before a justice only, not before a grand jury). St. 1907, c. 7, p. 6 (legislative investigation of public officers; witnesses compellable, but the testimony "shall not be used against him," etc., "nor shall any criminal action or proceeding be brought against such witness on account of such testimony" except for perjury). St. 1907, c. 8, p. 16, § 7 (anti-trust law; witness for the State "shall not be subject to indictment" etc. for matters testified to). St. 1913, Spec. Sess., c. 31, p. 62, § 16 (liquor laws; an accomplice "shall be exempt from prosecution for any offense under this law about which he may be required to testify").

*United States*: St. 1903, Fed. 25, c. 755 (Appropriation Act), 32 Stat. 904 (similar to St. 1893, *supra*, for "any proceeding, suit, or prosecution" under certain enumerated acts, including the Anti-Trust law). St. 1906, Mar. 21, Joint Res. 11, Stat. L. vol. 34, p. 824 (Joint Res. 8, ib. p. 823, amended; in the Interstate Commerce Commission's investigations into railroad discriminations and monopolies, all the immunities, etc., conferred by the act of Feb. 11, 1893, "shall also apply to all persons who may be subpoenaed to testify as witnesses or to produce documentary evidence" under the authority conferred). St. 1906, June 30, c. 3920, Stat. L. vol. 34, p. 798 (quoted *ante*, § 2259; abolishing the privilege for corporations). St. 1910, May 7, c. 216, No. 168, 61st Cong. p. 352 (Rev. St. § 860, repealed).

*Virginia*: St. 1902, Extra, c. 22 (bribery offences; "nor shall any witness called by the Court or Commonwealth's attorney and giving evidence for the prosecution, either before the grand jury or the court in such prosecution, be ever proceeded against for any offence of giving, or offering to give, or accepting a bribe committed by him at the time and place indicated in such prosecution; but such witness shall be compelled to testify").

1912, *Flanary v. Com.*, 113 Va. 775, 75 S. E. 289 (in a prosecution under Code § 3853, concerning elections, a witness who had testified before a grand jury under Code § 145a, containing an immunity provision as to election offences, was held to have obtained immunity and therefore to be compellable; precise point of dispute not clear).

*Washington*: St. 1907, c. 60, p. 99 (bribery and corruption offences; any offender "shall be a competent witness against any other person so offending," and is compellable; "but the testimony so given shall not be used" etc.; and the person "shall not thereafter be liable to indictment" etc.; but this Act does not apply to proceeding before a committing magistrate or justice of the peace). St. 1909, c. 249, p. 986, § 316 (anarchistic propa-

[*Note 5 — continued*]

ganda; no person to be excused on investigation of such offences on the ground of self-crimination); § 78 (bribery, etc.; re-enacting St. 1907, c. 60). St. 1909, c. 249, p. 900, § 39 (criminal Code; wherever in this Code "it is provided that a witness shall not be excused from giving testimony tending to criminate himself, no person shall be excused" on that ground, but "he shall not be prosecuted or subjected" etc., for any matter so testified to, except for perjury). St. 1909, c. 249, p. 958, § 228 (gambling, etc.; no person to be excused "from giving testimony concerning any offense committed by another . . . by reason of his having bet or played at the prohibited device"); § 171 (similar provision for dueling offences). St. 1911, c. 117, p. 589, § 76 (public service commission; witnesses compellable, "but such evidence or testimony shall not be used" etc., except for perjury). St. 1913, c. 120, p. 356, § 13 (game law offences; "a participant in the violation thereof may testify as a witness against any other person violating the same, without incriminating himself in so doing," but the evidence shall not be used etc.).

*Wisconsin*: St. 1905, c. 149 (in prosecutions under Stats. 1898, §§ 4352, 4583, the privilege is abolished, "when so ordered to testify by a court of record or any judge thereof; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which such person may so testify or produce evidence," except for perjury therein). St. 1905, c. 447, § 1 (no railroad corporation shall be excused from producing documents, etc., in any civil action for penalties, etc., on the ground that the document, etc. "may subject it to a penalty or forfeiture," or be excused "from making a true answer under oath by and through its properly authorized officer or agent" on such a ground); ib. § 2 (no officer or employee of any railroad corporation shall be excused from testifying or producing documents, etc., on the above ground; but no such person shall be prosecuted, etc.; immunity clause as in St. 1905, c. 149, *supra*). St. 1909, c. 528, Stats. § 1435 f—22 (midwifery offences; witness compellable, but "no person shall be prosecuted" for any matter thus testified to, except for perjury). St. 1913, c. 773, p. 1321, § 106 (adding a new § 4475-2 to Stats.; bribery as to State funds deposit; witness compellable, but "no testimony so given shall be in any manner used" etc., except for perjury).

[*Note 10*, p. 3178; *add*.]

and in the opinion of Brown, J., in *Hale v. Henkel*, 201 U. S., 43, cited *infra*, note 11.

[*Note 11*; *add*.]

1904, *State v. Jack*, 69 Kan. 387, 76 Pac. 911 (St. 1897, quoted *supra*, n. 5, exempting from prosecution for offences against the anti-trust law, effectually annuls the privilege).

1904, *Re Briggs*, 135 N. C. 118, 47 S. E. 403 (*Brown v. Walker* followed, sanctioning the effectiveness of Cr. Code, § 1215; Douglas, J., specially concurring with hesitation, and Walker, J., also specially concurring).

1904, *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 24 Sup. 563 (order of the Circuit Court requiring production of certain contracts, etc., at the petition of the Commission in a complaint by the district attorney alleging violations of St. 1887, Feb. 4, as amended by St. 1893, Feb. 11, as to discriminations, etc., and asking for the enforcement of the statute by injunction to desist from the violations; the witness, an official of a defendant corporation, was ordered to produce, since the immunity of the statute would annul the privilege; *Brown v. Walker* followed). 1905, *Jack v. Kansas*, 199 U. S. 372, 26 Sup. 73 (following *Brown v. Walker*; accepting a decision of the Kansas Court which held sufficient the immunity of Kan. St. 1897, c. 265, § 10). 1905, *Re Hale*, 139 Fed. 496, 501, C. C. (under U. S. St. 1903, Feb. 19, the immunity produced by testimony "in any proceeding," etc., applies to testimony before a grand jury). 1906, *Hale v. Henkel*, 201 U. S. 43, 26 Sup. 370 (*Brown v. Walker*, *supra*, approved and followed without dissent; here applying the rule to testimony and documents obtained under the immunity-clause of U. S. St. 1903, Feb. 25, *supra*, n. 5).

[Note 11 — *continued*]

1905, *Murphy v. State*, 124 Wis. 635, 102 N. W. 1087 (*Brown v. Walker* followed, applying Stats. 1898, § 4078, amended by St. 1901, c. 85, cited *supra*, n. 5).

[Text, p. 3178, at the end of first paragraph; *add.*:]

It may also be noted that, as a necessary deduction from the principle of § 2259, *ante*, an immunity granted to a person who testifies or produces documents is sufficient to destroy the privilege for him, even though the facts obtained from him serve to incriminate a *third person*, — in particular, a *corporation* whose agent or officer the witness is.<sup>12a</sup>

<sup>12a</sup> 1906, *Hale v. Henkel*, 201 U. S. 43, 26 Sup. 370.

Conversely, compulsory immunity to the officer or agent does not benefit the corporations: Ind. St. 1907, c. 243, p. 490, Mar. 11, § 11 (anti-trust law, civil remedies; witness compellable, who is agent etc. of corporation, to be immune from prosecution, but "such exemption shall be personal to such witness and shall not exempt or render immune the corporation" etc.).

[Note 13, par. 1; *add.*:]

1902, *U. S. v. Kimball*, 117 Fed. 156, 163 (nature of compulsion, considered).

[Note 13, par. 2; at the end, *add.*:]

A *plea in bar* has also been tried:

1910, *Heike v. U. S.*, 217 U. S. 423, 30 Sup. 539 (the defendant pleaded specially in bar that he had obtained statutory immunity by testifying before the grand jury; this plea failed, the trial Court directing a verdict on it; the defendant then, by leave pleading over, pleaded not guilty; before trial of this plea, the trial Court entered judgment subject to the leave to plead; on the question whether this judgment was reviewable in the Supreme Court as a final judgment, the argument was made that the statutory immunity was meant to prevent prosecution, and hence a judgment on a plea in bar if favorable must be final; this argument was held insufficient to affect the usual rule as to Federal judgments on writ of error).

[Note 14; *add.*:]

*Ohio*: 1913, *State v. Cox*, 87 Oh. St. 313, 101 N. E. 135.

*U. S.*: 1906, *Edelstein v. U. S.*, C. C. A., 149 Fed. 636, 642 (good opinion by Adams, J.; Philips, J., diss.).

1908, *Wechsler v. U. S.*, 2d C. C. A., 158 Fed. 579 (under *U. S. St.* 1898, c. 541, § 7, following *Edelstein v. U. S.*).

1910, *U. S. v. Brod*, C. C. N. D. Ga., 176 Fed. 165 (under *U. S. St.* 1898, c. 541, § 7, Bankruptcy; following *Edelstein v. U. S.* and *Wechsler v. U. S.*). 1912, *Glickstein v. U. S.*, 222 U. S. 139, 32 Sup. 71 (the immunity granted in § 7, subd. 9, of the Bankruptcy Act does not bar a prosecution for perjury committed in the testimony exacted under that section). 1913, *Cameron v. U. S.*, 231 U. S. 710, 34 Sup. 244 (applying the Bankruptcy Act, St. July 1, 1898, § 7, and *U. S. Rev. St.* 1878, § 860; but the further ruling that under the latter statute "testimony given [by the same person] in the one bankruptcy proceeding [before the examiner], not tending to establish perjury in that proceeding, should not have been received to establish the crime charged in the other proceeding [before the referee]," is an unworthy quibble, and must excite astonishment; has that august body never cast its eyes down into the sweltering trial courts, and become aware of the disgusting and disgraceful amount of perjury daily practiced, and has it never reflected that the difficulties of punishing perjury are made almost insuperable by quibbling rulings such as the above, and is it willing to share now a part of the public disgrace that perjury thrives unrepessed?

[Note 14 — continued]

We commend a perusal of the opinion of Furman, P. J., in *Ostendorf v. State*, 1912, 8 Okl. Cr. 360, 128 Pac. 143, 153).

*Contra*: 1906, *U. S. v. Simon*, 146 Fed. 89, 92 D. C. (for a bankrupt; cited *post*, § 2282, n. 5). 1913, *U. S. v. Rhodes*, D. C. S. D. Ala., 212 Fed. 518 (the opinion cites only, *In re Harris*, 164 Fed. 292, which is however irrelevant).

[Text, p. 3179; *add*, at the end of the section, a new paragraph, and a new note 15:]

The question will also arise, under these statutes, whether the witness has, in the *subject of his testimony, made a disclosure such as entitles him to the immunity*. This may depend somewhat upon the phrasing of the particular statute. But, so far as the general principle is not affected by particular statutory wordings, it should be necessary and sufficient (a) that the witness *states something*, not merely denies knowledge of any facts; (b) that his statement is of facts *asked for* by the opponent, not of facts volunteered or irrelevantly interjected; and (c) that the facts concern a matter about which the answer *might* by reasonable possibility *have criminated him*; for, while on the one hand it is immaterial whether the answer actually given is an incriminating one, yet, on the other hand, there is no privilege which he can exchange for the immunity unless (*ante*, § 2260) the matter is one on which his answer might conceivably criminate him.<sup>15</sup> (d) If the foregoing requirements are fulfilled,

<sup>15</sup> The cases do not cover all the points above noted: 1859, *R. v. Skeen*, 8 Cox Cr. 143 (cited *supra*, n. 13).

1896, *People v. Sternberg*, 111 Cal. 3, 43 Pac. 198 (cited *supra*, n. 13).

1906, *Rudolph v. State*, 128 Wis. 222, 107 N. W. 466 (indictment for soliciting a bribe as alderman; plea, that under St. 1901, c. 85, quoted *ante*, § 2281, n. 5, he was immune from prosecution by reason of having testified on the subject before the grand jury; his testimony there merely stated that he was alderman, and knew of no bribery; held, that the testimony to his being alderman was not upon an incriminating fact, on the principle of § 2260, *ante*, so as to secure immunity). 1906, *State v. Murphy*, 128 Wis. 201, 107 N. W. 470 (similar; the defendant's testimony that he "did not know of any alderman demanding or receiving money," etc., was held not to secure immunity; as to point (a), *supra*, in the text, it is held that whether the witness gives testimony adverse to himself or not, and whether he testifies truthfully or not, are immaterial, but the question is under the statute "whether the defendant did, in any reasonable sense, testify concerning the transaction, matter, or thing for or concerning which he is prosecuted," and therefore "we should but travesty the statute should we hold that a declaration that he could give no evidence of any transactions within a general class constituted testimony concerning one"; lucid opinion by Dodge, J., concurred in on this point by the others; as to point (c), *supra*, in the text, Dodge, J., declares that the immunity granted may be broader than the privilege yielded, in respect to the scope of facts, if the Legislature clearly so intends; but from this view, *i.e.* that the immunity from the crime could be supposed to be given in exchange for "disclosures which but for moral turpitude he could be compelled to make any way, disclosures of mere circumstances so remote as not to fall within the scope of self-criminatory evidence," Marshall, J., dissents "as emphatically as practicable," because the immunity and privilege are equivalents, "the one being exchanged by force of the law for the other," and the statutory phrase "transaction, matter, or thing" signifies "an event of a criminal character"; with him agree Kerwin and Winslow, JJ., thus forming a majority on this point c).

1906, *Edelstein v. U. S.*, — C. C. A. —, 149 Fed. 636, 642 (under U. S. Bankruptcy Act

[Text, p. 3179 — continued]

1898, § 7, subdiv. 9, the grant of immunity for "any criminal proceeding" is restricted to "such as might arise out of the conduct of his business . . . about which alone the statute authorized the examination in question to be made").

there remains the question as to *other crimes*; i. e. does the immunity extend to offences (disclosed by him) other than the one charged in the indictment or sought for in the proceeding? Here something depends on the nature of the tribunal and the words of the statute. (1) On a trial by jury upon indictment, the offence charged, or one incidental to it, would mark the limit of immunity; for the general object of the immunity would thus be sufficiently attained, and the immunity is not meant to be wasteful. But on a roving inquiry by a grand jury, no formal document defines its scope, either to warn the witness or to form a record of the results; hence there should be no limit, if the three conditions (a, b, c) above mentioned are fulfilled. (2) Yet the statute may use broad terms; if it does, those terms should be taken as marking the limits; for the Legislature has power to make the pardon-immunity larger than was necessary and the only question can be whether its statute has so expressed an intention.<sup>18</sup>

<sup>18</sup> 1908, *People v. Argo*, 237 Ill. 173, 86 N. E. 679 (under a statute authorizing a court to make an order of immunity for a witness called upon in a bribery inquiry, the statutory immunity covers only the offences of bribery specified in the statute, and therefore questions concerning illegal gambling, in protection of which the bribery was said to have been committed, are still privileged; unsound, because the statute's immunity-phrase covered "any matter to which he shall be required to testify," and this must signify any matter relevant to the bribery inquiry).

1912, *Heike v. U. S.*, C. C. A., 192 Fed. 83 (whether testimony to offences under the anti-trust law gave immunity under a charge of fraud on the revenue laws).

May acts for which immunity *has been obtained* be still used merely as *evidence relevant* to a charge of some later act? Yes: 1911, *U. S. v. Swift*, D. C. N. D. Ill., 186 Fed. 1002 (an immunity obtained by giving information in 1904 does not extend to include acts done in pursuance of the same continuing conspiracy to 1910 or a period prior but not barred by statute of limitations; and the transactions covered by the original immunity may still be given in evidence when relevant to show the nature of the conspiracy at a later time).

The foregoing question, it is to be noted, may arise in one of two ways: Either the accused *has made disclosure* of a separate offence, and is later charged with it, and then pleads an immunity gained by his disclosure; or, the accused *refuses disclosure* of the other offence, alleging it to be a separate one, therefore not covered by the immunity, and therefore still privileged, and the prosecution alleges the contrary and asks that an answer be compelled. The decision, it would seem, should be the same, in whichever of these ways the question arises.

[Text, p. 3178, after the paragraph ending "single jurisdiction"; add the following, as a new section:]

§ 2281a. **Same: Mode of Obtaining Immunity in return for Self-Criminating Evidence.** There has been a rapid increase in the number and scope of

[Text, p. 3178 — continued]

statutes thus granting immunity in order to enable the State prosecutors to obtain evidence which would have been protected by the privilege. Owing to this increase, a most important question arises as to the procedure of the disclosure which is to obtain immunity.

(a) Where the disclosure takes place in the course of testimony at an *ordinary trial*, whether before a judge, master-in-chancery, or other judicial officer, it can hardly be doubted that the usual requirements established in principle must be followed; *i. e.* there must be a *claim of privilege*<sup>1</sup> — and a

<sup>1</sup> The general principle is amply shown in the authorities cited *ante*, § 2268. The following apply it to the present situation:

1913, *Scribner v. State*, 9 Okl. Cr. 465, 132 Pac. 933 (interpreting Okl. Const. Bill of Rights, § 27; “the immunity clause is just as broad and no broader than the right or privilege of silence which it invades”).

1911, *Com. v. Richardson*, 229 Pa. 609, 79 Atl. 222 (testimony given as a witness for the prosecution, in a trial of M., without subpoena and without claim of privilege, held not to entitle to immunity from use under Pa. Const. Art. 3, § 32).

1902, *U. S. v. Kimball*, 117 Fed. 156, 163, C. C. (“The constitutional privilege cannot be violated before it can be invoked for his protection. . . . Compulsion can only exist where there is something to be overcome, as for instance refusal, objection, or an unwillingness of which the jury is apprised. Hence that refusal, objection, or unwillingness must affirmatively appear before compulsion is possible. . . . He must express his unwillingness in some form, and bring himself within the rule that he who would have the benefit of an exemption or privilege must claim it”). 1904, *Burrell v. Montana*, 194 U. S. 572, 24 Sup. 787, *semble* (a witness answering voluntarily and without claim of privilege on a bankruptcy citation cannot obtain the benefit of the Bankruptcy Act’s prohibition of the subsequent use of the testimony against him).

1906, *State v. Murphy*, 128 Wis. 201, 107 N. W. 470 (the defendant had testified under subpoena before the grand jury; his testimony consisted wholly of denials of any knowledge on the matters involved, and it did not appear that he claimed any privilege or offered any objection; Marshall, J., held that “for the statute to operate, there must be evidence under a real compulsion, not mere right of compulsion,” so that an express claim of privilege would be unnecessary only where the situation was such that on refusal to answer “he would be liable to punishment as standing in defiance of the Court”; Kerwin, J., concurred; Winslow, J., concurred; “I do not think that compelling a person to appear by subpoena can properly be considered as compelling him to testify; . . . A person might be compelled by subpoena to attend, but might testify voluntarily when so in attendance and thus waive his privilege; in like manner I think he may waive his immunity; I do not mean by this that it is necessary for the witness to refuse to answer, but simply that he should make known the fact that he does not testify voluntarily but only in obedience to the command of the law and the Court,” which he did not here do; Dodge, J., dissenting, on this point).

*Contra*: 1887, *People v. Sharp*, 107 N. Y. 427, 445 (“He could not be required, in order to gain the indemnity which the same law afforded, to go through the formality of an objection or protest which, however made, would be useless”).

Under U. S. R. S. § 860 (which does not give immunity, but only forbids the use of the evidence), the statute’s language makes a claim unnecessary.

1909, *Hammond Lumber Co. v. Sailors’ Union*, C. C. N. D. Cal., 167 Fed. 809, 823 (deposition given in a civil proceeding upon a subpoena *duces tecum* to produce records as secretary; the witness producing and being examined was held entitled to the benefit of U. S. R. S. § 860 though no claim of privilege was made at the time; it is enough if “the exemp-

[Text, p. 3178 — continued]

*ruling of the judge* overriding the claim and directing an answer.<sup>2</sup> The reason is that the anticipatory legislative pardon or immunity is not given absolutely, but only conditionally upon and in exchange for the deprivation of the privilege. The Legislature did not intend to give something for nothing, *i. e.* to give immunity merely in exchange for a testimonial disclosure which it could in any event have got by ordinary rules or by the witness' failure to insist on his privilege.<sup>3</sup> The immunity was intended to be given solely as the means of overcoming the obstacle of the privilege; and therefore (irrespective of the precise formality of the judge's procedure) could not come into effect until that obstacle was explicitly presented and thus needed to be overcome. On the one hand, it is plain, the judge, upon such a claim of privilege being made, could if he chose respect it, and thus refrain from exercising the immunity-power. Conversely, therefore, the immunity operates as soon as — and not until — he overrides the claim, by some form of ruling. It is not to be argued, in opposition, that the criminality of the act disappears by operation of law as soon as the witness speaks, and that therefore no claim of privilege is necessary. This argument, in the first place, equally ignores the above-mentioned essential feature of the legislative intention (namely, to give the immunity solely as a means of removing the obstacle of the claim). But furthermore, it involves somewhat of a logical absurdity; for by this theory, before the witness has testified, his act is still criminal, and therefore within the privilege, and yet he can be compelled to speak and thus do something to remove the obstacle. If the claim is not made, the evidence thus obtained is first sought to be used," *i. e.* in proceedings for criminal contempt in violating the injunction in the civil proceeding). But this statute is now repealed (*ante*, § 2281, n. 5).

<sup>2</sup> Authorities *ante*, § 2270, n. 6; § 2271, for the general principle; and the following: 1907, *Ex parte Andrews*, 51 Tex. Cr. 79, 100 S. W. 376 (a witness refused to answer, claiming the privilege; on *habeas corpus*, an immunity statute being cited, it was held that "inasmuch as he was offered no immunity," the privilege remained).

The proper *statutory form*, for making clear the necessity of an express claim of privilege in order to obtain the immunity, is found in the statutes of the Dominion and Ontario, quoted *ante*, § 2281, n. 5. The California statute of 1905 (quoted *ante*, § 2281, n. 5), antedating by a year the ruling in *U. S. v. Armour*, is a well-worded statement offering a fair and correct solution of the problem. It does not vary from what might well be the judicial construction of the privilege, except in its liberality in presuming a claim of privilege in the absence of a reading aloud of the statute to the witness. The statute, however, has omitted to provide (as it ought to) that the oath may be impliedly waived, and that a voluntary attendance of the witness at a hearing shall be equivalent to a summons by subpoena, for the purpose of entitling to immunity.

<sup>3</sup> This appears, *e. g.*, in the *U. S. St. 1887* (Interstate Commerce Commission), §§ 9, 12, and its successors (*ante*, § 2281, n. 5), where it is said that "the claim . . . shall not excuse," and "no person shall be excused . . . on the ground that, etc.," "but no person shall be prosecuted for" anything so testified about.

This general principle that there must inherently be an *exchange* of privilege for immunity is well stated in the following opinions: 1884, *Turney, J.*, in *State v. Warner*, 13 Lea 52, 62-66.

1906, *Marshall, J.*, in *State v. Murphy*, 128 Wis. 201, 107 N. W. 470 (quoted *infra*, § 2281 n. 15).

[Text, p. 3178 — continued]

its criminality; in other words, being as yet non-compellable, he is compelled to become compellable! No such logical feat is required in applying the other view above set forth.

(b) Where the testimonial disclosure is made before an *administrative officer*, having the auxiliary power to subpoena witnesses and to obtain judicial aid to enforce his testimonial powers,<sup>4</sup> the question is more complicated in certain details, though not different in principle. (1) In the first place, no *service of subpoena* is necessary, in order to bring into play the testimonial function, either of officer or of witness. Just as a witness may voluntarily take the stand in court without a subpoena, and still be subject to a witness' duties of disclosure and entitled to a witness' privileges; so too for the informal and less dramatic proceedings of an administrative officer, no subpoena is essential in law; the situation merely presents greater difficulty of interpreting the circumstances and of determining whether the person spoke as a witness in a given case.<sup>5</sup> Nor is an *oath*, it would seem, any more necessary; whether perjury could be committed without an oath is immaterial, for the law of crimes and of evidence are not inherently coextensive; the imposition of an oath is a safeguard of trustworthiness only, and if the officer waives it, both his testimonial powers and the witness' testimonial duties remain unaffected in essence.<sup>6</sup> (2) But a *claim of privilege against self-incrimination*, explicitly made, and an explicit overriding of it by the officer, are essential.<sup>7</sup> This is not only equally true as for the case of testimony in a judicial trial (*supra*, (a)), but the explicitness is here even more essential, and particularly where the administrative officer makes a general demand for documents or testimony upon a broad class of topics. The reason is clear. The officer has testimonial powers to extract a general mass of facts, of which some, many, or most will certainly be innocent and unprivileged, some may be privileged communications (*e.g.*, between attorney and client) whose privilege remains unaffected by the statute defining his powers, and some may be privileged as self-crimi-

<sup>4</sup> *E. g.*, the Commissioner of Corporations, under U. S. St. 1903, *supra*, § 2281, n. 5.

<sup>5</sup> Authority cited for the general principle as to subpoena, *ante*, § 2199, n. 5; and the following:

1906, U. S. *v. Armour Co.*, 142 Fed. 808, N. D. Ill., Humphrey, J. (a plea of immunity from prosecution, by the defendants, officers of meat-packing companies, was sustained, on the ground that the defendants had as witnesses obtained immunity, under U. S. St. 1903, Feb. 14 and 25, cited *supra*, n. 5, § 2281, by producing documents and giving information to the Federal Commissioner of Corporations; "the subpoena is a useless and superfluous thing after the parties are together").

By a Federal statute, passed since the above ruling in U. S. *v. Armour*, it has been attempted to confine the grant of immunity to persons who testify or produce "in obedience to a subpoena . . . under oath" (U. S. St. 1906, June 30, c. 3920, Stat. L. vol. 34, p. 798; quoted *ante*, § 2259). But of course it still remains for the Court to determine whether such a statute infringes on the constitutional lines of the privilege.

<sup>6</sup> U. S. *v. Armour*, *supra*, and authorities cited *ante*, § 1819. *Contra*: 1884, *State v. Warner*, 13 Lea 52, 57.

<sup>7</sup> *Contra*, in U. S. *v. Armour*, *supra*.

[Text, p. 3178 — *continued*]

nating but liable to become demandable by overriding this privilege with a grant of immunity. Among this mass of facts, then, the officer will seek those which are relevant to his administrative inquiry; he cannot know which of them fall within one or another privilege, in particular, which of them tend to criminate at all, or to criminate a particular person; if such facts are there, he may not desire or be authorized to exercise the option of granting immunity so as to obtain them; his primary function and power is to obtain the relevant facts at large, and his power to obtain a special and limited class of facts by grant of immunity is only a secondary one, and one which he will not exercise till a cause arises, if even then. For these reasons of practical sense, then, as well as for the inherent requirements of principle already noticed for judicial officers, it is particularly true for an inquiry by an administrative officer that the witness must explicitly claim his privilege, and specifically *the* privilege against self-incrimination, and must then be overridden in that claim, before immunity can take effect. The contrary view<sup>8</sup> can only be fallen into by forgetting the contrast between the broad class of innocent facts which are the normal object of the officer's inquiry, and the special and limited class of criminal facts which may form scattered parts of the mass. The analogy is seen in judicial trials, where it is settled that though an accused in a criminal trial need make no claim, yet a party in a civil trial or a witness in any trial *must* make his claim,<sup>9</sup> because out of the whole mass of innocent facts subject to inquiry it cannot be known beforehand by the tribunal what particular facts asked for will tend to criminate nor whether he will voluntarily choose to disclose them. So, here, it is especially necessary that the claim of the particular privilege against self-incrimination should be explicitly put forward by the witness to segregate and mark the specific facts which he knows or believes to have that quality; then, and then only, is the officer placed in a position when he can consciously exercise the option which the immunity-statute gives him. This option he can certainly not be deemed to exercise unwittingly and in gross by the mere circumstance of pursuing his normal course of duty and power for relevant facts at large. It is indeed astonishing to suppose that a witness by surreptitiously including criminal with non-criminal facts could obtain from such an officer a wholesale immunity, without having done anything to notify either whether particular facts are criminating or whether he waives his privilege voluntarily and without immunity. (3) The *formalities* of claim and immunity-grant, before an administrative officer, are the only really doubtful and difficult aspects of the problem. In the first place, it is doubtful whether a statutory requirement of *writing* for the validity of the witness' claim would be constitutional. A writing is not necessary for such a claim in court; nor would the claim necessarily there become part of the record. But the statute, as a matter of policy, ought at least to require the officer to file his questions in writing, and to note a claim of privilege in writing; so that the Government, on its part, could at least insure itself and

<sup>8</sup> Laid down in *U. S. v. Armour*, *supra*.

<sup>9</sup> *Ante*, § 2268.

[Text, p. 3178 — continued]

the witness against the enormous expense of time and money that might be involved in a trial of the plea of immunity.<sup>10</sup> In the next place, if writing is not requirable nor in fact employed, the claim and its overriding must at least be *explicit*; by which is meant, not a form of words, nor any formality of conduct, but an expressed and understood claim of the right not to disclose on the specific ground of facts tending to criminate; and an explicit overriding of the claim and a grant of immunity.<sup>11</sup> Furthermore, in the case of an inquiry into acts of a *corporation*, where the Government demands production of corporate books from the agents of the corporation, the agent producing the books must claim the personal privilege for himself, if that is what he desires; first, because it cannot be known, until he says so, that the corporate books contain facts tending to criminate *him*; and, secondly, because, even though they do, it cannot be known which of the privileges — his own, or that of the corporation, or both — the officer will choose to override; for, in spite of *Hale v. Henkel* (*ante*, § 2259, n. 2), a question may still remain as to the privilege of the corporation.<sup>12</sup> Finally, the claim may well be *in gross*, *i. e.* for a particular mass of documents the claim may be made as to all criminating facts therein, and need not be more specifically made nor more frequently renewed than will suffice to avoid misunderstanding. The essential thing is that no formality is required, on the one hand, and, on the other, that the witness, since he is the one to be explicit, must be explicit enough to serve his purpose. — These are not all the applicable considerations, either of general principle or of detail; the entire question will doubtless not be thoroughly worked out in our judicial decisions for many years to come. But the foregoing aspects are those which will first claim the judicial labors for their early settlement by courts of last resort.

It remains to notice a misunderstanding which should not obscure the effect of the rule in question. It was said, for example, at the time of *U. S. v. Armour*, above cited, that "the Department of Commerce and Labor, created with power to investigate the trusts and combinations in restraint of trade, it is declared, is absolutely useless if the results of its investigations cannot furnish any basis on which to bring offenders to punishment." Now the profession

<sup>10</sup> As in *U. S. v. Armour*, *supra*.

<sup>11</sup> Whether the claim was explicitly made in fact in *U. S. v. Armour*, *supra*, is perhaps open to question, as to some of the witnesses, upon some of the testimony. But it is fairly clear that the witnesses' counsel were amply aware of the applicability of the privilege, and could have been explicit enough had they chosen. The natural query is, why did they not all explicitly and in writing claim both privilege and immunity?

The following statute seeks to supply a simple method of plainly *declining the immunity*: N. Y. St. 1912, c. 312, p. 568 (amending Consol. L. c. 40, St. 1909, c. 88, by adding § 2446; if by any law an immunity of the present sort is provided, a person may file with the county clerk "a statement expressly waiving such immunity" for a specified transaction, and thereupon his testimony "may be received or produced before any judge," etc., and if received, "such person shall not be entitled to any immunity," etc.).

<sup>12</sup> This distinction seems not to have been noticed in *U. S. v. Armour*, *supra*.

[Text, p. 3178 — continued]

ought to understand that no administrative Department has a function to procure self-incriminating evidence "on which to bring offenders to punishment." That is precisely what the Constitution protects us against. It is just because no officer has inquisitorial powers to force self-crimination that the immunity-statutes were passed; so that only by abnegating the judicial inquisitorial attitude could the Department obtain the information necessary for its administrative purposes. The real inconvenience of the above-cited ruling in *U. S. v. Armour* was that it hampered the Department of Justice, by making the Department of Commerce the unwitting instrument of stopping the prosecutions of the former. Even this is not an insuperable obstacle. If *U. S. v. Armour* should ever become the final law, it would mean simply this, that an administrative officer, in obtaining testimony for the purposes of his department, has the burden of making and proving an explicit and specific disavowal of any intention to grant immunity from prosecution, otherwise the immunity obtains. This leaves the situation temporarily annoying for the Government; but it leaves them with ample power of self-protection for the future.<sup>13</sup>

<sup>13</sup> Suppose a witness *already under indictment* and now summoned before the grand jury to testify as a witness on the same subject; has his privilege yet disappeared? Yes, for although he has not yet had an opportunity to claim immunity from trial, yet the indictment is a substantial part of the *quid pro quo*, and his act of testifying will relate back to the indictment, and will entitle him to quash it:

1910, *In re Kittle*, C. C. S. D. N. Y., 180 Fed. 946.

§ 2282. Same: (2) Statutes forbidding the Use of Testimony.

[Text, p. 3180, l. 2 from below, after "remedy of the statute"; add a new note 3b:]

<sup>3b</sup> This view has now been taken in *Com. v. Cameron*, 229 Pa. 592, 79 Atl. 169 (1911; under Pa. Const. Art. 3, § 32, providing that in bribery self-crimination may be compelled, but that such testimony "shall not afterwards be used against him," the witness so testifying does not obtain immunity from prosecution).

[Note 4; add:]

1904, *Re Briggs*, 135 N. C. 118, 47 S. E. 403 (*La Fontaine v. Underwriters* cited with approval).

[Note 5, par. 2; add:]

1910, *State v. Drew*, 110 Minn. 247, 124 N. W. 1091 (under the State banking-frauds act, the prosecution offered the accused's schedules of assets filed in involuntary bankruptcy proceedings under the Federal act; held that the immunity granted was not broad enough to remove the privilege).

1904, *U. S. v. Goldstein*, 132 Fed. 789, D. C. (privilege held not annulled, under § 7 of the Act; the voluntary filing of a petition is not a waiver).

1904, *Re Hess*, 134 Fed. 109, D. C. (the Bankruptcy Act, § 7 does not abolish the privilege; but the decision proceeds in part upon the erroneous ground — *ante*, § 2258 — that the statute gives no protection against use of the evidence in State courts).

1904, *Burrell v. Montana*, 194 U. S. 572, 24 Sup. 787 (*State v. Burrell*, Mont., *supra*, affirmed).

1906, *U. S. v. Simon*, 146 Fed. 89, 92, D. C. (applying *Burrell v. Montana*, *supra*; and also

[*Note 5 — continued*]

holding that a bankrupt cannot be charged with perjury committed in bankruptcy proceedings because the statute, forbidding the use of his testimony "in any criminal proceeding," omits the usual exception for perjury committed therein; collecting the prior rulings on this point).

1906, *Edelstein v. U. S.*, — C. C. A. —, 149 Fed. 636, 642 (privilege held not annulled).

1911, *Matter of George Harris*, 221 U. S. 274, 31 Sup. 557 (a court order on a bankrupt to deposit his books with the receiver for use only in the bankrupt settlement but not for criminal proceedings, but does not infringe the privilege, in spite of the possibility that the knowledge so obtained may be used to find other evidence against him in criminal proceedings).

[*Note 7; add:*]

*N. Dak.*: 1908, *In re Beer*, 17 N. D. 184, 115 N. W. 672 (*Counselman v. Hitchcock* followed, in a prosecution for violating the liquor law; holding Rev. Codes 1905, § 9383, ineffective). *Contra: Pa.*: 1911, *Com. v. Cameron*, 229 Pa. 592, 79 Atl. 169 (cited more fully *supra*, n. 3b).

[*Text*, p. 3184; *add a new paragraph:*]

Regardless, however, of the efficacy of such statutes to annul the privilege, and assuming that answers were duly made by the witness without disputing his compellability thereunder, the statutes have of course the effect of *preventing the later use* of such answers, according to their terms. This result has seldom, indeed, been invoked, but cannot be doubted.<sup>8</sup>

<sup>8</sup> 1908, *Jacobs v. U. S.*, 1st C. C. A., 161 Fed. 694 (under U. S. St. 1898, c. 541, § 7).

1908, *Alkon v. U. S.*, 1st C. C. A., 163 Fed. 810 (under U. S. Rev. St. 1878, § 860, now repealed); these cases are cited more fully *ante*, § 2276, n. 9, on the point of waiver.

### § 2285. Privileged Communications; General Principle.

[*Note 1; add:*]

Text approved in *O'Toole v. Ohio G. F. Ins. Co.*, 159 Mich. 187, 123 N. W. 795.

### § 2286. Sundry Confidential Communications not privileged.

[*Note 2; add:*]

1906, *Rogers v. State*, 88 Miss. 38, 40 So. 744 (good opinion by Calhoon, J.; a "solemn promise of secrecy" as to the name of a person returning stolen goods, held not to give a privilege).

[*Note 3; add, under Accord:*]

*Ok. St.* 1908, p. 20, Feb. 26 (no stenographer shall disclose any matter received from employer, under penalty; except when "called as a witness and directed to testify by a proper court as to matters within his employment").

[*Note 6; add:*]

1904, *Re Davies*, 68 Kan. 791, 75 Pac. 1048 (perjury of B. in returning personality for taxation; a banker held not privileged as to the amount of money held on deposit by him for B.; good opinion by Smith, J.).

[*Note 7, par. 1; add:*]

1911, *Plunkett v. Hamilton*, *Hamilton v. Plunkett*, 136 Ga. 72, 70 S. E. 781 (newspaper reporter; privilege denied; forceful opinion by Lumpkin, J.).

**§ 2287. Same : Telegrams.**

[*Note 8, par. 1; add:*]

1910, *Ex parte Gould*, 60 Tex. Cr. 442, 132 S. W. 364.

**§ 2292. Attorney and Client ; Privileged Communications.**

[*Note 1; add:*]

Cal. St. 1907, c. 68, p. 87, Mar. 1 (adds to C. C. P. § 1881, par. 2, the first four lines, "nor . . . capacity," of the Commissioners' amendments of 1901).

Colo. St. 1911, c. 230, p. 679, May 30 (amending Annot. St. 1891, § 4824, Rev. St. 1908, § 7274; adding the same provision as in Cal. St. 1907).

N. C. Rev. 1905, § 1620 (like Code 1883, § 1349).

**§ 2296. Advice sought for Sundry Non-Legal Purposes, etc.**

[*Note 2; add:*]

1905, *Turner v. Turner*, 123 Ga. 5, 50 S. E. 969 (statements to an attorney employed to obtain a loan, not privileged).

[*Note 3; add:*]

1909, *State v. Hoben*, 36 Utah 186, 102 Pac. 1000 (not decided as a general rule; here the State had opened the matter, and the district attorney was not allowed to claim privilege for consultation with the prosecutrix in a charge of rape under age).

1903, *Cobb v. Simon*, 119 Wis. 597, 97 N. W. 276 (defendant's consultation with district-attorney, not privileged).

**§ 2297. Advice in Conveyancing.**

[*Note 5; add:*]

1906, *Fox v. Spears*, 78 Ark. 71, 93 S. W. 560 (statements made while consulting over the drafting of a deed, excluded).

1912, *Delger v. Jacobs*, 19 Cal. App. 197, 125 Pac. 258 (drafting of a money-security, held not privileged on the facts).

1906, *Mueller v. Batcheler*, 131 Ia. 650, 109 N. W. 186 (conversations between parties consulting an attorney merely "as a scrivener or conveyancer," admitted).

**§ 2298. Advice in a Criminal or Fraudulent Transaction.**

[*Note 2, under United States; add:*]

1913, *State v. Wilcox*, 90 Kan. 80, 132 Pac. 982 (criminal libel; communications to a county attorney, to secure the prosecution of an innocent man by false testimony, held not privileged, being acts done as a part of a criminal plan).

1909, *People v. Farmer*, 194 N. Y. 251, 87 N. E. 457 (rule applied to deny the privilege as to the execution of a deed material on a charge of homicide).

**§ 2300. Persons having Legal Knowledge, but not admitted, etc.**

[*Note 1; add:*]

*Accord:* 1905, *State v. Smith*, 138 N. C. 700, 50 S. E. 859 (communications to an "attorney in fact," not being an attorney at law, not privileged).

*Contra:* 1906, *English v. Ricks*, 117 Tenn. 73, 95 S. W. 189 (a licensee to practise before justices of the peace only; privilege applied; no authority cited).

§ 2302. *Client's Belief in the Attorney's Status.*

[*Note 1, par. 1; add, under Excluded:*]

1908, *R. v. Choney*, 17 Man. 467 (confession to one falsely pretending to be the agent of the accused's attorney and asserting that the latter had sent word to tell about the case, excluded).

§ 2303. *Consultation in Attorney's Capacity.*

[*Note 1; add:*]

1903, *Sheehan v. Allen*, 67 Kan. 712, 74 Pac. 245.

1904, *Mack v. Sharp*, 138 Mich. 448, 101 N. W. 631.

The *value* of such communications is quite another matter: *King Lear*, I, 4; "*Fool*. Then 't is like the breath of an unfee'd lawyer, — you gave me nothing for it."

[*Note 2; add:*]

1889, *Skellie v. James*, 81 Ga. 419, 8 S. E. 607 (knowledge not acquired as attorney; statute held not applicable).

1904, *Union P. R. Co. v. Day*, 68 Kan. 726, 75 Pac. 1021 (consultation with a poormaster, who was also a lawyer, held not privileged on the facts).

§ 2304. *Time of Consultation, etc.*

[*Note 1; add:*]

1904, *Eckhout v. Cole*, 135 N. C. 583, 47 S. E. 655.

[*Note 2; add:*]

1909, *Lanasa v. State*, 109 Md. 602, 71 Atl. 1058 (communications pending a tentative employment never actually authorized, admitted).

1911, *Evans v. State*, 5 Okl. Cr. 643, 115 Pac. 809 (preliminary consultations, followed by withdrawal on account of the proposed fee being too high; held privileged on the facts).

§ 2306. *Communications, distinguished from Acts, etc.*

[*Note 2, par. 1; add:*]

1903, *Sheehan v. Allen*, 67 Kan. 712, 74 Pac. 245 (attorney not allowed to testify as to insanity learned solely in professional consultation).

1910, *Surface v. Bentz*, 228 Pa. 610, 77 Atl. 922 (the above passage cited).

§ 2307. *Same: Production of the Client's Documents.*

[*Note 1; add:*]

1908, *Ex parte Snow*, *Gibson v. Snow*, 75 N. H. 7, 70 Atl. 120 (counsel held not bound to produce a copy in his possession on behalf of his client and privileged as to the client).

[*Note 2, par. 1; add:*]

1913, *Pearson v. Yoder*, 39 Okl. 105, 134 Pac. 421 (attorney having a mortgage in court, required to deliver it to be put in evidence).

1890, *Edison El. L. Co. v. U. S. El. L. Co.*, 44 Fed. 294, 297, 45 id. 55, C. C. ("If documents are not privileged while in the hands of a party, he does not make them privileged by merely handing them to his counsel").

**§ 2309. Same: Testimony to Possession, etc., of Documents.**

[Note 1, par. 1; add:]

1903, *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552 (where he last saw certain bonds of the client, allowed).

1913, *Pearson v. Yoder*, 39 Okl. 105, 134 Pac. 421 (attorney compellable to say whether a mortgage in his custody is the one in suit).

**§ 2310. Relevancy or Necessity of the Communication.**

[Note 1, par. 1; add:]

1903, *Denunzio's Receiver v. Scholtz*, 117 Ky. 182, 77 S. W. 715 (a communication "not in regard to the subject matter of the employment is not privileged").

**§ 2311. Communications must be Confidential, etc.**

[Note 4, par. 1; add:]

1905, *Mackel v. Bartlett*, 33 Mont. 123, 82 Pac. 795.

[Note 5; add:]

1909, *Moyers v. Fogarty*, 140 Ia. 701, 119 N. W. 159 (on the facts). 1913, *Cockburn v. Hawkeye C. M. Ass'n*, — Ia. —, 143 N. W. 1006 (attorney allowed to verify a printed copy of a client's by-laws).

1906, *Temple v. Phelps*, 193 Mass. 297, 79 N. E. 482 (communications made concerning a third person's public testimony, not privileged).

1907, *Yardley v. State*, 50 Tex. Cr. 644, 100 S. W. 399 (attorney compelled to testify to his client's testimony given in open court at a former trial).

1907, *Aaron v. U. S.*, 8th C. C. A., 155 Fed. 833 (communications here held not privileged).

[Note 6; add:]

1906, *Denunzio's Receiver v. Scholtz*, 117 Ky. 182, 77 S. W. 715 (presence of a third person; privilege denied).

**§ 2312. Communications to Opponent or his Attorney, etc.**

[Note 3; add:]

1912, *Piercy v. Piercy*, 18 Cal. App. 751, 124 Pac. 561 (conversations with attorney for both parties are not privileged as between the parties).

1910, *Real Estate Trust Co. v. Wilmington & N. C. E. R. Co.*, — Del. —, 77 Atl. 756 (service of notice upon the opponent; no privilege).

1904, *Scott v. Aultman Co.*, 211 Ill. 612, 71 N. E. 1112 (divorce; communications in the presence of the opposing attorney at a consultation, not privileged).

1904, *List's Ex'x v. List*, — Ky. —, 82 S. W. 446 (message sent by the party through his attorney to the opponent, not privileged).

1905, *Brown v. Moosic M. C. Co.*, 211 Pa. 579, 61 Atl. 76 (communications with a joint attorney, not privileged).

1884, *Moffatt v. Hardin*, 22 S. C. 9, 12 (apparently by one party to the attorney in the opponent's presence; not privileged). 1905, *Wilson v. Gordon*, 73 S. C. 155, 53 S. E. 79 (mutual wills by sisters, the same attorney drafting for both; privilege held not applicable to the instructions for drafting the wills, "as between them or those claiming under them").

[Text, p. 3238, l. 8; add a new par.:]

Distinguish, of course, the rule of propriety (*ante*, § 1911) against calling *one's own attorney* as a witness even in the foregoing cases where he is to testify to a non-privileged communication with an opponent.

**§ 2313. Identity of Client or Purpose of Suit.**

[*Note 1; add:*]

1904, *Elliott v. U. S.*, 23 D. C. App. 456, 467 (the attorney-witness, having related a conversation with the testator in which the former had said that he was preparing memoranda for the will of another person, the name of that other person was held to be within the privilege; *Chirac v. Reinicker*, U. S., *infra*; distinguished; *Shepard, J.*, diss.).  
1906, *Strickland v. Capital C. Mills*, 74 S. C. 16, 54 S. E. 220 (the attorney's contract for fee and the assignment of an interest in a judgment are not privileged).

**§ 2314. Execution of a Will or Deed, etc.**

[*Note 2, par. 1; add:*]

1907, *Dominici's Estate*, 151 Cal. 181, 90 Pac. 448 (Nelson's Estate followed).  
1906, *Shapter's Estate*, 35 Colo. 578, 85 Pac. 688 (*Doherty v. O'Callaghan*, Mass., followed).  
1907, *Champion v. McCarthy*, 228 Ill. 87, 81 N. E. 808 (the above passage cited with approval, and *Blackburn v. Crawfords*, U. S., followed). 1912, *Norton v. Clark*, 253 Ill. 557, 97 N. E. 1079 (testator's sanity; privilege not applied).  
1909, *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755 (the client's instruction, to the attorney drafting a will and affidavit, to tell her brothers certain things after her death, held to remove the privilege; mis-called a waiver).  
1909, *Loree's Estate*, 158 Mich. 372, 122 N. W. 623.  
1912, *Veazey's Will*, 80 N. J. Eq. 466, 85 Atl. 176.  
1908, *Young's Estate*, 33 Utah 382, 94 Pac. 731 (privilege not applicable to the preparation of a will).  
*Contra*: 1911, *Cunnion's Will*, 201 N. Y. 123, 94 N. E. 648 (similar to *Butler v. Fayerweather*, *supra*; holding that the Code amendments of 1892, 1893, and 1899, do not alter the rule as laid down in *Loder v. Whelpley*, *supra*; but conceding that this is the result of the N. Y. statute and was not the rule at common law).

**§ 2315. Same: Attorney as Attesting Witness.**

[*Note 1; add:*]

1906, *Strickland v. Capital C. Mills*, 74 S. C. 16, 54 S. E. 220 (assignment).  
But such an attestation is of course no waiver for prior distinct communications:  
1907, *Hardy v. Martin*, 150 Cal. 341, 89 Pac. 111.

[*Note 2; add:*]

1906, *Inlow v. Hughes*, 38 Ind. App. 375, 76 N. E. 763 (like *Kern v. Kern*, *supra*).  
1906, *Brown v. Brown*, 77 Nebr. 125, 108 N. W. 180 ("the testator, by permitting his attorney to become a witness to the will, thereby consented" to his testifying to the circumstances of execution).

**§ 2317. Privilege not applicable to Knowledge acquired from Third Persons.**

[*Note 1, par. 1; add, under Accord:*]

1904, *King v. Ashley*, 179 N. Y. 281, 72 N. E. 106.  
1908, *In re Ruos*, D. C. E. D. Pa., 159 Fed. 252 (communications with a third person, not privileged).

**§ 2319. Documents of the Client, etc.; Conflict of Principles Illustrated.**

[*Note 1, p. 3245, col. 2:*]

In line 19 from below, *insert* "not" before "privileged"; in line 15 from below, omit, "on the first point this ruling is unsound."

[Note 1; add:]

*England*: Jones v. Great Central R. Co., [1910] A. C. 4 (plaintiff, an employee of defendant, was dismissed and sues; by his tradeunion rules he was obliged to give them full information, and was also entitled to free legal assistance from them, on order of the union officials; his letters to the union officials, before action brought, pending the officials' decision as to suing, were held not privileged; citing Anderson v. Bunk). Curtis v. Beaney, [1911] P. 181 (testamentary proceeding involving the testatrix' insanity; the testatrix had once been sued on a contract, and had apparently pleaded insanity; her then solicitor's brief prepared by him for counsel, held within the privilege; Walsham v. Stainton and Nicholl v. Jones, *supra*, followed; no other cases cited). Birmingham & M. M. O. Co. v. London & N. W. R. Co., [1913] 3 K. B. 850 (loss of goods by fire at defendant's station; reports on the fire by defendant's agents to superintendent, held privileged).

*Ireland*: 1905, Kerry Co. C. v. Liverpool S. Ass'n, L. R. 2 Ire. 38 (action for stranding a wrecked vessel; documents obtained by the defendant as agent of an insurance company with reference to the ship-owner's claim and the circumstances of the loss, held not privileged). 1905, Tobakin v. Dublin S. D. T. Co., L. R. 2 Ire. 58 (a statement of injury by the plaintiff, furnished to the defendant's agent at the latter's request after the injury, held not privileged in the defendant's hands).

*Canada*: Br. C.: 1904, Leadbetter v. Crow's Nest, 10 Br. C. 206 (general principle applied). Man.: 1906, Savage v. Canadian Pacific R. Co., 16 Man. 381 (reports upon an accident, sent in by the defendant's agents under standing orders, held not privileged).

Ont.: 1904, Elmsley v. Miller, 10 Ont. L. R. 343 (establishment of a highway; solicitors, employed by the plaintiff town to investigate its right to use the road, secured written evidence favorable to the claim, and action was begun; these documents were held privileged, though no litigation was resolved on at the time of the solicitor's investigations; Wheeler v. Le Marchant followed). 1906, Thomson v. Maryland Gas Co., 11 Ont. L. R. 44 (letters between the defendant's agent and its main office, concerning matters which the latter might refer to solicitors for legal advice, held not privileged, following the rule of Southwark & V. W. Co. v. Quick, cited *ante*, § 2318, n. 1). 1912, Swaisland v. Grand Trunk R. Co., Ont. H. C. J., 5 D. L. R. 750 (report of a railway investigating officer, upon an accident; not decided).

Que.: 1912, Feigleman v. Montreal St. R. Co., Que. S. C., 3 D. L. R. 125 (railway company's motorman's report of an accident, held not privileged). 1912, Montreal St. R. Co. v. Feigleman, Que. K. B., 7 D. L. R. 6 (report of an accident prepared by defendant's conductor and motorman under standing regulations, held privileged).

[Note 5; add:]

1889, Carroll v. East Tenn. V. & Ga. R. Co., 82 Ga. 452, 473, 10 S. E. 163 (personal injury; reports to the defendant by its employees, concerning the circumstances, held not receivable in evidence as admissions; the present question not passed upon).

1906, *Ex parte* Schoepf, 74 Oh. 1, 77 N. E. 276 (personal injury on a street railroad; the conductor's and motorman's reports of the accident, made to the claim-agent of the defendant, under its rule requiring such reports on matters from which a claim might arise and for submission to counsel if necessary, held privileged).

1895, Davenport Co. v. Pennsylvania R. Co., 166 Pa. 480, 31 Atl. 245 (loss of a shipper's goods; a report to the defendant by its agent, concerning the loss, held privileged, because made "after the plaintiff's claim for damages was made" and "in effect made to counsel, for they were made for the use of counsel in resisting this particular claim").

1890, Edison, El. L. Co. v. U. S. El. L. Co., 44 Fed. 294, 298, 45 id. 55 (English cases considered, and the doctrine stated).

1907, Virginia-Carolina C. Co. v. Knight, 106 Va. 674, 56 S. E. 725 (report of an accident, made by agent to principal, in the routine of business, before action brought or threatened, one copy being filed, another sent to the manufacturing department, and another to the attorneys, the last copy being offered; held not privileged).

[*Note 5 — continued*]

1904, *Cully v. Northern Pacific R. Co.*, 35 Wash. 241, 77 Pac. 202 (personal injury; reports of unspecified persons to the defendant concerning the circumstances of the injury, held privileged, and not demandable on answer to interrogatories under Ballinger's Code, § 6009, cited *ante*, § 1856; not distinguishing between the present principle and that of § 1856, *ante*, and somewhat inconsistently intimating that inspection of the documents could be obtained under Ballinger's Code, § 6047, quoted *ante*, § 1859).

1913, *Horlick's Malted Milk Co. v. Spiegel Co.*, 155 Wis. 201, 144 N. W. 272 (action for unfair competition; discovery sought from plaintiff under Stats. § 4096 as to reports made by plaintiff's employees; the order held properly to exclude reports of agents to plaintiff's attorney or by plaintiff's attorney to agents; this exception is probably both too broad and too narrow; *Koeber v. Somers*, 108 Wis. 497, 84 N. W. 991, and *Herman v. Schlesinger*, 114 Wis. 382, 90 N. W. 460, approved).

Compare the cases cited *ante*, § 1856, n. 8, 9 (discovery of names of witnesses).

**§ 2322. Inference from Claim; Judge to Determine Privilege.**

[*Note 1; add, under Contra:*]

1909, *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755 (following *McCove v. R. Co.*).

**§ 2325. Indirect Disclosure by the Attorney.**

[*Note 1; add:*]

1904, *Jones v. Nantahala M. & T. Co.*, 137 N. C. 237, 49 S. E. 94 (letter sent by the attorney to a third person, excluded).

**§ 2326. Third Persons Overhearing.**

[*Note 2; add:*]

1906, *State v. Falsetta*, 43 Wash. 159, 86 Pac. 168 (policemen overhearing the conversation).

**§ 2327. Waiver, in general; Voluntary Testimony as a Waiver.**

[*Note 1, l. 3; add:*]

1905, *Wood v. Etiwanda W. Co.*, 147 Cal. 228, 81 Pac. 512.

[*Note 3; add:*]

1905, *Wilson v. Ohio F. Ins. Co.*, 164 Ind. 462, 73 N. E. 892 (action against a surety; the plaintiff's attorney's testimony on the trial of the principal for embezzlement, held not a waiver of privilege for this trial; no authority cited).

1909, *Kelly v. Cummings*, 143 Ia. 148, 121 N. W. 540 (client's testimony to a transaction with the attorney is a waiver). 1912, *State v. Hector*, — Ia. —, 138 N. W. 917 (seduction; the woman having made explanations of her testimony before the grand jury and the county attorney, the latter was allowed to be called to contradict them).

1906, *Re Burnette*, 73 Kan. 609, 85 Pac. 547 (certain prior publication, held a waiver).

1903, *State v. Nelson*, 91 Minn. 143, 97 N. W. 652 (whether the client's testimony given generally is a waiver; not decided).

1905, *People v. Patrick*, 182 N. Y. 131, 74 N. E. 843 (a co-principal's voluntary testimony held, under the statute, "equivalent to an express waiver in open court" of his privilege).

1909, *People v. Farmer*, 194 N. Y. 251, 87 N. E. 457 (whether the defendant called herself B. where acknowledging a deed before an attorney; her subsequent public avowal of it, held a waiver).

1904, *Jones v. Nantahala M. & T. Co.*, 137 N. C. 237, 49 S. E. 94 (calling the attorney as a witness is a waiver as to prior inconsistent statements by the attorney).

§ 2328. **Waiver by Joint Clients, Agents, Assignees.**

[*Note 1; add.*]

1913, *In re Whiting*, 110 Me. 232, 85 Atl. 791 (guardian for insane; waiver at probate court trial; held a waiver on appellate trial).

[*Text*, l. 3, after "later trial"; *add* a new note 1a:]

<sup>1a</sup> *Accord.*: 1906, *Elliott v. Kansas City*, 198 Mo. 593, 96 S. W. 1023 (approving the principle of *Green v. Mass.*, *supra*, n. 1).

[*Note 3; add.*]

1904, *Leyner v. Leyner*, 123 Ia. 185, 98 N. W. 628 (wife as agent).

§ 2329. **Waiver by a Deceased Client's Representatives.**

[*Note 1; add.*]

1903, *Stewart v. Walker*, 6 Ont. L. R. 495 (*Russell v. Jackson*, Eng., followed, in an issue of *devisavit vel non*).

1911, *Wilkinson v. Service*, 249 Ill. 146., 94 N. E. 50.

1907, *Le Prohon's Appeal*, *Greene's Estate*, 102 Me. 455, 67 Atl. 317 (personal representative or heir may waive).

1913, *Holyoke v. Holyoke's Estate*, 110 Me. 469, 87 Atl. 40, *semble*.

1909, *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755 (in a controversy of succession, where both parties claim under the testator, neither can claim the privilege).

1903, *Ex parte Gfeller*, 178 Mo. 248, 77 S. W. 552 (privilege allowed to be waived by the executor, here seeking discovery against the attorney; following the analogy of *Thompson v. Ish*, Mo., cited *post*, § 2391, as to physician's privilege).

1907, *Parker v. Parker*, 78 Nebr. 535, 111 N. W. 119 (proponent allowed to waive the privilege).

*Undecided.*: 1906, *Brown v. Brown*, 77 Nebr. 125, 108 N. W. 180.

§ 2334. **Marital Communications; Marital Disqualification and Anti-Marital Privilege, distinguished.**

[*Note 1; add*, under *Accord.*]

1904, *Howard v. Com.*, 118 Ky. 1, 80 S. W. 211, 81 S. W. 704 (husband a witness only).

[*Note 3; add.*]

1905, *Marshall v. Marshall*, 71 Kan. 313, 80 Pac. 629 (removal of general marital disability for or against the other does not affect the privilege for communications).

[*Note 5; add.*]

1910, *Schreffler v. Chase*, 245 Ill. 395, 92 N. E. 272 (Rev. St. 1873, c. 51, § 5, leaves the common law rule untouched except so far as exceptions are expressly enumerated).

§ 2336. **Knowledge obtained in Confidence, etc.**

[*Note 1; add.*]

1906, *Caldwell v. State*, 146 Ala. 141, 41 So. 473 (letters not "of a private or confidential nature," admitted).

1905, *Hannaford v. Dowdle*, 75 Ark. 127, 86 S. W. 818 (husband testifying to business transactions with his wife; allowed). 1905, *Hight v. Klingensmith*, 75 Ark. 218, 87 S. W. 138 (wife's declarations in a third person's presence, admitted).

1908, *Donnan v. Donnan*, 236 Ill. 341, 86 N. E. 279 (will-contest; the widow's testimony to

## [Note 1 — continued]

the testator's conversations with one of the heirs, excluded, under an express statutory clause; unsound at common law). 1912, *Weigand v. Rutschke*, 253 Ill. 260, 97 N. E. 641 (husband not allowed to testify to statements by his wife, in an action by his son to set aside the wife's deed to a sister). 1912, *Stephens v. Collison*, 256 Ill. 238, 99 N. E. 914 (excluding statements made by the wife to third persons in the presence of her husband; applying the anomalous rule of the Illinois statute, c. 51, § 5).

1905, *Sexton v. Sexton*, 129 Ia. 487, 105 N. W. 315 (alienation of husband's affections; the wife allowed to testify to acts and conversations of the husband exhibiting his former affection and his subsequent loss thereof; the opinion is not entirely plain in stating whether it proceeds exclusively on the ground that such matters are not confidential, or in part also on the ground of an exception under § 2338, *post*; but the broad statements of *Hertrich v. Hertrich*, *supra*, are qualified). 1906, *Hardwick v. Hardwick*, 130 Ia. 230, 106 N. W. 639 (loss of consortium; *Sexton v. Sexton* followed).

1905, *Shepherd v. Com.*, 119 Ky. 931, 85 S. W. 191 (murder; the wife's communication to the defendant of threats by the deceased, admitted; but the opinion lacks appreciation of the proper reasoning). 1905, *Bright v. Com.*, 120 Ky. 298, 86 S. W. 527 (*Arnett v. Com.*, *supra*, followed). 1908, *Leucht v. Leucht*, 129 Ky. 700, 112 S. W. — ("although the word 'confidential' was not used [in the Code], it was evidently the purpose to exclude only such communications as would naturally grow out of the marriage relation").

1907, *White v. White*, 101 Minn. 451, 112 N. W. 627 (not decided, where a third party raised the question).

1901, *Lynn v. Hockaday*, 162 Mo. 123, 61 S. W. 888 (the proviso in Rev. St. 1899, § 4656, at the end, is limited to the cases in which the spouse is qualified by the prior part of the statute, and does not extend to cases in which she might have testified at common law). 1909, *Brown v. Patterson*, 224 Mo. 639, 124 S. W. 1 (widow admitted to testify to an agreement between H. and her husband; *Lynn v. Hockaday* approved).

1911, *In re Sherin*, 28 S. D. 420, 133 N. W. 701 (on rehearing; letters written by the wife's attorney, but authorized by her, held not privileged).

1905, *Cole v. State*, 43 Tex. Cr. 439, 88 S. W. 341 (statements of accused in the presence of his wife and her mother, admitted). 1912, *Lanham v. Lanham*, 105 Tex. 91, 145 S. W. 336 (will probate; letters of testator to wife reproaching her for misconduct, excluded).

1914, *Metropolitan Life Ins. Co. v. O'Grady*, — Va. —, 80 S. E. 743 (under Code § 3346a there is no limitation to confidential communications; here, communications concerning the drafting of a will were held privileged).

## § 2337. Communications, not Acts.

## [Note 2; add:]

*Can.*: 1903, *Gosselin v. King*, 33 Can. Sup. 255, 263 (questions to a wife as to intercourse, with a view to contradicting her husband, held not communications; *Girouard, J.*, diss.).

*Ark.*: 1905, *Wiley v. McBride*, 74 Ark. 34, 85 S. W. 84 (bill to set aside a fraudulent conveyance to a wife; discovery as to the gift, held not privileged).

*Cal.*: 1910, *People v. Loper*, 159 Cal. 6, 112 Pac. 720 (sanity or insanity; not privileged).

*Ga.*: 1905, *Macon R. & L. Co. v. Mason*, 123 Ga. 773, 51 S. E. 569 (a wife allowed to testify to her husband's personal injuries observed by her).

*Ill.*: 1908, *Donnan v. Donnan*, 236 Ill. 341, 86 N. E. 279 (will contest; the widow's testimony to the testator's mental condition, not admissible). 1910, *Schreffler v. Chase*, 245 Ill. 395, 92 N. E. 272 (probate of a wife's will, contested on the ground of unsoundness of mind; the husband's testimony for the contestant, as to her insane conduct, held privileged). 1912, *Stephens v. Collison*, 256 Ill. 238, 99 N. E. 914 (excluding the widow's testimony to the assets of her husband, on the present principle). 1912, *Donnan v. Donnan*, 256 Ill. 244, 99 N. E. 931 (widow of testator, not allowed to testify to his condition of health).

[*Note 2 — continued*]

*Mich.*: 1909, *Pierson v. Illinois C. R. Co.*, 159 Mich. 110, 123 N. W. 576 (husband's physical condition; privilege applicable).

*Tenn.*: 1906, *English v. Ricks*, 117 Tenn. 73, 95 S. W. 189 (probate contest, over a will bequeathing chiefly to a wife; to show the testator's marital unhappiness, his declarations that he was "living in hell," excluded; this seems erroneous).

*Wis.*: 1905, *Schultz v. Culbertson*, 125 Wis. 169, 103 N. W. 234 (widow allowed to testify to the deceased husband's mental incapacity based on acts observed by her without participation or influence on her part).

### § 2338. Exceptions and Distinctions.

[*Note 2; add:*]

1905, *Sexton v. Sexton*, 129 Ia. 487, 105 N. W. 315 (cited *ante*, § 2336, n. 1).

[*Text*, p. 3267, l. 8, at the end; *add:*]

On this analogy, it is plain that where either needs the evidence of communications in a trial involving a controversy between them, the privilege should cease, or a cruel injustice may be done <sup>1a</sup>.

<sup>1a</sup> *Accord*: 1897, *Beyerline v. State*, 147 Ind. 125, 45 N. E. 772 (cited *ante*, § 2337, n. 2). 1913, *Spearman v. State*, — Tex. Cr. —, 152 S. W. 915 (wife's perjury in a divorce suit; the wife had deposed in the suit admitting that she was pregnant, unknown to him, and by another man, before marriage; to show that in fact the husband himself was her seducer, and that she had admitted the opposite facts to save him from an alleged prosecution, her testimony to his fraudulent solicitations to make such deposition was admitted; per Harper, J.: "the law . . . will not prevent her from telling the truth . . . when he seeks by this means to wrong her"; Davidson, P. J., diss.).

*Contra*: 1911, *People v. Bowen*, 165 Mich. 231, 130 N. W. 706 (wife-murder; to show information of her infidelity, causing insanity, the defendant was not allowed to testify to her confessions to him).

[*Text*, p. 3267, last line; *add* a new par. (3a):]

(3a) Under statutes, questions may arise, as to the effect of sundry words making exceptions to the rule.<sup>2a</sup>

<sup>2a</sup> 1913, *Treiber v. McCormack*, 90 Kan. 675, 136 Pac. 268 (under Gen. St. 1909, § 5915, C. C. P. § 321, a wife or husband may testify for the other as to transactions done as agent for the other, the omission of the exception-clause to that effect in the former statute not having changed the law; but it is strange that the Court did not lay hold of the doctrine of waiver, *post*, § 2340, which was precisely the ground why the privilege need not here be applied).

### § 2339. Third Persons Overhearing, etc.

[*Note 1; add:*]

1906, *Com. v. Everson*, 123 Ky. 330, 96 S. W. 460 (by an eavesdropper).

[*Note 1; add* a new par. :]

Where an accused's *confession* has been *partly stated* by one hearing it, the principle of § 2100, *ante* (Completeness), requires that the whole should be given, even if it involves a communication to the wife:

1912, *People v. Bowen*, 170 Mich. 129, 135 N. W. 824, *semble*.

[*Note 2; add:*]

1905, *De Leon v. Terr.*, 9 Ariz. 161, 80 Pac. 348 (letter by the defendant to his wife, written with knowledge that by jail rules it would be opened and read by the jailer; the jailer allowed to testify to its contents).

1905, *Hammons v. State*, 73 Ark. 495, 84 S. W. 718 (defendant in jail gave to a messenger a letter for the wife; the messenger delivered it to the wife's father, who handed it to a relative of the injured party; admitted; *McCulloch and Battle, JJ., diss.*).

1909, *People v. Swaile*, 12 Cal. App. 192, 107 Pac. 134 (letter sent by accused to his wife through a police officer, read by the wife, given back to the officer at his request, and brought to court; admitted).

1909, *O'Toole v. Ohio G. F. Ins. Co.*, 159 Mich. 187, 123 N. W. 795 (letters lost by the husband and found by a third person without collusion, admitted; careful opinion, by *Ostrander, J.*). 1910, *People v. Dunnigan*, 163 Mich. 349, 128 N. W. 180 (defendant's letter to his wife, obtained, before delivery to her, by a trick of the sheriff, admitted).

1913, *State v. Wallace*, 162 N. C. 622, 78 S. E. 1 (husband's letter found by a policeman in husband's house, admitted).

1906, *Connella v. Terr.*, 16 Okl. 365, 86 Pac. 72 (forgery; letter sent by defendant to his wife, not reaching her, but falling into the sheriff's possession, admitted).

1910, *State v. Sysinger*, 25 S. D. 110, 125 N. W. 879 (letters written by defendant to his wife and by her delivered to the prosecuting attorney, admitted).

1911, *Gross v. State*, 61 Tex. Cr. 176, 135 S. W. 373 (husband's letter to wife, found by a prying third person on the latter's premises, excluded; unsound).

1905, *State v. Nelson*, 39 Wash. 221, 81 Pac. 721 (adultery of N. with S.; S.'s letter to her husband, offered to impeach her as a witness for the defendant N., admitted, because "produced by the officers of the State").

### § 2340. Who may Claim the Privilege; Waiver.

[*Note 1, under Contra; add:*]

1911, *Luick v. Arends*, — S. D. —, 132 N. W. 353.

1912, *Hampton v. State*, 7 Okl. Cr. 291, 123 Pac. 571.

[*Note 1; add, at the end:*]

The privilege, of course, does not belong to the *party to the suit* as such (*ante*, § 2196); hence, the party cannot appeal on the ground of an erroneous denial of the privilege: 1911, *Luick v. Arends*, — S. D. —, 132 N. W. 353 (alienation of wife's affections; the defendant cannot object to a ruling admitting for the plaintiff a letter from the wife to the plaintiff).

In strictness, no *third person* can raise the question:

1907, *White v. White*, 101 Minn. 451, 112 N. W. 627 (not decided).

May an *inference* be drawn from a party's failure to call his spouse to testify to a communication for which the privilege could have been waived? Yes; for the considerations applicable to the other privilege (*ante*, § 2243) seem here not applicable:

1912, *Hampton v. State*, 7 Okl. Cr. 291, 123 Pac. 571.

[*Note 3, par. 1; add:*]

1913, *McCord v. McCord*, 140 Ga. 170, 78 S. E. 833 (divorce; wife's testimony to desertion held a waiver of her privilege as to a letter written by her to the husband explaining his desertion).

1913, *Spearman v. State*, — Tex. Cr. —, 152 S. W. 915 (husband's use of a deposition of his wife, held to allow her explanation of his solicitations to make it; cited *ante*, § 2338, n. 1; *Davidson, P. J., diss.*).

But the *opponent's* calling of the wife cannot be a waiver:

1910, *Abrahams v. Woolley*, 243 Ill. 365, 90 N. E. 667.

[*Note 4, under Accord; add:*]

1913, *Marks v. Madsen*, 261 Ill. 51, 103 N. E. 625 (here the statute is a jumble of inconsistencies, and impliedly negatives any waiver).

1913, *Treiber v. McCormack*, 90 Kan. 675, 136 Pac. 268 (cited more fully *ante*, § 2338, n. 1).

1904, *Com. v. Cronin*, 185 Mass. 96, 69 N. E. 1065 (defendant's wife's testimony to her husband's private declarations to her, offered by him, excluded; erroneous).

§ 2341. **Death, Divorce, etc.**

[*Note 1, par. 1; add:*]

1910, *Schreffler v. Chase*, 245 Ill. 395, 92 N. E. 272 (appeal against a decree setting aside a wife's will for unsoundness of mind; the husband's testimony for the contestants, as to the wife's conduct and language in the family, held improperly admitted; Rev. St. 1873, c. 51, § 5, held to contain no exception to the common law rule for such a case). 1912, *Neice v. Chicago & Alton R. Co.*, 254 Ill. 595, 98 N. E. 989 (widow of deceased person killed by defendant's train, not allowed to testify to a conversation with him as to his intention in taking a journey).

1911, *People v. Bowen*, 165 Mich. 231, 130 N. W. 706.

1910, *Metzger v. Royal Neighbors*, 86 Nebr. 61, 124 N. W. 913.

1905, *Schultz v. Culbertson*, 125 Wis. 169, 103 N. W. 234.

[*Note 2; add:*]

1907, *Wickes v. Walden*, 228 Ill. 56, 81 N. E. 798.

1904, *German-Amer. Ins. Co. v. Paul*, 5 Ind. Terr. 703, 83 S. W. 60.

1909, *Pierson v. Illinois C. R. Co.*, 159 Mich. 110, 123 N. W. 576 (point not noticed in opinion).

1911, *Luick v. Arends*, — S. D. —, 132 N. W. 353 (divorce since suit begun; point not noticed).

1903, *Davis v. State*, 45 Tex. Cr. 292, 77 S. W. 451.

[*Note 3; add:*]

*Accord*: 1913, *Holyoke v. Holyoke's Estate*, 110 Me. 469, 87 Atl. 40.

§ 2346. **Juror's Privileged Communications; Scope of the Principle.**

[*Note 2; add, at the end:*]

But the rule does not prevent a juror from testifying at a subsequent trial to *knowledge obtained by a view of premises* at a former trial: 1875, *Cramer v. Burlington*, 42 Ia. 315 (juror who had examined a sidewalk at a view on a former trial, admitted). 1906, *Hughes v. Chicago, St. P. M. & O. R. Co.*, 126 Wis. 525, 106 N. W. 526 (similar). Compare § 1168, *ante*.

§ 2349. **Impeaching a Verdict; Jurors' Motives, Beliefs, etc.**

[*Note 2; add:*]

*Cal.*: see the later cases cited *infra*, n. 3.

*D. C.*: 1910, *Hyde v. U. S.*, 35 D. C. App. 451, 486 (jurors' affidavits that the verdict in a conspiracy case was reached by a compromise as to acquittal and conviction of the several defendants).

*Ia.*: But this foregoing line of precedents seems to have been abandoned in recent cases, based probably on a misconception of the doctrine of *Wright v. Tel. Co.*, *post*, § 2353:

## [Note 2 — continued]

1904, *Douglass v. Agne*, 125 Ia. 67, 99 N. W. 550 (jurors' testimony that they gave weight to evidence not properly before them, admissible). 1907, *Brown Land Co. v. Lehman*, 134 Ia. 712, 112 N. W. 185 (same).

*Kan.*: 1911, *State v. Keehn*, 85 Kan. 765, 118 Pac. 851 (two jurors' affidavits as to misunderstanding of judge's power to reduce degree of crime, as a ground for their vote, excluded; following *Perry v. Bailey*).

*Nebr.*: 1908, *Hamblin v. State*, 81 Nebr. 148, 115 N. W. 850 (jurors' affidavits as to misunderstanding instructions, excluded).

*La.*: 1905, *State v. Ferguson*, 114 La. 70, 38 So. 23 (jurors' affidavits that they considered the defendant's previous record, excluded). 1906, *State v. Barrett*, 117 La. 1086, 42 So. 513 (juror's statement after verdict that he had a fixed opinion when selected, excluded).

*Mont.*: 1906, *State v. Beeskove*, 34 Mont. 41, 85 Pac. 376 (misunderstanding of the instructions; excluded).

*N. H.*: 1906, *Winslow v. Smith*, 74 N. H. 65, 65 Atl. 108 (jurors' affidavits as to misconstruing instructions, excluded). 1912, *Boston & M. R. Co. v. Franklin*, 76 N. H. 459, 84 Atl. 44 (preceding cases affirmed; the ground not clearly appearing).

*N. D.*: 1905, *State v. Forrester*, 14 N. D. 335, 103 N. W. 625 (jurors' affidavits as to misunderstanding the instructions, excluded).

*Tex.*: 1904, *Bearden v. State*, 47 Tex. Cr. 271, 83 S. W. 808 (jurors' affidavits that they assented on agreement to petition for pardon, excluded). 1913, *Rogers v. State*, — Tex. Cr. —, 159 S. W. 40 (juror's affidavit that he agreed because of the others' promise to sign a recommendation for pardon, excluded).

*Vt.*: 1905, *Marcy v. Parker*, 78 Vt. 73, 62 Atl. 19 (jurors' affidavits that they misunderstood the instructions, excluded).

*Wash.*: 1905, *State v. Strodemier*, 41 Wash. 159, 83 Pac. 22 (that misconduct did not influence the verdict; excluded). 1909, *Ralton v. Sherwood L. Co.* 54 Wash. 254, 103 Pac. 28 (affidavits that the jurors did not consider certain instructions, excluded). 1909, *State v. Aker*, 54 Wash. 342, 103 Pac. 420 (juror's affidavit that he assented through intimidation, excluded).

[Note 3; add, under *California*.:]

1905, *People v. Chin Non*, 146 Cal. 561, 80 Pac. 681 (jurors' affidavits that the reading of certain newspapers did not influence them, excluded). 1909, *Kimic v. San Jose L. G. I. R. Co.*, 156 Cal. 379, 104 Pac. 986 (affidavits as to influence of misconduct, excluded).

## § 2350. Same: Examining the Jury before Discharge, etc.

## [Note 1; add.:]

1884, *Dearborn v. Newhall*, 63 N. H. 301 (leading opinion, by Doe, C. J.).

1906, *Winslow v. Smith*, 74 N. H. 65, 65 Atl. 108 (good opinion, by Chase, J.).

## § 2351. Issues of the Trial, as Material, etc.

## [Note 2; add.:]

1882, *Hewett v. Chapman*, 49 Mich. 4, 12 N. W. 888 (trover for timber; to show that the jury in a former trial had allowed for this claim, a juror's testimony was excluded).

## § 2354. Irregularities and Misconduct; State of the Law, etc.

## [Note 2; add.:]

*Ala.*: 1906, *Birmingham R. L. & P. Co. v. Moore*, 148 Ala. 115, 42 So. 1024 (juror's affidavit, not admitted to show a quotient verdict).

[*Note 2 — continued*]

*Ariz.*: 1913, *Hull v. Larson*, 14 *Ariz.* 492, 131 *Pac.* 668 (quotient verdict; juror's affidavit inadmissible, in civil cases).

*Cal.*: 1905, *People v. Chin Non*, 146 *Cal.* 561, 80 *Pac.* 681 (jurors' affidavits to show improper reading of newspapers, admitted, because offered by the prosecution; no authority cited). 1909, *Kimic v. San Jose L. G. I. R. Co.*, 156 *Cal.* 379, 104 *Pac.* 986 (affidavits as to misconduct, excluded).

*Ill.*: 1908, *Wyckoff v. Chicago City R. Co.*, 234 *Ill.* 613, 85 *N. E.* 237 (affidavit of juror's private view of premises, excluded).

*Ia.*: 1904, *Douglass v. Agne*, 125 *Ia.* 67, 99 *N. W.* 550 (*contra* to *Bingham v. Foster, supra*, but not noticing it). 1907, *Clark v. Van Vleck*, 135 *Ia.* 194, 112 *N. W.* 648 (jurors' affidavits that they reckoned damages for matters not properly before them, excluded).

*Kan.*: 1904, *State v. Rambo*, 69 *Kan.* 777, 77 *Pac.* 563 (juror's testimony received as to the juror's allusion to the defendant's failure to testify).

*La.*: 1912, *State v. Cloud*, 130 *La.* 955, 58 *So.* 827 (juror's testimony to disqualifying knowledge of the case, excluded).

*Ky.*: 1912, *Beard v. Com.*, 149 *Ky.* 632, 149 *S. W.* 989 (under *Cr. C.* § 272, "a juror cannot be examined to establish a ground for a new trial except it be to establish that the verdict was made by lot"; here, a separation of the jury).

*Md.*: 1909, *Brinsfield v. Howeth*, 110 *Md.* 520, 73 *Atl.* 289 (juror's affidavit to browbeating in the jury-room, excluded).

*Mich.*: 1901, *Wixom v. Bixby*, 127 *Mich.* 486, 86 *N. W.* 1001 (rule applied to exclude a juror's affidavit as to a quotient verdict of damages). 1905, *Battle Creek v. Haak*, 139 *Mich.* 514, 102 *N. W.* 1005 (rule applied to exclude jurors' affidavits as to an average verdict of damages).

1905, *Brister v. State*, 86 *Miss.* 461, 38 *So.* 678 (juror's affidavit as to reading law-books, excluded).

*N. H.*: 1912, *Boston & M. R. Co. v. Franklin*, 76 *N. H.* 459, 84 *Atl.* 44 (preceding cases affirmed; the ground not clearly appearing).

*N. Mex.*: 1913, *Goldenberg v. Law*, 17 *N. M.* 546, 131 *Pac.* 499 (damages determined by coin-tossing; jurors' affidavits, excluded).

*N. D.*: 1913, *Johnson v. Seel*, 26 *N. D.* 299, 144 *N. W.* 237 (jurors' affidavits to another juror's remarks in the jury room showing bias, excluded).

*Okl.*: 1912, *Keith v. State*, 7 *Okl. Cr.* 156, 123 *Pac.* 172 ("manner in which the jury arrived at their verdict," two jurors' affidavits excluded).

*R. I.*: 1910, *Phillips v. Rhode Island Co.*, 32 *R. I.* 16, 78 *Atl.* 342 (unauthorized view; jurors' affidavits excluded).

*S. D.*: 1908, *Ewing v. Lunn*, 22 *S. D.* 95, 115 *N. W.* 527 (jurors' affidavits as to a juror's intoxication, excluded).

*U. S.*: 1912, *Hyde & Schneider v. U. S.*, 225 *U. S.* 347, 381, 32 *Sup.* 793 (jurors' affidavits not received to show that the verdict of guilty against two defendants was a compromise between those jurors who believed that all three defendants should be convicted and those who believed that all three should be convicted). 1913, *McDonald v. Pless*, 4th *C. C. A.*, 206 *Fed.* 263 (quotient verdict; juror's testimony not admissible; the opinion fails to make the proper distinctions).

*Wash.*: 1913, *Maryland Casualty Co. v. Seattle El. Co.*, 75 *Wash.* 430, 134 *Pac.* 1097 (misconduct in taking a private view; jurors' affidavits admitted to show the fact, but not its effect on their minds; discriminating opinion by *Ellis, J.*).

*Wyo.*: 1912, *Pullman Co. v. Finley*, 20 *Wyo.* 456, 125 *Pac.* 380 (quotient verdict; two jurors' affidavits, not admitted).

[*Note 5; add.*]

1912, *State v. Cloud*, 130 *La.* 955, 58 *So.* 827.

[Note 9; add:]

- 1905, *Birmingham R. & E. Co. v. Mason*, 144 Ala. 387, 39 So. 590 (jurors' affidavits that an improper document was not read by them, admitted). 1906, *Birmingham R. L. & P. Co. v. Moore*, 148 Ala. 115, 42 So. 1024.  
 1905, *State v. West*, 11 Ida. 157, 81 Pac. 107 (juror's affidavit, admissible to explain his separation from the jury during retirement; but uncorroborated it is insufficient).  
 1903, *Groves & S. R. R. Co. v. Herman*, 206 Ill. 34, 69 N. E. 36, *semble* (chance-verdict).  
 1907, *Strand v. Grinnell A. G. Co.*, 136 Ia. 68, 113 N. W. 488.

[Note 15, par. 1, l. 4; add:]

- 1905, *People v. Murphy*, 146 Cal. 502, 80 Pac. 709.  
 1885, *Dearborn v. Newhall*, 63 N. H. 301.  
 1913, *Maryland Casualty Co. v. Seattle El. Co.*, 75 Wash. 430, 134 Pac. 1097.

[Note 15, par. 1, l. 7; add:]

- 1906, *Goodwin v. Blanchard*, 73 N. H. 550, 64 Atl. 22 (collecting authorities).

#### § 2355. Mistake in Announcing or Recording the Verdict.

[Note 2; add:]

- 1904, *McCoy v. Jordan*, 184 Mass. 575, 69 N. E. 358 (a juror, on being asked by the clerk whether he assented, answered, "Under protest"; the verdict was held properly recorded as unanimous).  
 1907, *Butteris v. Mifflin & L. M. Co.*, 133 Wis. 343, 113 N. W. 642 (affidavits that four jurors "did not intend to return a verdict" as found, excluded).

[Note 4, par. 1, add:]

- 1904, *Gillespie v. Ashford*, 125 Ia. 729, 101 N. W. 649 (like *Capen v. Stoughton*, Mass.).  
 1912, *Randall v. Peerless Motor Car Co.*, 212 Mass. 352, 99 N. E. 221 (the unanimous affidavits of the jurors that the answer "No" to an interrogatory was intended to be "Yes" but was mistakenly recorded was received, though made after separation).

#### § 2356. Same: Explaining the Verdict's Meaning, etc.

[Note 1; add:]

- 1906, *R. v. Burdell*, 11 Ont. L. R. 440.  
 1905, *Denham v. Com.*, 119 Ky. 508, 84 S. W. 538 (mistake in the wording).  
 1906, *State v. Miles*, 199 Mo. 530, 98 S. W. 25.  
 1905, *State v. Godwin*, 138 N. C. 582, 50 S. E. 277 (here the judge refused to accept a verdict of "Guilty, but innocently").

[Text, p. 3303, last line; add a note 1a:]

<sup>1a</sup> That the trial judge may properly ask the jury, when they *cannot reach a verdict*, *how their votes divide* (without asking which way the majority stands), seems harmless enough, especially as these facts and more are shortly afterwards told freely out of court; but a finical spirit has recently rebuked such questions, and has even not scrupled to delay the course of justice for this petty cause:

- 1906, *Burton v. U. S.*, 196 U. S. 283, 25 Sup. 243.  
 1906, *McCoy v. U. S.*, 6 Ind. Terr. 415, 98 S. W. 144.

[Note 2; add:]

- 1906, *Koch v. State*, 126 Wis. 470, 106 N. W. 531 (correction of a sealed verdict after discharge, not allowed on the facts).

§ 2358. Arbitrators' Awards; Foregoing Principles Applied.

[Note 1, at the end; add:]

Upon the distinction between *general* and *special submissions* to award, for which the rule differs somewhat, see the lengthy opinions in the following case: 1906, *White Star Mining Co. v. Hultberg*, 220 Ill. 578, 77 N. E. 327 (two judges dissenting).

[Note 2; add:]

1903, *Jensen v. Deep Creek F. & L. S. Co.*, 27 Utah 66, 74 Pac. 427 (arbitrator's testimony may be received to show that "all matters included in the submission were considered and adjudicated").

[Note 5; add:]

1907, *Chicago, B. & Q. R. Co. v. Babcock*, 204 U. S. 585, 27 Sup. 326 (assessment of a railroad by a State board of equalization, alleged to be invalid by reason of the board's improper method of calculating valuations and taxable amounts; the "operation of their [the board's] minds in valuing and taxing the roads," held to be immaterial; "all the often-repeated reasons for the rule as to jurymen apply with redoubled force to the attempt, by exhibiting on cross-examination the confusion of the members' minds, to attack in another proceeding the judgment of a lay tribunal, which is intended, so far as may be, to be final, notwithstanding mistakes of fact or law").

*Contra* to the foregoing: 1877, *Schettler v. Fort Howard*, 43 Wis. 48 (assessors). 1879, *Plumer v. Board*, 46 Wis. 163, 174, 50 N. W. 416 (assessors).

§ 2360. Grand Jurors' Communications; History, etc.

[Note 4; add:]

Ind. St. 1905, p. 584, § 103 (re-enacts Rev. St. 1897, § 1754).

[Note 5; add:]

and the opinion of Boyd, J., in *Re Atwell*, 140 Fed. 368, D. C. (1905).

§ 2363. Privilege of Witnesses before the Grand Jury; Instances, etc.

[Note 1, par. 1; add:]

1905, *State v. Brown*, 128 Ia. 24, 102 N. W. 799 (wife of defendant).

[Note 2, par. 1; add:]

1906, *State v. Campbell*, 73 Kan. 688, 85 Pac. 784 (accused's testimony; repudiating the construction by the Missouri Court, in *Tindal v. Nichols*, *infra*, of the statute on which the Kansas statute was founded).

[Text, p. 3316, at the end of l. 9 (par. a); add a note 2a:]

<sup>2a</sup> Accord: 1906, *State v. Campbell*, 73 Kan. 688, 85 Pac. 784 (good opinion by Porter, J.).

1905, *Murphy v. State*, 124 Wis. 635, 102 N. W. 1087; and *Jenkins v. State*, Fla., *Hinshaw v. State*, Ind., cited *supra*, n. 2.

[Note 3, at the end; add:]

So also the testimony may be used, as of course, for establishing an *immunity from prosecution* (*ante*, § 2281), obtained in return for the giving of testimony:

1905, *Murphy v. State*, 124 Wis. 635, 102 N. W. 1087. 1905, *Havenor v. State*, 125 id. 444, 104 N. W. 116.

[*Note 5, at the end; add.*:]

Compare the statutes giving the right to a *list of witnesses* before trial (*ante*, §§ 1850-1854).

So also on proceedings involving the *indictment's validity*:

1908, *Atwell v. U. S.*, 4th C. C. A., 162 Fed. 97 (after the indictment has been presented and published, and the grand jury discharged, a juror is amenable to subpoena to testify on a plea in abatement as to testimony given by witnesses before the grand jury).

[*Text*, p. 3317, after par. (d) insert a new par. (d'):]

d' When a person *pleads immunity* from prosecution by reason of testimony given before a grand jury under an immunity statute (*ante*, § 2281), the present privilege should of course not apply to prevent proof of his testimony by a grand juror.<sup>7a</sup>

<sup>7a</sup> Ala. St. 1909, No. 191, Spec. Sess. p. 63, Aug. 25, § 12; *id.* St. 1911, No. 259, p. 249, Apr. 6, § 32.

[*Note 8; add.*:]

Vt. St. 1910, No. 221, p. 228 (amending Pub. St. §§ 5523-29; stenographer shall not disclose testimony taken at a criminal inquest, but this shall not prevent disclosure "on an order of the Supreme or County Court").

#### § 2364. Grounds for Indictment; Illegal Evidence, etc.

[*Note 1, par. 1; add.*:]

1906, *State v. Hopkins*, 115 La. 786, 40 So. 166 (motion to quash the indictment; a grand juror's testimony, and the district attorney's, as to the attorney's advice regarding the jurors' action, excluded).

1907, *United States v. Tallmadge*, 14 N. M. 293, 91 Pac. 729.

[*Note 3; add.*:]

1905, *Taylor v. State*, 49 Fla. 69, 38 So. 380 (collecting many cases).

1905, *State v. Faulkner*, 185 Mo. 673, 84 S. W. 967.

1907, *People v. Sexton*, 187 N. Y. 495, 80 N. E. 396.

1904, *U. S. v. Cobban*, 127 Fed. 713, C. C. 1905, *Chadwick v. U. S.*, 141 Fed. 225, 234, C. C. A.

[*Note 5; add.*:]

*Contra*: 1909, *People v. Nall*, 242 Ill. 284, 89 N. E. 1012 (misconduct of State's attorney in the jury-room; testimony of foreman and of attorney, excluded).

[*Note 7; add.*:]

1904, *Nash v. State*, 73 Ark. 399, 84 S. W. 497 (here the Court misapplies the secrecy principle). 1855, *State v. Baker*, 20 Mo. 339.

#### § 2371. Testimonial Privilege of the Executive, etc.

[*Note 1, par. 1; add.*:]

1909, *R. v. Baines*, 1 K. B. 258 (the Prime Minister and the Home Secretary were subpoenaed to testify as to a breach of the peace committed by woman suffragists at a public meeting; on a motion to set aside the subpoenas, the applicants alleged that their "attendance at the assizes would involve a serious interruption of any public duties as a minister of the Crown"; held, that "it must not be supposed that the position which the applicants occupy affords them any privilege; they stand in the same position as any other of His Majesty's subjects").

§ 2373. Irremovability of Official Records.

[Note 2; add:]

La. St. 1912, No. 242, p. 539, July 11, § 12 (certain public records to be irremovable, except on giving bond).

U. S. St. 1904, April 19, c. 1398, Stat. L. vol. 33, p. 186 (land-office applications, etc., to be produced; cited more fully *ante*, § 1676, n. 11).

[Text, p. 3331; at the end, add a new paragraph (4):]

(4) The right of a citizen or taxpayer to *inspect official records* in their place of custody (*ante*, § 1858, n. 2).

§ 2374. Privilege for Communications by Informers, etc.

[Note 1; add:]

1787, *State v. Phelps*, Kirby Conn. 282 (State's attorney not allowed to testify "what the prisoner had disclosed to him, upon an application to be admitted a witness for the State; for such disclosures "would tend to defeat the benefits the public may derive from them").

1909, *Michael v. Matson*, 81 Kan. 360, 105 Pac. 537 (communication to the district attorney, privileged; "in this country the privilege has been treated as covering the communication itself").

1911, *Wells v. Toogood*, 165 Mich. 677, 131 N. W. 124 (communications to a deputy-sheriff, by one complaining of a theft, held privileged).

1913, *Sullivan v. Hill*, — W. Va. —, 79 S. E. 670 (prosecuting attorney held not privileged, before a legislative committee, not to disclose his information, or its source, concerning an alleged bribery for which criminal prosecution was then in contemplation).

1906, *Schultz v. Strauss*, 127 Wis. 325, 106 N. W. 1066 (defendant held privileged from disclosing, on interrogatories of discovery by the plaintiff, his testimony before the grand jury and district attorney, on which the plaintiff desired to found an action for defamation and malicious prosecution; the opinion properly places the ruling on grounds of substantive law).

[Note 4; add:]

1906, *Rogers v. State*, 88 Miss. 38, 40 So. 744 (larceny of a package; R. having been summoned before the grand jury, and testifying that the package was brought back and given to him for the owner, by a woman to whom he promised secrecy, he was held not privileged not to disclose her name).

[Note 5, col. 2, l. 1; add:]

Ont. St. 1904, 4 Edw. VII, c. 23, § 20 (no assessor shall disclose information acquired concerning assessments, etc., "except when examined as a witness before any court").

U. S.: 1906, *In re Reid*, D. C. E. D. Mich., 155 Fed. 933 (bankruptcy; tax statement filed by the bankrupt with the Detroit assessors, held privileged for the Detroit assessors, under Mich. Comp. L. 1897, § 3846, forbidding disclosure).

[Note 5, at the end; add:]

So also the following statutes, for *factory-inspectors*, *mine-inspectors*, and *railway-commissions*:

Ont. St. 1905, 5 Edw. VII, c. 13, § 30 (a factory-inspector, when called as a witness, "shall be entitled acting herein by the direction and on behalf of the attorney-general or a member of the Executive Council to object to giving evidence as to any factory inspected by him in the course of his official duty"). St. 1906, 6 Edw. VII, c. 11, § 78 (no mining officer

[Note 5 — continued]

"shall be compellable in any court to disclose information acquired by him in his official position"). St. 1906, 6 Edw. VII, c. 30, § 231 ("All such returns [by railway companies to the railway board] of accidents made in pursuance of the provisions of this act shall be privileged communications, and shall not be evidence in any court whatsoever" except in enforcing penalty for failure to make returns).

[Note 6:]

In line 1, add: "and Rev. St. § 4908."

In line 6, add: "and 44 Fed. 294, 299."

Add: Eng. St. 1907, 7 Edw. VII, c. 29, § 68, Patents and Designs Act (reports of examiners to be privileged, unless the Court certifies "that such production or inspection is desirable in the interests of justice").

[Note 6, at the end; add:]

For the citizen's right to inspect public records, see *ante*, § 1858, n. 2.

### § 2375. Privilege for Secrets of State.

[Note 3; add:]

1906, *Davis v. State*, 145 Ala. 69, 40 So. 663 (under Code 1897, § 5086, providing that a U. S. revenue liquor-license may be proved orally, the defendant was allowed to be asked if he had one).

1906, *State v. Nippert*, 74 Kan. 371, 86 Pac. 478 (illegal liquor sales; the Federal revenue collector having refused to produce the record of liquor tax-lists or to furnish a copy, under the rule in *Re Weeks*, *infra*, an examined copy was admitted; the present principle not considered). 1906, *State v. Schaeffer*, 74 Kan. 390, 86 Pac. 477 (similar).

1910, *Stegall v. Thurman*, D. C. N. D. Ga., 175 Fed. 813 (operations of a distillery under grand jury inquiry for violation of State prohibition law; the U. S. storekeeper and gauger on duty thereat, held privileged from disclosing information obtained by him in the course of duty, and prohibited to be disclosed by U. S. Rev. St. 1878, § 3167, "except as provided by law," and Treasury Circulars of April 15, 1898, Oct. 10, 1900, and April 18, 1904; "the method prescribed by the Secretary of the Treasury for courts obtaining this information is an application to the Secretary of the Treasury by the judge of the Court in which the information is desired"; *Boske v. Comingore* followed). 1910, *In re Grove*, 3d C. C. A., 180 Fed. 62 (infringement of patent on engines for torpedo-boat-destroyers; the defendant having pleaded the official secrecy of plans drawn for the construction of government vessels, the Secretary of the Navy on request from the Court declared that the proof would not be detrimental to public interests, and the witness was held compellable).

1906, *Meyer v. Home Ins. Co.*, 127 Wis. 293, 106 N. W. 1087 (tobacco lost by fire; records of the U. S. internal-revenue department at Milwaukee showing the amount of goods, held privileged, on demand of the deputy collector; following *Boske v. Comingore*, U. S.).

[Note 4; add:]

1904, *Mercer v. Denne*, 2 Ch. 535, 544 (ancient plans and maps of seashore boundaries prepared for the War Office in 1641-47 were excluded, by Farwell, J., because "it would be most dangerous to admit confidential reports, made to the War Office"; the ruling is absurd, first, because the War Office made no claim of privilege, and secondly, because the offering counsel had become fully conversant with the "confidential" documents, and thirdly, because the lapse of time had made the secret of no consequence; no authority at all is cited). 1905, *Mercer v. Denne*, 2 Ch. 538, 560 (foregoing ruling affirmed on appeal; Vaughan Williams, J.: "I agree, although not perhaps exactly on the same grounds").

[Note 5; *add.*:]

*Alta.* St. 1910, 2d sess., Evidence Act, c. 3, § 30 (like Ont. Rev. St. 1897, c. 73, § 27).  
*Ont.* St. 1909, c. 43, § 27 (like R. S. 1897, c. 73, § 27).

[Note 8; *add.*, at the end:]

1913, *Schall v. Northland M. C. Co.*, 123 Minn. 214, 143 N. W. 357 (trustee in Federal bankruptcy court, held not privileged against a subpoena *d.t.*).  
 Distinguish of course the question how far a citizen may claim access to and inspection of judicial or similar records (*ante*, § 1858, n. 2).

[Text, p. 3341, l. 18 from above, after "liability"; insert a new note 9a:]

(\*) The Federal Government's deliberate obstruction, by this means, of the enforcement of the State liquor laws has been reprehensible. In *Stegall v. Thurman*, Fed., cited *supra*, n. 3, Newman, J., has some sensible remarks on the seemliness of the Federal government removing obstructions of this sort from the ordinary course of justice in the State courts.

### § 2380. Physician and Patient; History of the Privilege, etc.

[Note 3; *add.*:]

1904, *Banigan v. Banigan*, 26 R. I. 454, 59 Atl. 313.

[Note 5; *add.*:]

*Mich.*: 1904, *Dick v. Supreme Body*, 138 Mich. 372, 101 N. W. 564 (statute applied to a hearing before a fraternal insurance board). St. 1905, No. 136 (in prosecutions for illegal marriage of persons sexually diseased, "any physician who has attended or prescribed for any husband or wife for either of the diseases above mentioned shall be compelled to testify to any facts found by him from such attendance"). St. 1909, No. 234, p. 418, June 2 (amending Comp. St. 1897, § 10181, by adding: provided that on an issue of probating a patient's will the heirs at law "shall be deemed to be personal representatives of such deceased patient for the purpose of waiving the privilege" etc.).

*Mo.* St. 1907, p. 245, Mar. 16 (dying declarations of woman in abortion cases; attendant physician is competent to testify, and his relation shall not disqualify him).

*N. Y.* St. 1905, c. 331 (amends C. C. P. 1877, § 834, by inserting after "surgery" the words "or a professional or registered nurse," and by adding, at the end, the following: "unless where the patient is a child under the age of sixteen the information so acquired indicates that the patient has been the victim or subject of a crime, in which case the physician or nurses may be required to testify," etc., when the crime is the subject of the inquiry; this proviso is a poor sop to the demands of justice and does not palliate the atrocity of closing the physician's mouth where the victim was an adult).

*N. C.* Rev. 1905, § 1621 (like St. 1885, c. 159).

*Wis.* St. 1911, c. 322, p. 328 (amending Stats. § 4075, by replacing "compelled" with "permitted," and adding, "but as a witness in his own behalf he may disclose such information in any civil action brought by such patient or his legal representatives to recover damages for malpractice in such professional attendance, and also in any criminal prosecution for such malpractice, whenever such patient or his legal representatives shall have first given evidence relating to such information").

[Note 6; *add.*:]

A careful discussion of the scope and policy of the privilege will also be found in Professor H. B. Hutchins' article in the *Michigan Law Review*, II, 687 (1904), "The Physician as an Expert."

[Text, p. 3351, at the end of the second paragraph; *add* a note 6a:]

<sup>6a</sup> A recent Michigan statute (cited *supra*, n. 5) commits the absurdity of abolishing the privilege for sexual disease in certain cases, while retaining it on other facts.

[Note 8; *add.*:]

and Mr. Wm. A. Purrington in the Columbia Law Review, VI, 388 (1906), "An Abused Privilege."

§ 2381. Confidentiality of Communications, etc.

[Note 1; *add.*:]

1905, *Murphy v. Board*, 2 Cal. App. 468, 83 Pac. 577.

[Note 2; *add.*:]

1914, *Booren v. McWilliams*, 26 N. D. 558, 145 N. W. 410.

[Note 4; *add.*:]

1914, *Mutual Life Ins. Co. v. Owen*, — Ark. —, 164 S. W. 720 (a second physician, attending the first as a guest and adviser only, held within the privilege).

§ 2382. Professional Character of the Consultation.

[Text, l. 6 of the §, after "the word"; *add* a new note 1a:]

1909, *Laurie Co. v. McCullough*, 174 Ind. 477, 90 N. E. 1014 (a teacher of gymnastic exercises taken by medical advice, held not within the privilege).

1909, *Homnyack v. Prudential Ins. Co.*, 194 N. Y. 456, 87 N. E. 769 (life insurance; St. 1904 and St. 1906, applied to concede the privilege to a professional nurse; effect of St. 1906 on pending actions, considered).

[Note 2; *add.*:]

1904, *Schermer v. McMahon*, 108 Mo. App. 36, 82 S. W. 535.

[Note 3; *add.*:]

For a nurse, see N. Y. St. 1905, c. 331, quoted *ante*, § 2380.

[Note 4; *add.*:]

1904, *State v. Lyons*, 113 La. 959, 37 So. 890 (a coroner-physician, visiting the accused at a charity-hospital after the affray, held not within the privilege).

1905, *Arnold v. Maryville*, 110 Mo. App. 254, 85 S. W. 107 (a consultation "only with a view of qualifying them to testify in the cause," not privileged). 1906, *Obermeyer v. Lageman C. M. Co.*, 120 Mo. App. 59, 96 S. W. 673 (statements at an interview with the opponent's physician in which the latter was partly trying to cure and partly trying to get evidence, held entirely privileged). 1907, *Smart v. Kansas City*, 208 Mo. 162, 105 S. W. 709 (physicians of a city hospital where the plaintiff went for treatment, held all within the privilege, regardless of whether any one was specially retained).

1910, *People v. Austin*, 199 N. Y. 446, 93 N. E. 57 (examination of accused made by the physician in jail at the defendant's request for the purpose of testifying as to sanity; the defendant did not call him on the trial, but the prosecution did; held not privileged).

[Note 5; *add.*:]

1906, *Smoot v. Kansas City*, 194 Mo. 513, 92 S. W. 363.

1907, *State v. Werner*, 16 N. D. 83, 112 N. W. 60 (conversation between the accused, the State's attorney, and the physician, held not privileged).

A hypothetical question to a physician who has had professional relations with the patient is of course not privileged: 1904, *Crago v. Cedar Rapids*, 123 Ia. 48, 98 N. W. 354.

[Note 6; *add.*:]

*Accord*: 1910, *Ossenkop v. State*, 86 Nebr. 539, 126 N. W. 72 (autopsy of the deceased by a physician employed by defendant).

[*Note 6 — continued*]

*Contra*: 1912, *Thomas v. Byron Tp.*, 168 Mich. 593, 134 N. W. 1021 (privilege allowed, where the physician's privileged relation to deceased during lifetime facilitated his performance of the autopsy).

The privilege is universally held to include the medical records of a *hospital*. But *quære* whether it should include the records of a *State insane asylum*, where the undoubtedly medical character of the records is overridden by the public nature of the books (*ante*, § 1858, note 2, *suppl.*).

1913, *Massachusetts M. L. Ins. Co. v. Board*, — Mich. —, 144 N. W. 538 (*mandamus* to compel the trustees of the State Asylum for the Insane to permit inspection of their records of an insured confined there; the records held to be within the privilege, because consisting of entries by medical officer, and the privilege held to override the public nature of the books, though this last point is not discussed; another instance of the bad absurdity of the privilege).

[*Note 7; add:*]

*Accord*: 1907, *People v. Furlong*, 187 N. Y. 198, 79 N. E. 978 (*People v. Hoch* followed). *Contra*: 1905, *McRae v. Erickson*, 1 Cal. App. 326, 82 Pac. 209 (privilege applied to the surgeon of defendant's hospital, treating an injured employee).

1907, *Colorado Midland R. Co. v. McGarry*, 41 Colo. 398, 92 Pac. 915 (physician sent by the defendant to treat him professionally, and not merely to get information for defendant, held within the privilege).

1904, *Battis v. Chicago, R. I. & P. R. Co.*, 124 Ia. 623, 100 N. W. 543 (railway company's surgeon sent to examine plaintiff after the injury, and treating him; privilege held applicable).

1904, *Meyer v. Supreme Lodge*, 178 N. Y. 63, 70 N. E. 111 (a physician called by strangers to save a would-be suicide, and prescribing for the purpose, is within the privilege, even though the patient repels his services; *Gray, J.*, and *Parker, C. J.*, diss.).

1907, *Union Pacific R. Co. v. Thomas*, 152 Fed. 365, 367 (a physician sent by the defendant to treat the injured plaintiff against the protest of the plaintiff; privilege held applicable).

1913, *Arizona & N. M. R. Co. v. Clark*, 9th C. C. A., 207 Fed. 817, 823 (consultation with an oculist, employed by the opponent, but called by the plaintiff and supposed by the plaintiff to have come at his own request alone, held privileged).

### § 2383. Communications Necessary for Prescription.

[*Note 1; add:*]

1905, *McRae v. Erickson*, 1 Cal. App. 326, 82 Pac. 209 (details of the cause of the injury, held privileged).

1904, *Battis v. Chicago, R. I. & P. R. Co.*, 124 Ia. 623, 100 N. W. 543.

1912, *Steketee v. Newkirk*, 173 Mich. 222, 138 N. W. 1034 (testimony held not privileged, on the facts).

1908, *Green v. Terminal R. Ass'n*, 211 Mo. 18, 109 S. W. 715 (statement of the place where plaintiff was at the time of the injury, made to the defendant's surgeon in response to their inquiries in preparation for a report held not privileged on the facts).

1908, *Re Newcomb's Estate*, 192 N. Y. 238, 84 N. E. 950 (a question as to the deceased's ability to travel, held improper, though it specified no disease; "the question is close").

1914, *Booren v. McWilliams*, 26 N. D. 558, 145 N. W. 410 (seduction under promise of marriage; the woman's statements to the physician, made a week after the child's birth, and concerning the promise to marry, held not within the privilege; two judges diss.).

1909, *Missouri Pac. R. Co. v. Castle*, 8th C. C. A., 172 Fed. 841 (a statement by a person with a crushed ankle as to the cause of the injury, held not necessary).

1905, *James v. State*, 124 Wis. 130, 102 N. W. 320 (examination of a raped child, merely to determine the existence of venereal disease, not privileged).

[Note 2, par. 1; *add.*:]

1909, *Madsen v. Utah L. & R. Co.*, 36 Utah 528, 105 Pac. 799 (the Court is to determine what is necessary, the physician's statement not being conclusive; the necessity must specifically appear in each instance, and not merely be presumed from the relation, but the inference may be drawn from the circumstances; *Straup, C. J., diss.*).

[Note 2, par. 2; *add.*:]

*Accord*: 1909, *Madsen v. Utah L. & R. Co.*, 36 Utah 528, 105 Pac. 799 (cited *supra*, this note).

*Contra*: 1905, *McRae v. Erickson*, 1 Cal. App. 326, 82 Pac. 209 ("The physician must commonly be regarded as the sole judge").

#### § 2384. Information, Active and Passive.

[Note 2; *add.*:]

1904, *Towles v. McCurdy*, 163 Ind. 12, 71 N. E. 129 ("all that the physician sees or observes" is privileged; here, the facts as to a testator's sanity).

1904, *Battis v. Chicago, R. I. & P. R. Co.*, 124 Ia. 623, 100 N. W. 543 (like *Prader v. Ass'n*).

1907, *Mansbach's Estate*, 150 Mich. 348, 114 N. W. 65 (mental condition; privilege held applicable).

1906, *Smoot v. Kansas City*, 194 Mo. 513, 92 S. W. 363 (*Gartside v. Ins. Co.* followed).

1906, *Myer's Will*, 184 N. Y. 54, 76 N. E. 920 (insanity; privileged).

[Note 3, par. 1; *add.*:]

1905, *Haughton v. Aetna L. Ins. Co.*, 165 Ind. 32, 73 N. E. 592 (fact of professional attendance just before the making of the policy, admitted).

1911, *State v. Stapp*, 65 Wash. 438, 118 Pac. 337 (cross-examination to an operation for abortion at a hospital, without naming or identifying the patient, held not a violation of the privilege).

#### § 2385. Criminal Cases, Malpractice.

[Note 1; *add.*:]

1905, *People v. Griffith*, 146 Cal. 339, 80 Pac. 68.

[Note 2; *add.*:]

1905, *McKenzie v. Banks*, 94 Minn. 496, 103 N. W. 497 (communications for the purpose of securing the physician's service for a criminal abortion are not privileged).

1912, *Thrasher v. State*, 92 Nebr. 110, 138 N. W. 120 (rape under age, the woman being deceased; the privilege held not available for the defendant to exclude testimony of the physicians attending her).

N. Y. St. 1905, c. 331 (quoted *ante*, § 2380, n. 5).

1912, *State v. Law*, 150 Wis. 313, 136 N. W. 803, 137 N. W. 457 (Stats. 1898, § 4078*d*, providing that no person shall be privileged etc. in prosecutions under § 4352 — abortion — or § 4583, is not limited to the privilege against self-crimination, but takes away also the present privilege under § 4075, in a prosecution for abortion; two judges diss.).

[Note 3; *add.*:]

*Accord*: Wis. Stats. 1911, c. 322, p. 328 (quoted *ante*, § 2380; but a comparison with the Indiana case, *Aspy v. Botkins*, *infra*, will show that this patchwork legislation did not go as far as it ought to have gone, to relieve the medical practitioner from the unfairness of the rule).

**§ 2386. Whose is the Privilege; Claim, etc.**

[*Note 1; add, at the end:*]

Of course the privilege is that of the patient as such, and applies equally for patients *not parties* to the case; this is everywhere assumed and conceded:

1906, *Myer's Will*, 184 N. Y. 54, 76 N. E. 920 (members of the testatrix' family).

[*Note 3; add:*]

On the general principle for all privileges (*ante*, §§ 2270, 2321), a *party not a patient* cannot as such object to a denial of the privilege; and this principle ought to be enforced oftener than it is:

1912, *Thrasher v. State*, 92 Nebr. 110, 138 N. W. 120 (rape under age; the woman being deceased, the defendant was not allowed to invoke the privilege to exclude medical testimony to her condition).

[*Note 4, par. 1; add:*]

1909, *Laurie Co. v. McCullough*, 174 Ind. 477, 90 N. E. 1014.

1905, *Arnold v. Maryville*, 110 Mo. App. 254, 85 S. W. 107.

1906, *Pennsylvania R. Co. v. Durkee*, 147 Fed. 99, C. C. A. (applying the N. Y. Code).

But the opponent may at least *call the physician* and force the patient-party to object and make claim:

1903, *State v. Booth*, 121 Ia. 710, 97 N. W. 74; this is on the principle of § 2268, *ante*.

**§ 2388. Waiver, in general.**

[*Note 2; add:*]

and the forceful opinion of Faris, J., in *Epstein v. Pennsylvania R. Co.*, 250 Mo. 1, 156 S. W. 699.

[*Note 3; add:*]

1906, *Roche v. Nason*, 185 N. Y. 128, 77 N. E. 1007 (the trial Court's ignoring of an express waiver, here held harmless).

Otherwise, the particular circumstances are to be considered:

1907, *Druhe H. L. Co. v. Fishbein*, 101 Minn. 81, 111 N. W. 950 (client's informal expression of willingness that the physician should testify, made on the stand and before consulting his attorney, held not a waiver).

[*Note 5; add:*]

but it was recognized in the following: 1906, *Williams v. Spokane F. & N. R. Co.*, 42 Wash. 597, 84 Pac. 1129.

[*Note 6; add:*]

*Accord*: 1906, *Trull v. Modern Woodmen*, 12 Ida. 318, 85 Pac. 1081.

1905, *Western Travelers' Acc. Ass'n v. Munson*, 73 Nebr. 858, 103 N. W. 688 (waiver in the constitution of a benefit association, held valid).

*Contra*, under statute: 1904, *Meyer v. Supreme Lodge*, 178 N. Y. 63, 70 N. E. 111 (a waiver of the privilege in an insurance contract is not effective under C. C. P. § 836 as amended in 1891; and the Federal Constitution cannot be invoked to protect a New York contract). 1905, *Supreme Lodge v. Meyer*, 198 U. S. 508, 25 Sup. 754 (*Holden v. Ins. Co.*, N. Y., followed, in construing a New York contract).

**§ 2389. Waiver by Bringing Suit, etc.**

[*Note 2; add:*]

1907, *Smart v. Kansas City*, 208 Mo. 162, 105 S. W. 709 (personal injuries; suit held not a waiver; the reasoning of the text above, answered by Woodson, J., but not convincingly;

[*Note 2 — continued*]

the present ruling, excluding three attending physicians to an alleged injury to a knee of a person who had concededly suffered tuberculosis of the knee and had already been crippled in it, shows what a farce the privilege is; this whole investigation, shutting out by law the most important testimony, was a huge parody on justice, so far as justice purports to rest on truth).

[*Note 3; add:*]

1911, *Woods v. Lisbon*, 150 Ia. 433, 130 N. W. 372 (plaintiff's testimony to the physician's treatment, held a waiver as to all physicians engaged in the same operation).

1913, *Reed v. Rex Fuel Co.*, — Ia. —, 141 N. W. 1056 (*Woods v. Lisbon* followed).

1913, *Epstein v. Pennsylvania R. Co.*, 250 Mo. 1, 156 S. W. 699 (cited more fully *post*, § 2390, n. 3).

[*Note 4; add, under Contra:*]

1905, *Indianapolis & M. R. T. Co. v. Hall*, 165 Ind. 557, 76 N. E. 242 (personal injury; ruling in *Williams v. Johnson* approved).

1904, *Battis v. Chicago, R. I. & P. R. Co.*, 124 Ia. 623, 100 N. W. 543.

1911, *Slater v. Sorge*, 166 Mich. 173, 131 N. W. 565 (see the citation *post*, § 2390, n. 3).

1904, *Holloway v. Kansas City*, 184 Mo. 19, 82 S. W. 89 (like *Burgess v. Sims D. Co.*, Ia., *supra*; but a voluntary testimony by the party to the circumstances of a physician's examination is a waiver of the privilege).

1905, *May v. Northern P. R. Co.*, 32 Mont. 522, 81 Pac. 328 (plaintiff's testimony to her injury and its treatment by two physicians, held not a waiver as to the testimony of a third).

1912, *Larson v. State*, 92 Nebr. 24, 137 N. W. 894 (the defendant's answers on cross-examination as to his treatment by Dr. H., held not to be a waiver of the privilege allowing the prosecution to call Dr. H.).

1907, *Union Pacific R. Co. v. Thomas*, 152 Fed. 365, 369.

1907, *Noelle v. Hoquiam L. & S. Co.*, 47 Wash. 519, 92 Pac. 372 (*Root, J.*, with *Hadley, C. J.*, diss., in an opinion of sound sense and logic).

[*Note 7; add:*]

1906, *Elliott v. Kansas City*, 198 Mo. 593, 96 S. W. 1023 (failure to claim privilege for testimony of the same physician to substantially the same facts at a prior trial of the same cause is a waiver of the privilege for the subsequent trial also; following *McKinney v. R. Co.*, N. Y.).

## § 2390. Waiver by Calling the Physician.

[*Note 2; add:*]

1908, *Pittsburgh C. C. & St. L. R. Co. v. O'Conner*, 171 Ind. 686, 85 N. E. 969 (the plaintiff's calling, at the first trial, of a physician who had examined him, held a waiver permitting the defendant to call him at the second trial; the same facts were the subject of both testimonies).

1905, *Nugent v. Cudahy P. Co.*, 126 Ia. 517, 102 N. W. 442 (cross-examination, held no waiver on the facts).

[*Note 3; add:*]

1913, *Mays v. New Amsterdam C. Co.*, 40 D. C. App. 249, 257 (calling one physician is not a waiver as to another physician who examined at a separate time; distinguishing *Baltimore & O. R. Co. v. Morgan*, 35 D. C. App. 195).

## [Note 3 — continued]

1911, *Jones v. Caldwell*, 20 Ida. 5, 116 Pac. 110 (calling one physician is not a waiver as to the other).

1911, *Slater v. Sorge*, 166 Mich. 173, 131 N. W. 565 (plaintiff consulted Dr. A for a dog-bite, and then Dr. B; at the trial he testified to both consultations, and then called Dr. B; held, that the defendant could not call Dr. A; following *Dotton v. Albion*).

## [Note 3; add:]

1911, *Missouri & N. A. R. Co. v. Daniels*, 98 Ark. 352, 136 S. W. 651 (calling one physician is not a waiver of the privilege for other physicians' testimony to the same ailment; another of these permissions to plaintiffs to misuse the privilege solely as an instrument for winning a case, and not as a protection for privacy of one's ailments; Dr. F. was allowed to testify that the plaintiff had a prolapsus of the uterus, but two other physicians were not allowed to testify to the same fact; obviously the plaintiff had no desire to keep private the fact; hence, the privilege lost its only purpose, and became simply a tool for tinkering with the truth).

1907, *Smart v. Kansas City*, 208 Mo. 162, 105 S. W. 709 (calling one of several physicians is not a waiver as to others; Lamm and Graves, JJ., diss.; "to hold so leaves a travesty on justice at the whimsical beck and call of a litigant"; the opinion of Lamm, J., is one of the signs observable of the judicial realization of the preposterous absurdity of the privilege in to-day's practice). 1913, *Epstein v. Pennsylvania R. Co.*, 250 Mo. 1, 156 S. W. 699 (three physicians examined the plaintiff while in the hospital; the defendant offered the testimony of one, to which the defendant did not object; but to the testimony of the other two, when next offered, he then objected; already he himself and a physician called by him had testified to his injuries; held, that the plaintiff's own testimony, with its references to the treatment by the first of the three doctors, was a waiver, as to the other two; expressly reserving the question whether waiver by calling or not objecting to one physician is a waiver as to others; Woodson, J., diss.; excellent opinion by Faris, J., one of the few that has shown a correct moral attitude to the privilege). 1914, *State v. Long*, — Mo. —, 165 S. W. 748; (seduction in 1909; issue whether the prosecutrix was chaste or pregnant in 1908; the State having called a physician who attended her for womb trouble in Dec., 1908, the defendant sought to use two other physicians who attended her for the same trouble in Nov., 1908; held that the State by offering the testimony of one physician, with the prosecutrix' consent, as to a specific ailment, waived the privilege as to all other physicians consulted for that ailment; liberal opinion, harmonizing prior authorities, by Graves, J.; Woodson, J., concurring, because "can see no useful purpose to be achieved by my continual dissent").

## [Note 4, par. 2; add:]

1910, *Brotherhood of Painters v. Barton*, 46 Ind. App. 160, 92 N. E. 64 (in an action on a death policy, to show the cause of death, the record of a city board of health, based on the physician's certificate required by law to be filed, was excluded, partly on the ground of privilege; this is absurd, for the public filing has already destroyed the whole virtue of the privilege).

*Contra*: 1906, *Krapp v. Metrop. L. Ins. Co.*, 143 Mich. 369, 106 N. W. 1107 (physician's certificate of death filed as required by law, and admissible under Comp. L. § 4617, cited *ante*, § 1644, held admissible; the former statute not to be overridden by the present privilege).

## So too for a deposition taken on behalf of the patient:

1907, *Clifford v. Denver & R. G. R. Co.*, 188 N. Y. 349, 80 N. E. 1094 (the plaintiff took the physician's testimony in a deposition, with cross-interrogatories and answers, but rested without reading any part of it; held that the taking and filing of the deposition was a waiver of the secrecy of the privilege, and that the statutory amendments as to the form of express waiver did not apply to such a case; careful opinion by Vann, J.; such a victory of common sense over the quiddities of the statute is matter for congratulation).

**§ 2391. Waiver by Deceased Patient's Representative.**

[Note 1; add:]

*N. Y.*: the amendments of 1891-1899, cited *ante* § 2380, n. 5, have modified the rule.  
*Wis.*: 1904, *Hunt's Will*, 122 *Wis.* 460, 100 *N. W.* 874 (will contest; the contestants may not waive the privilege; "no one, save the patient himself," can do so).  
*N. D.*: 1910 *Auld v. Cathro*, 20 *N. D.* 461, 128 *N. W.* 1025 ("the privilege cannot be waived by the heirs and personal representatives"; following the New York doctrine, but ignoring the feature that the *N. Y.* Code has a peculiar clause about express waiver).

[Note 2; add:]

*Colo.*: 1906, *Shapter's Estate*, 35 *Colo.* 578, 85 *Pac.* 688 (*Thompson v. Ish*, Mo., followed).  
*Ind.*: the later cases look the other way: 1901, *Brackney v. Fogle*, 156 *Ind.* 535, 60 *N. E.* 303 (see the next case). 1904, *Towles v. McCurdy*, 163 *id.* 12, 71 *N. E.* 129 ("This Court in *Brackney v. Fogle* expressly decided that the rule announced in *Kern v. Kern* [*ante*, § 2315, n. 2, denying the privilege to an attorney attesting a will] did not apply to the testimony of physicians, . . . even where the controversy was confined to the heirs and devisees of the decedent"). 1906, *Heaston v. Kreig*, 167 *Ind.* 101, 77 *N. E.* 805 (on the facts, held that the privilege could be waived only by the executor who is seeking to support a will *prima facie* valid). 1908, *Scott v. Smith*, 171 *Ind.* 453, 85 *N. E.* 774 (while the personal representative may waive the privilege to protect the interests of the estate, yet an administrator may not waive it in a proceeding to remove himself).  
*Ia.*: 1906, *Long v. Garey Inv. Co.*, — *Ia.* —, 110 *N. W.* 26 (action by creditors to reach property transferred by the deceased, fraud of creditors and mental incapacity being the grounds of the action; held that the administrator could waive the privilege, so far as the issue of incapacity was concerned).  
*Kan.*: 1911, *Fish v. Poorman*, 85 *Kan.* 237, 116 *Pac.* 898.  
*Mich.*: 1907, *Mansbach's Estate*, 150 *Mich.* 348, 114 *N. W.* 65 (devisee seeking probate, held not entitled to waive).  
*Minn.*: 1907, *Olson v. Court of Honor*, 100 *Minn.* 117, 110 *N. W.* 374 (defence of suicide, in an action on an insurance policy; the deceased representative allowed to call the physician; "the purpose of the statute is to protect the patient, and not his adversary; . . . as a general rule, those who represent him after his death may also waive the privilege, for the protection of interests which they claim under him"; good opinion by Start, C. J.). 1908, *Mageau v. Great Northern R. Co.*, 103 *Minn.* 290, 115 *N. W.* 651 (*Olson v. Court of Honor* approved; but whether a husband may waive, in an action for loss of wife's services, not decided).  
*Nebr.*: 1907, *Parker v. Parker* 78 *Nebr.* 535, 111 *N. W.* 119 (proponent allowed to waive the privilege).

**§ 2394. Priest and Penitent; Privileged Communications; History, etc.**

[Note 3, last line; add:]

Mr. Badeley's arguments are criticised in a note in 6 *Jurist*, n. s., pt. 2, p. 319 (1860).

[Note 6; add:]

and the instances cited in L. C. J. Coleridge's letter quoted *supra* in the text.

[Text, p. 3363, at the end; add:]

1890, L. C. J. Coleridge, Letter to Mr. Gladstone (*Life and Correspondence*, 1904, II, 364): "I should not bore you, but I think perhaps it may interest you to know what Willes (Sir James) once told me he thought as to confession. He was, on the whole, the greatest and largest lawyer I ever knew, and I knew Jessel, Cairns and Campbell. I defended Constance Kent, John Karslake prosecuted her, and Willes tried her at Salisbury. Wagner was to have been a witness, and Willes had made up his mind that he should have to hold one

[Text, p. 3363 — continued]

way or the other as to the sanctity of confession. He took infinite pains to be right and he was much interested, because the point, since the Reformation, had never been decided. There were strong dicta of strong Judges — Lord Ellenborough, Lord Wynford and Alderson — that they would never allow Counsel to ask a clergyman the question. On the other hand, Hill, a great lawyer and good man, *but* a strong Ulster Protestant, had said there was no *legal* privilege in a clergyman. The thing did not come to a decision, for Constance Kent pleaded guilty; and Karlake told me he should never have thought of putting the question to Wagner; and I had resolved *if* he did (but I knew he was a gentleman) that as an advocate I would not object, but use it in my speech. Willes, however, I suppose did not know us quite so well as we knew each other; and he had prepared himself to *uphold* my objection if I made it. He said he had satisfied himself that there was a *legal* privilege in a priest to withhold what passed in confession. Confession, he said, is made for the purpose of absolution. Absolution is a judicial act. The priest in absolving acts as a Judge, and no Judge is ever obliged to state his reasons for his judicial determination. This, you see, puts it on grounds of general law, and would be as applicable to Manton, Oliver Cromwell's chaplain, who, most certainly, heard confessions and absolved, as to the Pope himself. Whether the English Judges would have upheld Willes's *law* I own I doubt, but I thought it might interest you to know the opinion, and the grounds of it, of so great a lawyer and so really considerable a man. Practically, while Barristers and Judges are gentlemen the question can never arise. I am told it never *has* arisen in Ireland in the worst times."

**§ 2395. Statutes recognizing the Privilege.**

[Note 1; add:]

Nev. St. 1905, c. 113 (amending St. 1869, § 383, being Gen. St. 1885, § 3405, *supra*, by changing "cannot" to "shall not," and omitting the words after "character").

[Note 2; add:]

1906, *State v. Morgan*, 196 Mo. 177, 95 S. W. 402 (communication to a minister not professionally admitted).

1905, *Colbert v. State*, 125 Wis. 423, 104 N. W. 61 (interview between a priest and a parishioner, held not a confession to him professionally).

**§ 2396. Policy of the Privilege.**

[Note 1; add:]

The pith of the matter can also be seen in L. C. J. Coleridge's letter, quoted *ante*, § 2394.

**§ 2405. Parol Evidence Rules; (A) History.**

[Note 7, at the end; add:]

So also in the English borough courts, which earlier passed out of formalism: Bateson, "Borough Customs," II, *Introd.* pp. 150-152 (Selden Soc. Pub., XXI; 1906).

**§ 2406. Creation of Legal Acts; Subject must concern Legal Relations.**

[Note 6, par. 1; add:]

1904, *Fleming v. Morrison*, 187 Mass. 120; 72 N. E. 499 (the testator's declaration to the attesting witness, after the attestation, that "it was a fake, made for a purpose," admitted, and the document held void).

[*Note 7; add:*]

1911, *Lavalleur v. Hahn*, 152 Ia. 649, 132 N. W. 877 (contract intended to be a sham, in fraud of a third person; facts shown; the opinion is hazy on the theory, and uses the term "fraud" too loosely; the parol evidence rules concededly stifle the revelation of a great deal of fraud; there is no general principle that fraud may be shown; rather the contrary).  
 1904, *Humphrey v. Timken C. Co.*, — Kan. —, 75 Pac. 528 (order of purchase signed by H.; H. allowed to show an understanding that he was nominal purchaser only, B. being the real purchaser but insolvent, and the seller being desirous to evade proceedings by B.'s creditors; this is apparently unsound).

[*Text*, p. 3381, line 4 from end of section; *add* a note 8:]

\* Of course, the facts constituting the real transaction, and making it void for illegality, may here always be shown: 1908, *Clemens v. Crane*, 234 Ill. 215, 84 N. E. 884 (the rule does not prevent proof of usury in a loan). 1903, *Wheeler v. Metrop. Stock Exchange*, 72 N. H. 315, 56 Atl. 754 (wagering contract).

### § 2408. Act must be Final; Delivery, as applied to Deeds, etc.

[*Note 2; add:*]

1905, *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337.

[*Note 3; add:*]

1912, *Culver v. Carroll*, 175 Ala. 469, 57 So. 767.  
 1905, *Spacy v. Rjitter*, 214 Ill. 266, 73 N. E. 447. 1904, *Van der Aa v. Van Drunen*, 208 Ill. 108, 70 N. E. 33 (a deed held on the facts not delivered). 1905, *Coleman v. Coleman*, 216 Ill. 261, 74 N. E. 701 (delivery to a third person for the grantor's children; "the test is the intent with which the act or acts relied on as the equivalent or substitute for actual delivery were done"). 1906, *Blake v. Ogden*, 223 Ill. 204, 79 N. E. 68. 1906, *Phelps v. Pratt*, 225 Ill. 85, 80 N. E. 69. 1909, *Calleraud v. Piot*, 241 Ill. 120, 89 N. E. 266 (deed deposited with a notary and left there until the grantor's death). 1911, *De Graff v. Manz*, 251 Ill. 531, 96 N. E. 516. 1912, *Weigand v. Rutschke*, 253 Ill. 260, 97 N. E. 641 (deed). 1904, *Emmons v. Harding*, 162 Ind. 154, 70 N. E. 142 (elements of delivery considered). 1906, *Foreman v. Archer*, 130 Ia. 49, 106 N. W. 372.  
 1909, *Flynn v. Flynn*, 17 Ida. 147, 104 Pac. 1030 (good opinion by Sullivan, C. J.).  
 1907, *Young v. McWilliams*, 75 Kan. 243, 89 Pac. 12.  
 1907, *Wilkins v. Somerville*, — Me. —, 66 Atl. 893.  
 1909, *Hearn v. Purnell*, 110 Md. 458, 72 Atl. 906.  
 1904, *Roup v. Roup*, 136 Mich. 385, 99 N. W. 389. 1912, *Luscombe v. Peterson*, 173 Mich. 165, 138 N. W. 1057.  
 1905, *Rausch v. Michel*, 192 Mo. 293, 91 S. W. 99.  
 1908, *Rowley v. Bowyer*, 75 N. J. Eq. 80, 71 Atl. 398. 1909, *Gould v. Hurley*, 75 N. J. Eq. 512, 73 Atl. 129 (deed to H., handed by the grantor to her father, etc.).  
 1904, *Powers v. Rude*, 14 Okl. 381, 79 Pac. 89 (escrow).  
 1913, *Buchanan v. Clark*, 164 N. C. 56, 80 S. E. 424.  
 1909, *Morgan v. Morgan*, 82 Vt. 243, 73 Atl. 24 (deed handed by grantor to town clerk, with instructions to file but not to record now; the clerk afterwards recorded on instructions from the grantee and handed it to the grantee; held, no delivery).  
 1913, *Leftwich v. Early*, — Va. —, 79 S. E. 384 (deed of life estate, retained in grantor's possession).  
 1904, *Kittoe v. Willey*, 121 Wis. 548, 99 N. W. 337.  
 1910, *Jackson v. Lamar*, 58 Wash. 383, 108 Pac. 946.

For a complete and scholarly treatment of the Illinois cases, see Mr. Albert S. Long's article, "Delivery of Deeds in Illinois" (Illinois Law Rev., VIII, 159) and notes in later

[*Note 3 — continued*]

volumes of the Illinois Law Review. See also Professor H. A. Bigelow's valuable article, "Conditional Deliveries of Deeds of Land" (Harvard Law Rev., XXVI, 565).

[*Note 4, par. 1; add:*]

- 1911, *Hammond v. McCullough*, 159 Cal. 639, 115 Pac. 216.
- 1912, *Walker v. Green*, 23 Colo. App. 154, 128 Pac. 855.
- 1908, *Bowers v. Cottrell*, 15 Ida. 221, 96 Pac. 936 (an especially interesting case).
- 1908, *White v. Willard*, 232 Ill. 464, 83 N. E. 954 (voluntary conveyance).
- 1909, *Good v. Williams*, 81 Kan. 388, 105 Pac. 433 (deed returned to grantor to be recorded in the locus of the land).

[*Note 4, par. 1; add:*]

- 1906, *Interstate Inv. Co. v. Bailey*, — Ky. —, 93 S. W. 578. 1908, *O'Neal v. Sovereign Woodmen*, 130 Ky. 68, 113 S. W. 52.
- 1907, *Blackwell v. Blackwell*, 196 Mass. 186, 81 N. E. 910.
- 1904, *Chastek v. Souba*, 93 Minn. 418, 101 N. W. 618.
- 1909, *Russel v. Close's Est.*, 83 Nebr. 232, 119 N. W. 515 (contract for services as nurse).
- 1909, *McGuire v. Clark*, 85 Nebr. 102, 122 N. W. 675.
- 1905, *Wheaton v. Liverpool & L. & G. Ins. Co.*, 20 S. D. 62, 104 N. W. 850 (insurance policy).
- 1912, *Henry v. Phillips*, 105 Tex. 459, 151 S. W. 533.
- 1865, *Younge v. Guilbeau*, 3 Wall. 636.
- 1908, *Kershner v. Henderson*, 48 Wash. 228, 93 Pac. 323 (deed and will).

[*Note 4, par. 2; add:*]

- 1908, *Matheson v. Matheson*, 139 Ia. 511, 117 N. W. 755.
- 1913, *Houlton v. Houlton*, 119 Md. 180, 86 Atl. 514.

[*Note 4, par. 3; add:*]

- 1913, *In re Van Alstyne*, 207 N. Y. 298, 100 N. E. 802 (gift of personalty; requisites of delivery discussed).

[*Note 5; add:*]

- 1911, *Horton v. Stone*, 32 R. I. 499, 80 Atl. 1 (replevin bond, delivered by one of the sureties to the other with the condition that the principal sign before delivery to the obligee, but the document was delivered in breach of that condition; the document held not binding).

[*Note 6, l. 1; add:*]

- 1913, *Thurston v. Tubbs*, 257 Ill. 465, 100 N. E. 947.
- 1908, *Matheson v. Matheson*, 139 Ia. 511, 117 N. W. 755.
- 1907, *Nolan v. Otney*, 75 Kan. 311, 89 Pac. 690 (an interesting case, and a careful opinion by Mason, J.).
- 1906, *Craddock v. Barnes*, 142 N. C. 89, 54 S. E. 1003 (good opinion by Walker, J.).
- 1910, *O'Brien v. O'Brien*, 19 N. D. 713, 125 N. W. 307.
- 1913, *Jackson v. Jackson*, 67 Or. 44, 135 Pac. 201.

[*Note 6, l. 4; add:*]

- 1905, *Grilley v. Atkins*, 78 Conn. 380, 62 Atl. 337.
- 1907, *McIntyre v. McIntyre*, 147 Mich. 365, 110 N. W. 960.

[*Note 10; add:*]

- 1911, *Dennison v. Barney*, 49 Colo. 442, 113 Pac. 519.
- 1905, *Bieber v. Gans*, 24 D. C. App. 517 (bond; distinguishing *Burke v. Dulaney*, U. S., *post*, § 2409, n. 6, and confining the rule to sealed instruments).

[Note 10 — *continued*]

1905, *Whitney v. Dewey*, 10 Ida. 633, 80 Pac. 1117 (the opinion calls it a "well-settled principle of law," and cites the early English authorities, ignoring the later ones).

1908, *Wipfler v. Wipfler*, 153 Mich. 18, 116 N. W. 544 (where the inequity of the rule is illustrated).

1908, *Hamlin v. Hamlin*, 192 N. Y. 164, 84 N. E. 805.

1905, *Richmond v. Caruthers*, 103 Va. 774, 50 S. E. 265 (maintaining the old-fashioned distinction between sealed and unsealed instruments).

1909, *Dorr v. Midelburg*, 65 W. Va. 778, 65 S. E. 97.

[Note 11, *add.*:]

1905, *Graham v. Rimmel*, 76 Ark. 140, 88 S. W. 899 (explaining the escrow rule as involving a condition subsequent only).

1906, *Anderson v. Goodwin*, 125 Ga. 663, 54 S. E. 679 (deed delivered by the agent contrary to condition).

1906, *Elliott v. Murray*, 225 Ill. 107, 80 N. E. 77 (good example; prior cases collected).

1906, *Oswald v. Caldwell*, 225 Ill. 224, 80 N. E. 131. 1907, *Van Norman v. Young*, 228 Ill. 425, 81 N. E. 1060 (that a chattel mortgage was delivered on condition that it was "not to be enforced" unless the mortgagor desired to borrow money at the mortgagee's bank, allowed to be shown). 1908, *Ward v. Conklin*, 232 Ill. 553, 83 N. E. 1058 (delivery of deed on alleged oral conditions). 1908, *Benner v. Bailey*, 234 Ill. 79, 84 N. E. 638. 1908, *Potter v. Barringer*, 236 Ill. 224, 86 N. E. 233 ("a deed cannot be delivered to the grantee in escrow").

1911, *Koester v. Northwestern P. H. Co.*, 24 S. D. 546, 124 N. W. 740 (construing Civ. Code, § 924, and Cal. Civ. Code, § 1056, which declare that "a grant cannot be delivered to the grantee conditionally").

[Note 12; *add.*:]

Approved by Russell, J., in *Heitmann v. Commercial Bank*, 6 Ga. App. 584, 65 S. E. 590 (1909).

[Note 14; *add.*:]

1908, *Kirby v. Kirby*, 236 Ill. 255, 86 N. E. 259 (deed recorded without grantee's knowledge).

1904, *Erlor v. Erlor*, 124 Ia. 726, 100 N. W. 856 (recording of a deed in the name of a son, instead of the father).

1906, *Whiting v. Hoglund*, 127 Wis. 135, 106 N. W. 391.

[Note 15, at the end; *add.*:]

Compare the following examples: 1906, *Griswold v. Griswold*, 148 Ala. 239, 42 So. 554.

1905, *Cribbs v. Walker*, 74 Ark. 104, 85 S. W. 244.

1904, *Wilenou v. Handlon*, 207 Ill. 104, 69 N. E. 892. 1907, *Noble v. Fickes*, 230 Ill. 594, 82 N. E. 950 (useful opinions, illustrating the arguments on both sides). 1908, *Potter v. Barringer*, 236 Ill. 224, 86 N. E. 233 (deed). 1910, *Phillips v. Gannon*, 246 Ill. 98, 92 N. E. 616 (deed to be defeasible on death in certain circumstances).

1906, *Leonard v. Leonard*, 145 Mich. 563, 108 N. W. 985.

1905, *Schlicher v. Keeler*, 67 N. J. Esq. 635, 61 Atl. 434.

1907, *Sappingfield v. King*, 49 Or. 102, 89 Pac. 142.

Delivery for a *gift mortis causa* is determined by the same principles as deeds: 1912, *Stratton v. Athol Savings Bank*, 213 Mass. 46, 99 N. E. 454.

For the *presumption of delivery*, arising from various circumstances, see *post*, § 2520.

**§ 2409. Same: Delivery, as applied to Negotiable Instruments.**

[Note 5; add:]

1912, *Young v. Hayes*, 212 Mass. 525, 99 N. E. 327 (promissory note indorsed and handed over on condition that it should not be binding until the signatures of G. and P. were secured, held not binding between the parties).

[Note 6; add:]

1905, *Graham v. Rimmel*, 76 Ark. 140, 88 S. W. 899 (note for an insurance policy; collecting prior cases).

1914, *Norman v. McCarthy*, 56 Colo. 290, 138 Pac. 28 (check given temporarily in lieu of bond).

1908, *Purcell v. Armour Packing Co.*, 4 Ga. App. 253, 61 S. E. 138 (check; able opinion by Powell, J.).

1904, *Mendenhall v. Ulrich*, 94 Minn. 100, 101 N. W. 1057 (note to be operative only on subsequent acceptance of a policy).

1909, *Hunter v. First National Bank*, — Ind. —, 87 N. E. 734 (renewal note was sent to H. to be signed as co-surety; H. signed it, and pencilled "Get S. on this as well," and handed it to the payee's agent; S. refused to sign; held that this could be shown to deny H.'s liability).

1911, *Smith v. Dotterweich*, 200 N. Y. 299, 93 N. E. 985 (note given for insurance policy, conditionally on the insurer obtaining a loan for the insured; admitted; good opinion by Werner, J.).

1912, *Mitchell v. Altus State Bank*, 32 Okl. 628, 122 Pac. 666 (surety's signature on condition that others first sign).

1907, *Hodge v. Smith*, 130 Wis. 326, 110 N. W. 192 (here the question also was involved whether the transferee acquired it in due course). 1908, *Paulson v. Boyd*, 137 Wis. 241, 118 N. W. 841 (note in connection with stock transfer).

**§ 2410. Same: Delivery as applied to Contracts in general.**

[Note 3, par. 1; add:]

1906, *Barton P. M. Co. v. Taylor*, 78 Ark. 586, 94 S. W. 713 (contract-memorandum, not to be binding till corrected; query, does this overrule *Findley v. Means*, *infra*, par. 2?).

1909, *Heitmann v. Commercial Bank*, 6 Ga. App. 584, 65 S. E. 590 (cited more fully *post*, § 2435, n. 3).

1909, *Wiltse v. Fifield*, 143 Ia. 332, 121 N. W. 1086 (contract signed but operation reserved until it was re-written with corrections). 1912, *Cedar Rapids Nat'l B'k v. Carlson*, 156 Ia. 343, 136 N. W. 659 (note that the defendants were not to be bound unless 24 signatures were obtained; allowed).

1913, *Stroupe v. Hewitt*, 90 Kan. 200, 133 Pac. 562 (agreement for a five days' test of a business bought).

1910, *Colonial Park Estates v. Massart*, 112 Md. 648, 77 Atl. 275 (paper signed as temporary memorandum only).

1904, *Elastic Tip Co. v. Graham*, 185 Mass. 597, 71 N. E. 117 (defendant was allowed to nullify a creditor's agreement, signed by him and handed to the plaintiff's agent on condition that it should not be valid till signed by a certain proportion of other creditors, though this condition did not come to the plaintiff's own knowledge). 1910, *Brown v. Quinby Co.*, 204 Mass. 206, 90 N. E. 586 (that an agreement, though delivered, was to take effect only after a corporation should be organized, etc., allowed). 1910, *Laprade v. Fitchburg & L. St. R. Co.*, 205 Mass. 77, 90 N. E. 982 (negotiations for a release; one draft having been proposed, and then a different one, and the testimony differing as to whether the first had been accepted and the second substituted or no document signed, it was held proper to let the jury consider the oral negotiations as being possibly the sole actual agreement).

## [Note 3 — continued]

1905, *Dodd v. Kemnitz*, 74 Nebr. 634, 104 N. W. 1069 (contract of sale, delivered subject to a third person's approval).

1908, *Sarasohn v. Kamaiky*, 193 N. Y. 203, 86 N. E. 20 (a Jewish rabbi and his son the plaintiff negotiated for certain payments and transfers by the father; another rabbi acted as scribe and drew up a contract; father and son signed it, and the scribe attested it and kept it; a copy certified by the scribe and signed by the father was given to the son; held that the scribe's custody of the original did not prevent the contract from being legally binding as a completed instrument). 1911, *Stiebel v. Grosberg*, 202 N. Y. 266, 95 N. E. 692 (a release under seal may be shown orally to have been delivered on a condition precedent as to its validity; but this Court still insists on the theoretical fallacy that "the delivery is a separate, independent act from that of executing it").

1913, *Blackstad N. Co. v. Parker*, 163 N. C. 275, 79 S. E. 606 (draft order, left by defendant with plaintiff's salesman to await final decision).

1913, *Colonial Jewelry Co. v. Brown*, 38 Okl. 44, 131 Pac. 1077 (agreement that an order should not become effective for 5 days, within which it could be canceled, admitted).

1913, *Gamble v. Riley*, 39 Okl. 363, 135 Pac. 390 (agreement for stock-delivery, conditional on a third person's approval; condition allowed to be shown).

1904, *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643 (condition that a contract of sale should not have effect unless a corporation was organized, allowed to invalidate the instrument).

1904, *State v. Chamber of Commerce*, 121 Wis. 110, 98 N. W. 930 (sale of a certificate of stock on a condition precedent as to the authority of L.).

## [Note 4, par. 1; add:]

1907, *Cavanagh v. Iowa Beer Co.*, 136 Ia. 236, 113 N. W. 856 (city license as condition precedent to a lease).

## [Note 6, l. 5; add:]

1907, *Hall v. Kary*, 133 Ia. 465, 110 N. W. 930. 1908, *Creveling v. Banta*, 138 Ia. 47, 115 N. W. 598 (deeds prepared in blank for the grantee's name, and left at a bank).

1909, *Mahoney v. Salisbury*, 83 Nebr. 488, 120 N. W. 144 (deed blank for grantee, then filled in by agent, but not recorded till after attachment by grantor's creditors).

## [Note 6, at the end; add:]

Whether the *authority* to fill the blank may be in parol or must be under *seal*, is a separate question; the authorities are noticed in *Carr v. McColgan*, 100 Md. 462, 60 Atl. 606 (1905).

## § 2411. Publication, as applied to Wills.

## [Note 2; add:]

The surviving use of the publication-principle may still be seen in the following case: 1906, *Bogert v. Bateman*, — N. J. Eq. —, 65 Atl. 238.

## § 2413. Intent and Mistake, in general.

[Text, page 3389, l. 7 from below; after "actor," add note 1a:]

<sup>1a</sup> Approved in an elaborate and careful opinion by Russell, J., in *Heitmann v. Commercial Bank*, 6 Ga. App. 584, 65 S. E. 590 (1909).

## § 2414. Jural Subject of an Act; Secret Intent, etc.

## [Note 1; add:]

1910, *Lepley v. Anderson*, 142 Wis. 668, 125 N. W. 433 (understanding that the document should serve only as a sham, to deceive a third person liable to one of the parties; apparently enforced).

§ 2415. **Intent and Mistake ; (B) Terms of an Act ; (a) Signing by Mistake ; (1) Individual Mistake.**

[Note 1; add:]

1905, *Main v. Radney*, — Ala. —, 39 So. 981 (order of purchase ; signature held conclusive).  
 1906, *Toledo C. S. Co. v. Garrison*, 28 D. C. App. 243, 248 (contract).  
 1907, *Mower Harwood C. & D. S. Co. v. Hill*, 135 Ia. 600, 113 N. W. 466 (signing a contract without reading it).  
 1911, *Case Threshing M. Co. v. Mattingly*, 142 Ky. 581, 134 S. W. 1131 (contract not read by plaintiff held valid).  
 1904, *Bradley v. Basta*, 71 Nebr. 169, 98 N. W. 697 (sale of an engine).  
 1875, *Upton v. Tribilcock*, 91 U. S. 45, 50 (subscription to stock). 1899, *Chesapeake & O. R. Co. v. Howard*, 14 D. C. App. 262, 294, 178 U. S. 153, 167, 20 Sup. 880.  
 1904, *Standard Mfg. Co. v. Slot*, 121 Wis. 14, 98 N. W. 923 (commission contract). 1905, *Kruse v. Koelzer*, 124 Wis. 536, 102 N. W. 1072 (deed).

For *bills of lading*, the peculiar rule in Illinois is different : *infra*, n. 5.

So for a *release* signed by a person mentally ill.

1912, *Hicks v. Jenkins*, 68 Wash. 401, 123 Pac. 526.

[Note 2; add:]

1910, *Eckert v. Century F. Ins. Co.*, 147 Ia. 507, 124 N. W. 170.  
 1904, *Continental F. Ins. Co. v. Whitaker*, 112 Tenn. 151, 79 S. W. 119.

But this rule is certainly not to be a general one :

1909, *McAdams v. McAdams*, 80 Oh. 232, 88 N. E. 542 (defendant son being in a confidential relation to the plaintiff father, and having drafted a deed of grant from plaintiff to defendant, the plaintiff claimed that the deed omitted a certain reservation which was intended to be inserted ; the plaintiff maintained that he had not read the deed, but he had it in his possession for six weeks before signing ; held, that the deed was binding).

Compare the question arising when the insured signs a document containing *answers erroneously transcribed by the insurer's agent* (*post*, § 2416, n. 6, § 2418, n. 2, § 2434, n. 4).

The following cases deal with *releases of claims for personal injury* ; these usually raise chiefly the question of semi-fraud (*post*, § 2416), on the one hand, and heedless failure to read the document, on the other hand ; they turn largely on the facts of each case ; but so far as the general principle of law is concerned, it seems to belong at this place.

1910, *Baltimore & O. R. Co. v. Morgan*, 35 D. C. App. 195 (release signed without reading on the supposition that it was a receipt only).

1908, *Kelly v. Chicago R. I. & P. R. Co.*, 138 Ia. 273, 114 N. W. 536 (collecting prior cases).

[Note 3; add:]

1904, *Letourneau v. Carbonneau*, 35 Can. Sup. 110 (an illiterate's signature is ineffective "where there is either (a) a request that the document shall be read by the party putting it forward, which is refused, or (b) where it is misread, or (c) where the contents are misrepresented").

1905, *Ray v. Baker*, 165 Ind. 74, 74 N. E. 619 (an illiterate held not bound by obligations signed not negligently through the fraud of the beneficiary for amounts in excess of agreement ; the fact that the obligor did not ask the assistance of a third person held not negligence in law on the facts).

1904, *Stoner v. Zachary*, 122 Ia. 287, 97 N. W. 1098 (signing a draft without reading, for lack of spectacles ; issue of negligence allowed). 1909, *Blossi v. Chicago & N. W. R. Co.*, 144 Ia. 697, 123 N. W. 360 (good opinion, by Deemer, J.).

1904, *Wilson, Close & Co. v. Pritchett*, 99 Md. 583, 58 Atl. 360 (rule for illiterates, considered).

1908, *Sundvall v. Interstate Iron Co.*, 104 Minn. 499, 116 N. W. 1118 (alien signing release explained by interpreter ; correctness of interpreter's information, held to be a proper issue).

[Note 3 — continued]

- 1909, *First State Bank v. Borchers*, 83 Nebr. 530, 120 N. W. 142 (note signed by alien).  
 1904, *Delaware Indians v. Cherokee Nation*, 193 U. S. 127, 24 Sup. 342 (contract or treaty between the Cherokee Nation and the Delaware tribe; an understanding of the latter as to the nature of the title conveyed, not considered, the treaty having been read over repeatedly to both parties).  
 1909, *Illinois Steel Co. v. Paczocha*, 139 Wis. 23, 119 N. W. 550 (lease by an alien).

[Note 4; add:]

- 1905, *Atlantic Coast L. R. Co. v. Dexter*, 50 Fla. 180, 39 So. 634 (bill of lading signed).  
 1906, *Tewes v. North German L. S. S. Co.*, 186 N. Y. 151, 78 N. E. 864.  
*Contra*: 1905, *Hayes v. Adams Exp. Co.*, 73 N. J. L. 105, 62 Atl. 284.

The following rulings do not go so far:

- 1909, *Florman v. Dodds & C. Ex. Co.*, 79 N. J. L. 63, 74 Atl. 446 (a shipper presumed to have read, but not conclusively).  
 1909, *Hill v. Adams Ex. Co.*, 78 N. J. L. 333, 74 Atl. 674 (similar).

[Note 5; add:]

- 1906, *Wabash R. Co. v. Thomas*, 222 Ill. 337, 78 N. E. 777 (even the signature by the shipper is not conclusive). 1909, *Coats v. Chicago R. I. & P. R. Co.*, 239 Ill. 154, 87 N. E. 929 (but here applying the contrary law of Iowa). 1911, *Illinois Match Co. v. Chicago R. I. & P. R. Co.*, 250 Ill. 396, 95 N. E. 492.

**§ 2416. Same: (2) Individual Mistake known to or induced by the Second Party.**

[Note 1; add:]

- 1902, *Jones Stacker Co. v. Green*, 14 Man. 61 (contract for a stacker, not read by the party signing; held void for misrepresentations, not fraudulent, as to the contents).  
 1910, *St. Louis I. M. & S. R. Co. v. Carter*, 93 Ark. 589, 526 S. W. 99 (release of personal-injury claim). 1910, *Stewart v. Fleming*, 96 Ark. 371, 131 S. W. 955 (misrepresentations as to contents by plaintiff's agent, defendant not reading it; prior cases examined). 1913, *Ingram v. Coleman*, — Ark. —, 160 S. W. 886 (contract to sell land).  
 1904, *Central of Ga. R. Co. v. Goodwin*, 120 Ga. 83, 47 S. E. 641 (release signed without reading, on fraudulent representations, hold not binding).  
 1912, *Turner v. Mfrs.' & Consumers' Coal Co.*, 254 Ill. 187, 98 N. E. 234 (personal injury release by the injured man while in a hospital).  
 1907, *Eldorado Jewelry Co. v. Darnell*, 135 Ia. 555, 113 N. W. 344 (but the opinion does not correctly distinguish between fraud and unilateral mistake). 1909, *Providence Jewelry Co. v. Fessler*, 145 Ia. 74, 123 N. W. 957 (good opinion, by Weaver, J.).  
 1906, *Deming Inv. Co. v. Wallace*, 73 Kan. 291, 85 Pac. 139.  
 1909, *Atchison T. & S. F. R. Co. v. Coltrane*, 80 Kan. 317, 102 Pac. 835 (release of personal injury claim).  
 1907, *Western Mfg. Co. v. Cotton*, 126 Ky. 749, 104 S. W. 758. 1913, *New Bell J. C. Co. v. Oxendine*, 155 Ky. 840, 160 S. W. 737 (release).  
 1908, *McNamara v. Boston Elevated R. Co.*, 197 Mass. 383, 83 N. E. 878 (release signed on fraudulent representations of its contents by the releasee is not binding; misrepresentation distinguished from concealment). 1910, *Kiely v. Corbett*, 205 Mass. 158, 91 N. E. 410 (fraudulent misrepresentation, not found on the facts). 1912, *Kean v. New York C. & H. R. R. Co.*, 210 Mass. 449, 97 N. E. 64 (document signed on fraudulent misrepresentations is not binding). 1912, *Barry v. Mutual Life Ins. Co.*, 211 Mass. 306, 97 N. E. 779 (check, indorsed upon the fraudulent representation of the defendant's agent that it was only a voucher).

## [Note 1 — continued]

1906, Hulett v. Marine S. Bank, 143 Mich. 219, 106 N. W. 879 (notes signed under false representations as to the tenor).  
 1905, Eggleston v. Advance T. Co., 96 Minn. 241, 104 N. W. 891 (sale of farm implements).  
 1908, Tait v. Locke, 130 Mo. App. 273, 109 S. W. 105 (agent misreading).  
 1913, Dunston Lithograph Co. v. Borgo, 84 N. J. L. 623, 87 Atl. 334 (order for goods).  
 1909, Gray v. James, 151 N. C. 80, 65 S. E. 644 (deed misrepresented, and signed without reading).  
 1910, McCall v. Toxaway T. Co., 152 N. C. 648, 68 S. E. 136 (rule of Gray v. James, *supra*, applied to a release for personal injury claims).  
 1906, Stone v. Moody, 41 Wash. 680, 84 Pac. 617 (admirable opinion by Root, J.).  
 1908, Hale v. Hale, 62 W. Va. 609, 59 S. E. 1056 (interesting case of a grantor alleged to have been defrauded by his wife and his son; careful opinion by Poffenburger, J.).  
*Contra*: 1913, Shores-Mueller Co. v. Lonning, — Ia. —, 140 N. W. 197 (omission to read because of the other party's fraudulent statements; document is binding; careful opinion; this seems to be settled doctrine for Iowa; but is it not unique as well as unsound?).

## [Note 2; add:]

1909, Grimsley v. Singletary, 133 Ga. 56, 65 S. E. 92 (an illiterate signing on fraudulent misrepresentations is not negligent by mere failure to consult a third person).  
 1913, Shores-Mueller Co. v. Lonning, — Ia. —, 140 N. W. 197 (doctrine of negligence applied; but this is also erroneous, as is the doctrine of the same case cited in note 1, *supra*; has not the Court been misled by failing to notice the distinctions between errors known and not known to the other party? In the present case, the document was sued on by the party perpetrating the alleged rascality, and not by a *bona fide* transferee; none of the present doctrines are supposed to protect proved rascals).  
 1909, Vaillancourt v. Grand Trunk R. Co., 82 Vt. 416, 74 Atl. 99 (release of right of action by a workman).

## [Note 4; add:]

Howatson v. Webb, [1908] 1 Ch. 1 (defendant signed certain deeds on H.'s representation that they transferred the E. property; in fact, they contained a mortgage to W. covenanting for payments and came to the hands of W. an innocent party; held binding, as the defendant knew at least that the deed did deal with that property).  
 1905, Home Nat'l Bank v. Hill, 165 Ind. 226, 74 N. E. 1086 (a note inserted by trick between the folds of another paper presented to the defendant for his signature; not liable, because not negligent on the facts).  
 1907, Biddeford Nat'l Bank v. Hill, — Me. —, 66 Atl. 721 (note signed by defendant on O.'s fraudulent representations that it was a receipt; as against a *bona fide* holder, an issue of negligence was submitted).  
 1905, Brown v. Feldwert, 46 Or. 363, 80 Pac. 414 (promissory note signed without reading, held binding; placed on the ground of negligence).

## [Note 5; add:]

1905, Daly v. Simonson, 126 Ia. 716, 102 N. W. 780 (lease by the plaintiff, omitting a clause giving to the defendant, the lessee and illiterate, the right to remove fixtures; reformation allowed).  
 1911, Weil v. Quidnick Mfg. Co., 33 R. I. 58, 80 Atl. 447 (oral offer of a contract, mis-written by the offeree, and then signed inadvertently by the offeror; held void, if the offeree was fraudulent in the mis-writing).

## [Note 6; add:]

1909, Prestwood v. Carlton, 162 Ala. 327, 50 So. 254 (warranty of title in a lease; defendant allowed to show that he signed the lease in reliance on plaintiff's erroneous draft of the description of lands included; good opinion, by Mayfield, J.).

[*Note 6 — continued*]

1903, *Wirsching v. Grand Lodge*, 67 N. J. Eq. 711, 56 Atl. 713 (deed of transfer signed by a foreigner, under peculiar circumstances; rescission allowed; the other party being under mistake as to another fact, but not knowing of the grantor's mistake).

1904, *Jones v. Warren*, 134 N. C. 390, 46 S. E. 740 (here the defendant drew the contract, and by mistake inserted the wrong price, and the plaintiff was illiterate; reformation allowed).

1904, *Medley v. German A. Ins. Co.*, 55 W. Va. 342, 47 S. E. 101 (insurance policy written by the agent of the insurer, and mistakenly reciting the title, etc., of the property, the insured not having read it; reformation allowed; *Brannon, J.*, diss.).

Compare the insurance cases cited *post*, § 2434, n. 4.

**§ 2418. Same: (3) Mutual Mistake, as affecting Bona Fide Holders.**

[*Note 1; add:*]

1905, *Shields v. Mongollon Explor. Co.*, 137 Fed. 539, 549, C. C. A., *semble* ("There is no hard-and-fast rule that one who fails to read a deed before signing it may not seek its reformation in equity in a case where there has been a mutual mistake").

[*Note 2; add:*]

Whether reformation can be afforded *at law*, under code procedure, is an interesting question: 1905, *Ætna Ins. Co. v. Brannon*, 99 Tex. 391, 89 S. W. 1057 (misdescription by mutual mistake in an insurance policy; whether after a fire the contract can be treated as having been reformed, for the purpose of allowing recovery).

1905, *Phoenix Assur. Co. v. Boyette*, 77 Ark. 41, 90 S. W. 284 (similar).

**§ 2419. Same: (b) Signing a Document having Blanks, etc.**

[*Note 2; add:*]

*Smith v. Prosser*, [1907] 2 K. B. 735 (blank notes signed by defendant and left with an agent under instructions not to use until authorized by cable; the agent filled them without authority and negotiated them to the plaintiff on false representations; held, not liable; unsound; the opinion of *Vaughan Williams, L. J.*, draws a scholastic and untenable distinction between placing signed blanks with an agent "for the purpose of its being issued as a negotiable instrument," and "as custodian only, and intending that the notes should not be issued until he sent instructions").

1911, *Jarvis v. Willson*, 45 Can. Sup. 401 (blank filled wrongfully by agent).

1914, *Gronvold v. Federal Union S. Co.*, 8th C. C. A., 212 Fed. 908 (bond).

[*Note 3; add:*]

1913, *Osby v. Reynolds*, 260 Ill. 576, 103 N. E. 556.

1911, *Guthrie v. Field*, 85 Kan. 58, 116 Pac. 217 (a strange case on the facts).

[*Note 5; add:*]

1910, *Diamond Distilleries Co. v. Gott*, 137 Ky. 585, 126 S. W. 131 (insertion of a place of payment in a blank left unfilled on a printed form).

**§ 2420. Same: (C) Delivery of a Document, etc., Contrary to Intent of Maker.**

[*Note 2; add:*]

1907, *McKnight v. Parsons*, 136 Ia. 390, 113 N. W. 858 (reviewing the cases).

1909, *Buzzell v. Tobin*, 201 Mass. 1, 86 N. E. 923 (check handed to payee by clerk without authority and negotiated to the holder).

[Note 4; add:]

1905, *Wilbur v. Grover*, 140 Mich. 187, 103 N. W. 583; 1906, *Blake v. Ogden*, 223 Ill. 204, 79 N. E. 68.

[Note 5; add:]

1913, *Osby v. Reynolds*, 260 Ill. 576, 103 N. E. 556.  
1909, *Merck v. Merck*, 83 S. C. 329, 65 S. E. 347.

[Note 7; add:]

1905, *Franklin v. Killilea*, 126 Wis. 88, 104 N. W. 993 (release). In 2 *Illinois Law Rev.* 110 (1907) Professor A. M. Kales has a valuable note critically analyzing the theories.

§ 2421. Unilateral Acts : Foregoing Principles applied to Wills, etc.

[Note 1, par. 1; add:]

1894, *Beamish v. Beamish*, L. R. 1 Ir. 7 (Warren, P. J., "ventured to state the following propositions: 1. Knowledge and approval of a will is necessary, and must be proved; 2. The execution of a will by a competent testator is presumptive and *prima facie* evidence of the fact; 3. If the competent testator has read the will or heard it read, the presumption is strong and conclusive, unless there are special circumstances attending the execution of the will; 4. Among such special circumstances are fraud, . . . ; 5. Whether read or not, if in any way the contents of the will have been brought to the notice of the testator, the effect is the same; 6. Even where there has been a reading of the will, but the state of the testator was such that he could not have had an intelligent appreciation of the words, he must be taken to have known and approved of the will if the words have been *bona fide* used by a person whom he trusts to draw it up for him").

1906, *Lipphard v. Humphrey*, 28 D. C. App. 355, 360 (knowledge of contents is presumed for illiterates also).

1906, *Todd v. Todd*, 221 Ill. 410, 77 N. E. 680 (*Sheer v. Sheer*, *supra*, approved). 1908, *Jones v. Abbott*, 235 Ill. 220, 85 N. E. 279 (rule applied to a testator's contract not to make a will).

1908, *Ross v. Ross*, 140 Ia. 51, 117 N. W. 1105 (execution is sufficient evidence of knowledge).

1907, *Bradford v. Blossom*, 207 Mo. 177, 105 S. W. 289.

1913, *Bailey v. Bee*, — W. Va. —, 80 S. E. 454.

Compare the following: 1905, *Reems' Succession*, 115 La. 102, 38 So. 930.

1905, *Masseth's Estate*, 213 Pa. 136, 62 Atl. 640.

[Note 1, par. 2; add:]

1908, *In re Wrenn*, 2 Ir. R. 370 (cited more fully *post*, § 2463, n. 3).

1904, *Boston Safe D. & T. Co. v. Buffum*, 186 Mass. 242, 71 N. E. 549 (missing words can be supplied only where the words used show by necessary implication the words that are lacking). 1908, *Polsey v. Newton*, 199 Mass. 450, 85 N. E. 574.

*Contra*, as to inserting words:

1907, *Munro v. Henderson*, 1 Ir. R. 440 (a bequest in case of a daughter's death, with an obvious syntactical omission of a clause; the Court supplied a clause "to effectuate the intention which was imperfectly expressed but can be gathered from the context and from the rest of the will").

Compare, however, the acute discussion of this topic in Mr. Roland Gray's article, "Striking Words out of a Will" (*Harvard Law Rev.*, XXVI, 212), and in Professor Henry Schofield's article "The So-called Equity Jurisdiction to Construe and Reform Wills" (*Illinois Law Review*, VI, 485).

The following seem sound: 1870, *Hubbard v. Alexander*, L. R. 3 Ch. D. 738 (testator's declaration, at the time of signing a codicil, that it was a duplicate, admitted). 1875, *Hunt's*

[*Note 1 — continued*]

Goods, L. R. 3. P. & D. 250 (two sisters, each executing by mistake the will prepared for the other).

Compare the cases cited *ante*, § 2411.

[*Note 3; add:*]

and the intent not to sign it as a *testamentary* paper (*ante*, §§ 2406, 2411).

[*Note 4, par. 1; add:*]

1908, *Bloedel v. Cromwell*, 104 Minn. 487, 116 N. W. 947.

### § 2423. Motive as making an Act Voidable.

[*Note 4; add:*]

1905, *Rockwell v. Capital T. Co.*, 25 D. C. App. 98, 112 (fraud; release under seal).

### § 2425. Integration; General Theory, etc.

[*Note 5; add:*]

1906, *International Harv. Co. v. Campbell*, 43 Tex. Civ. App. 421, 96 S. W. 93 (collecting other cases).

### § 2426. B. Integration of Legal Acts; History.

[*Note 8, l. 4; add:*]

1308, *Pastrel v. Amory*, Y. B. 1 Ed. II (Maitland's ed. I, 32; Selden Society Pub. vol. XVII), Trin. No. 3 (the same point, but the decision was reserved, and is not recorded).

1310, *Willoughby v. Queneby*, Y. B. 4 Edw. II, Maitland's ed. No. 54, p. 166 (Selden Society Pub. vol. XXII).

[*Note 15, l. 5; add:*]

1310, *Boys v. Charles*, Maitland's Yearbooks, II, 168, 3 Ed. II, No. 8 (Selden Soc. vol. XIX) ("a charter is not a feoffment; it is only evidence of a feoffment").

1310, *Boxendone v. Haliburne*, ib. 182, 186, 3 Ed. II, No. 12 ("The deeds are only evidence").

[*Note 23, l. 5; add:*]

Compare the popular view even a century later:

*King Henry VI*, pt. II; IV, 2:

"*Dick*. The first thing we do, let's kill all the lawyers.

"*Cade*. Nay, that I mean to do. Is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment, that parchment, being scribbled o'er, should undo a man? Some say the bee stings; but I say 'tis the bee's wax, for I did but seal once to a thing and I was never mine own man since."

[*Note 42; add:*]

Compare the article of Mr. Frank Goodwin, "Must an Agreement to Stand Seized have been in Writing before the Statute of Frauds?" (*Harvard Law Rev.*, VII, 464).

### § 2427. Integration of Unilateral Acts; Official Documents.

[*Text*, p. 3423, par. 2, l. 6, at the end; *add* a new note 1a:]

<sup>1a</sup> For *Louisiana*, the principle of the French law prevails, that an "authentic act," i. e. a document executed before a public officer, is conclusive. The theoretical position of that rule is not easy to allot. [See *ante*, § 1352, n. 1a.]

**§ 2429. Integration of Bilateral Acts ; No Integration at all ; Casual Memoranda.**

[*Note 1 ; add :*]

1910, *Goldsmith v. Marcus*, 7 Ga. App. 849, 68 S. E. 462 (unsigned memorandum).  
 1906, *Wright v. Anderson*, 191 Mass. 148, 77 N. E. 704 (agreement for dismissing a suit, etc., held a mere memorandum).  
 1906, *Ivey v. Bessemer C. C. Mills*, 143 N. C. 189, 55 S. E. 613 (letter).

**§ 2430. Partial Integration ; General Test.**

[*Text*, p. 3426, l. 2 from below, after "applicable" ; *insert a new note 1a :*]

(<sup>a</sup>) Cited with approval : 1908, *Moran B. Co. v. Pacific C. C. Co.*, 48 Wash. 592, 94 Pac. 106.

[*Note 3 ; add :*]

1909, *Lese v. Lamprecht*, 196 N. Y. 32, 89 N. E. 365 (approving this passage).

**§ 2432. Receipts and Releases ; Bills of Lading.**

[*Note 1, par. 1 ; add :*]

1905, *Stegall v. Wright*, 143 Ala. 204, 38 So. 844 (receipt in full allowed to be contradicted, on the facts).  
 1907, *Brown v. Crown G. M. Co.*, 150 Cal. 376, 89 Pac. 86.  
 1912, *Frisel v. Coney*, 168 Mich. 602, 134 N. W. 989.  
 1905, *Devencenzi v. Cassinelli*, 28 Nev. 222, 81 Pac. 41.  
 N. Y. St. 1909, c. 65, p. 22, Feb. 17, now C. C. P. § 961c (receipt of officer of municipal corporation, not to be conclusive).

[*Note 2, par. 1 ; add :*]

1906, *Murphy v. Black*, 148 Ala. 675, 41 So. 877 (a receipt containing a release, held to "import a contract").  
 1877, *Bonesteel v. Gardner*, 1 Dak. 372, 46 N. W. 590 (bill of sale).  
 1905, *Lanham v. Louisville & N. R. Co.*, 120 Ky. 351, 86 S. W. 680.  
 1909, *Offutt v. Doyle*, — Ky. —, 122 S. W. 156.  
 1907, *Budro v. Burgess*, 197 Mass. 74, 83 N. E. 318.  
 1905, *Interurban C. Co. v. Hayes*, 191 Mo. 248, 89 S. W. 927.  
 1904, *Hennessy v. Kennedy F. Co.*, 30 Mont. 264, 76 Pac. 291 (*Ramsdell v. Clark*, *supra*, followed).  
 1908, *Waters v. Phelps*, 81 Nebr. 674, 116 N. W. 783 (contract for a conveyance).  
 1911, *Stiebel v. Grosberg*, 202 N. Y. 266, 95 N. E. 692 (release distinguished from a receipt).

[*Note 2, par. 2, under Bill of Lading ; add :*]

1910, *Alabama Gt. So. R. Co. v. Norris*, 167 Ala. 311, 52 So. 891.  
 1905, *Atlantic Coast L. R. Co. v. Dexter*, 50 Fla. 180, 39 So. 634.  
 1903, *Lake Erie & W. R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138 (a recital of a reduction from the usual freight rate may be contradicted).

[*Note 2, par. 2, under Ticket ; add :*]

1904, *Coine v. Chicago & N. W. R. Co.*, 123 Ia. 458, 99 N. W. 134.  
 1907, *McCollum v. Southern P. R. Co.*, 31 Utah 494, 88 Pac. 663.

The application to an *indorsement of payment on commercial paper* may be seen *post*, § 2445, n. 6.

§ 2433. **Recital of Consideration in a Deed.**

[Note 1; add:]

- 1906, *Gibbons v. Jos. Gibbons C. M. & M. Co.*, 37 Colo. 96, 86 Pac. 94 (bill of sale of mining stock).  
 1909, *Bashinski v. Swint*, 133 Ga. 38, 65 S. E. 152.  
 1913, *Read v. Gould*, 139 Ga. 499, 77 S. E. 642 (separate contract-document as consideration).  
 1904, *Brosseau v. Lawy*, 209 Ill. 405, 70 N. E. 901 (amount of incumbrance assumed by grantee). 1908, *Spence v. Central Accident Ins. Co.*, 236 Ill. 444, 86 N. E. 104.  
 1913, *State Bank v. Young*, — Ia. —, 140 N. W. 376.  
*Ky. St.* 1903, §§ 470, 472; 1905, *Continental Casualty Co. v. Jasper*, 121 Ky. 77, 88 S. W. 1078 (applied to an insurance policy).  
 1907, *Way v. Greer*, 196 Mass. 237, 81 N. E. 1002 (money loaned for bail).  
 1909, *Koogle v. Cline*, 110 Md. 587, 73 Atl. 672.  
 1909, *Scovel v. Detroit*, 159 Mich. 95, 123 N. W. 569. 1909, *Ruch v. Ruch*, 159 Mich. 231, 124 N. W. 52.  
 1904, *Johnson v. McClure*, 92 Minn. 257, 99 N. W. 893.  
 1905, *Fowlkes v. Lea*, 84 Miss. 509, 36 So. 1036 (recital of receipt of consideration, allowed to be contradicted, in an action for non-payment; Truly, J., diss.).  
 1912, *Harman v. Fisher*, 90 Nebr. 688, 134 N. W. 246 (deed to children; Root, J., diss.).  
 1905, *Perkins v. Trinity R. Co.*, 69 N. J. Eq. 723, 61 Atl. 167.  
 1904, *Medical College Laboratory v. N. Y. University*, 178 N. Y. 153, 70 N. E. 467 (bill for reconveyance for non-performance of oral promises).  
 1909, *Shehy v. Cunningham*, 81 Oh. 289, 90 N. E. 805 (a father having deeded land to his son for a recited consideration of \$4700, and the son bringing suit after the father's death for his share of the estate, held, that in determining whether the land was an advancement the recital as to payment of money by the son could be contradicted).  
 1904, *McGary v. McDermott*, 207 Pa. 620, 57 Atl. 46.  
 1904, *Willcox v. Priestler*, 68 S. C. 106, 46 S. E. 557.  
 1905, *Windsor v. St. Paul M. & M. R. Co.*, 37 Wash. 156, 79 Pac. 613. 1908, *Warwick v. Hitchings*, 50 Wash. 140, 96 Pac. 960.  
 1904, *Lathrop v. Humble*, 120 Wis. 331, 97 N. W. 905. 1903, *Halvorsen v. Halvorsen*, 120 Wis. 52, 97 N. W. 494. 1905, *Mueller v. Cook*, 126 Wis. 504, 105 N. W. 1054.  
 So also for the real object to be secured by a *mortgage*: 1905, *Campbell v. Perth Amboy S. & E. Co.*, 70 N. J. Eq. 40, 62 Atl. 319.

[Note 2, par. 1; add:]

- 1913, *Williams v. Chicago R. I. & P. R. Co.*, — Ark. —, 158 S. W. 967 (release and contract by injured employee).  
 1909, *Louisville & N. R. Co. v. Willbanks*, 133 Ga. 15, 65 S. E. 86 (deed of right of way, with a contract as to crossings).  
 1907, *Farquhar v. Farquhar*, 194 Mass. 400, 80 N. E. 654.  
 1908, *Kramer v. Gardner*, 104 Minn. 370, 116 N. W. 925 (recital forming part of a contract to assume a mortgage).  
 1909, *Southard v. Arkansas Valley & W. R. Co.*, 24 Okl. 408, 103 Pac. 750 (contract to pay in consideration of a railroad location; good opinion by Williams, J.).  
 1910, *Spokane Canal Co. v. Coffman*, 61 Wash. 357, 112 Pac. 383 (contract for land).  
 1904, *Butt v. Smith*, 121 Wis. 566, 99 N. W. 328 (alleged overpayment on a deed describing the land; an extrinsic agreement as to its area and price per acre, not given effect).  
 1904, *Stickney v. Hughes*, 12 Wyo. 397, 75 Pac. 945.

[Note 2; add, at the end of par. 2:]

Distinguish also cases in which the recital of consideration is said to be not disputable for the purpose of *invalidating the deed*; this seems often to mean merely that the deed or con-

[Note 2 — continued]

tract is valid regardless of consideration: 1865, *Illinois C. Ins. Co. v. Wolf*, 37 Ill. 354 (insurance policy). 1906, *Stannard v. Aurora E. & C. R. Co.*, 220 Ill. 469, 77 N. E. 254.

For the peculiar application of the rule that *as between solicitor and client* the deed must show on its face the true consideration, see the following: 1913, *Duffy v. Mathieson*, P. E. I., 13 D. L. R. 587.

§ 2434. **Warranty in a Sale; Insurance Warranties.**

[Note 1, par. 1; add:]

1905, *Gardiner v. McDonough*, 147 Cal. 313, 81 Pac. 964 (sale of beans, etc., by memorandum; oral agreement to equal sample, excluded; *Shaw, J.*, diss.; prior cases considered). 1904, *Telluride P. T. Co. v. Crane Co.*, 208 Ill. 218, 70 N. E. 319 (warranty of pipe, excluded). 1911, *Grubb v. Milan*, 249 Ill. 456, 94 N. E. 927 (contract for sale of restaurant). 1904, *Neale v. American E. V. Co.*, 186 Mass. 303, 71 N. E. 566 (excluded). 1906, *Scholl v. Killorin*, 190 Mass. 493, 77 N. E. 382 (oral warranty as to a steam roller, excluded). 1907, *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 82 N. E. 682 (quality of goods). 1905, *Gerhardt v. Tucker*, 187 Mo. 46, 85 S. W. 552.

[Note 2; add:]

1906, *Cooper v. Payne*, 186 N. Y. 334, 78 N. E. 1076 (sale of a knitting machine; foregoing cases followed; a passage from *Thomas v. Scutt*, *post*, § 2437, n. 3, cited as "a compendium of the law applicable to this case").

[Note 4; add:]

1906, *Deming Inv. Co. v. Shawnee F. Ins. Co.*, 16 Okl. 1, 83 Pac. 918.

This troublesome question of theory and policy is usually raised by the *erroneous transcription*, by the insurer's agent, of the *insured's representations as to material facts*, the insured then ignorantly signing the transcript: 1906, *Lyon v. United Moderns*, 148 Cal. 470, 83 Pac. 804 (collecting cases).

1906, *Prudential Ins. Co. v. Hummer*, 36 Colo. 208, 84 Pac. 61.

1904, *Medley v. German Alliance Ins. Co.*, 55 W. Va., 47 S. E. 101; and other cases cited, *ante*, § 2415, n. 2, § 2416, n. 6, § 2418, n. 2.

§ 2435. **Agreements not to Sue, or not to Enforce, etc.**

[Note 3; add:]

1906, *Jackson v. Drake*, 37 Can. Sup. 315 (account stated settling a balance; oral agreement that the amount was not to be deemed due unless and until certain moneys were collected, held ineffective).

1914, *Hurley v. Young Men's Christian Ass'n*, — Ariz. —, 140 Pac. 816 (subscription contract).

1909, *Heitmann v. Commercial Bank*, 6 Ga. App. 584, 65 S. E. 590 (thirteen persons indorsed a note, and ten of them had indorsed successive renewal notes; a final renewal note was signed by nine of the ten, with a letter to the bank asking for the return of the old notes; held that the understanding that the tenth person should indorse before the final note became valid was admissible; *Hill, C. J.*, diss., on the ground that the letter signed by nine was a final act and that the alleged understanding was virtually a condition subsequent in contradiction of it).

1914, *Little v. Liggett*, — Kan. —, 140 Pac. 838 (application for loan).

1908, *Basnight v. Southern Jobbing Co.*, 148 N. C. 350, 62 S. E. 420 (stock subscription).

1912, *Garrison v. Case Threshing M. Co.*, 159 N. C. 285, 74 S. E. 821 (sale and mortgage of machinery). 1913, *Lytton Mfg. Co. v. House Mfg. Co.*, 161 N. C. 430, 77 S. E. 233 (sale of kiln apparatus).

**§ 2436. Agreements of Counter-Claim, Renewal, etc.**

[Note 1; add:]

1909, *Woodson v. Beck*, 151 N. C. 144, 65 S. E. 751 (duebill accompanying an insurance policy; agreement as to surrender of old policy instead of payment of cash, excluded).

**§ 2437. Agreement to hold a Deed Absolute as Security; Agreement to hold in Trust.**

[Note 1; add:]

1906, *Wadleigh v. Phelps*, 149 Cal. 627, 87 Pac. 93.

1906, *Gibbons v. Jos. Gibbons, C. M. & M. Co.*, 37 Colo. 96, 86 Pac. 94.

1904, *Gannon v. Moles*, 209 Ill. 180, 70 N. E. 689. 1904, *Merriman v. Schmitt*, 211 Ill. 263, 71 N. E. 986.

1907, *Krebs v. Lauser*, 133 Ia. 241, 110 N. W. 443.

1905, *Stitt v. Rat Portage L. Co.*, 98 Minn. 52, 104 N. W. 561.

1906, *Gardner v. Welch*, 21 S. D. 151, 110 N. W. 110 (interesting example).

1913, *Hoover v. Bouffleur*, 74 Wash. 382, 133 Pac. 602.

1904, *Hursey v. Hursey*, 56 W. Va. 148, 49 S. E. 367.

Compare the alleged rule that such an agreement is not sufficiently proved by the *grantee's uncorroborated admissions* (*ante*, § 2054).

[Note 2; add:]

1913, *Carson v. National Life Ins. Co.* 161 N. C. 441, 77 S. E. 353 (absolute assignment of insurance policy).

But the Kentucky Court now accepts the orthodox doctrine, expressly overruling contrary decisions: 1909, *Hobbs v. Rowland*, 136 Ky. 197, 123 S. W. 1185.

[Note 3; add:]

1912, *Duffey v. Scientific A. C. Deptmt.*, 30 Okl. 742, 120 Pac. 1088 (book-order).

[Note 8; add:]

1909, *Ah Hoy v. Raymond*, 19 Haw. 568 (chattel mortgage).

[Note 12; add:]

1904, *Ostenson v. Severson*, 126 Ia. 197, 101 N. W. 789.

The subject has been exhaustively examined in the following articles: Professor J. B. Ames, "Constructive Trusts based upon the Breach of an Express Oral Trust of Land" (*Harvard Law Review*, XX, 549; 1907).

Professor George P. Costigan, Jr., "Trusts based on Oral Promises," etc. (*Michigan Law Review*, XII, 423, 535; 1914).

Professor H. F. Stone, "Resulting Trusts and the Statute of Frauds" (*Columbia Law Review*, VI, 326; 1906).

**§ 2438. Agreement to hold as Surety or Agent only.**

[Note 3; add:]

1905, *Russell v. Broadus C. Mills*, — Ala. —, 39 So. 712.

1905, *Raleigh & G. R. Co. v. Pullman Co.*, 122 Ga. 700, 50 S. E. 1008.

1904, *Reed v. Fleming*, 209 Ill. 390, 70 N. E. 667.

1914, *Brooks Co. v. Wilson*, — Mass. —, 105 N. E. 607 ("ordered by").

1904, *Western W. S. Co. v. McMillen*, 71 Nebr. 686, 99 N. W. 512.

1911, *Wiers v. Treese*, 27 Okl. 774, 117 Pac. 182.

[Note 5; add:]

Compare the following: 1905, *Usher v. Daniels*, 73 N. H. 206, 60 Atl. 746 (citing cases).

[Note 6, l. 2; add:]

1914, *Arizona L. Ins. Co. v. Lindell*, — Ariz. —, 140 Pac. 60.

1903, *Curran v. Holland*, 141 Cal. 437, 75 Pac. 46.

1906, *Buffington v. McNally*, 192 Mass. 198, 78 N. E. 309.

1911, *Davidson v. Hurtz*, 116 Minn. 280, 133 N. W. 862.

1906, *Schriner v. Dickinson*, 20 S. D. 433, 107 N. W. 536.

### § 2439. Fraud.

[Note 1; add:]

1910, *Delaney v. Jackson*, 95 Ark. 131, 128 S. W. 859 (lease).

1904, *McCrary v. Pritchard*, 119 Ga. 876, 47 S. E. 341.

1904, *Wilson, Close & Co. v. Pritchett*, 99 Md. 583, 58 Atl. 360.

1905, *Patten-W. D. Co. v. Planters' M. Co.*, 86 Miss. 423, 38 So. 209 (sale-contract).

1910, *Adams v. Gillig*, 199 N. Y. 314, 92 N. E. 670 (deed obtained by fraudulent representations of an intention to build dwellings on the land, the actual intention being to build an automobile garage).

1909, *Baker v. Berry Hill M. S. Co.*, 109 Va. 776, 65 S. E. 656.

### § 2440. Trade Usage and Custom.

[Note 1, par. 1; add:]

1913, *Smith v. Bloom*, — Ia. —, 141 N. W. 32 (stockyards methods).

1913, *Atkinson v. Kirkpatrick*, 90 Kan. 515, 135 Pac. 579 (custom of landlord and tenant in Arkansas City, not applied to a party living in another city).

1905, *Garfield v. Peerless M. C. Co.*, 189 Mass. 395, 75 N. E. 695 (commission on a sale of an automobile; trade usage admitted, on the facts). 1906, *Shute v. Bills*, 191 Mass. 433, 78 N. E. 96 (lease; usage as to repairs and control of gutters, etc.). 1910, *Barrie v. Quinby*, 206 Mass. 259, 92 N. E. 451 (usage in the book-trade as to an interval between expensive and cheap editions of the same book).

1904, *Blalock v. Clark*, 137 N. C. 140, 49 S. E. 88 (custom as to the mode of payment for cotton).

1904, *Portland F. M. Co. v. British & F. M. Ins. Co.*, 130 Fed. 860, 65 C. C. A. 344 (usage as to collection of freight charges from the person named in the bill of lading as the one to be notified, excluded).

### § 2441. Novation, Alteration, and Waiver, etc.

[Note 1; add:]

1907, *Roquemore v. Vulcan I. W. Co.*, 151 Ala. 643, 44 So. 557 (lease of a shovel).

1909, *O'Laughlin v. Poll*, 82 Conn. 427, 74 Atl. 763 (building contract, with agreement for extra work).

1913, *Elyea-Austell Co. v. Jackson Garage*, 13 Ga. App. 182, 79 S. E. 38 (waiver of a condition).

1904, *Strahl v. Western G. Co.*, — Nebr. —, 98 N. W. 1043 (services).

1904, *Putnam F. & M. Co. v. Canfield*, 25 R. I. 548, 56 Atl. 1033 (contract for steam-heating).

### § 2442. Miscellaneous Applications of the Rule, etc.

[Note 1; add:]

1904, *Guiou v. Thibeuau*, 36 N. Sc. 542 (agreement to maintain for life). 1904 *Meisner v. Meisner*, 37 N. Sc. 23 (lease of a farm, and agreement as to maintenance, etc.).

[*Note 1 — continued*]

1905, *Pearson v. Dancer*, 144 Ala. 427, 39 So. 474 (mortgage notes). 1905, *Weir v. Long*, 145 Ala. 328, 39 So. 974 (contract of sale of goods).  
 1906, *Thomas v. Johnston*, 78 Ark. 574, 95 S. W. 468 (whether an agreement was a lease or a sale of land). 1910, *Bradley Gin Co. v. Means M. Co.*, 94 Ark. 130, 126 S. W. 81 (machinery sale; promise to furnish a man to erect it, excluded).  
 1904, *Hartford v. Maslen*, — Conn. —, 57 Atl. 740 (whether land was tendered to the State in lieu of other land; the understanding of citizens at a mass-meeting, excluded). 1906, *Brosty v. Thompson*, 79 Conn. 133, 64 Atl. 1 (sale of a farm and of personalty used thereon).  
 1904, *Davis v. Fidelity Fire Ins. Co.*, 208 Ill. 375, 70 N. E. 359 (appointment of an agent). 1904, *Schneider v. Sulzer*, 212 Ill. 87, 72 N. E. 19 (oral agreement to dedicate for a street the land adjacent to land contracted for sale, excluded). 1904, *Osgood v. Skinner*, 211 Ill. 229, 71 N. E. 869 (contract to repurchase stock).  
 1904, *Ingram v. Dailey*, 123 Ia. 188, 98 N. W. 627 (labor and rent). 1904, *Sutton v. Weber*, 127 Ia. 361, 101 N. W. 775 (sale of goods by an agent, with condition of return).  
 1905, *Davies v. Bierce*, 114 La. 663, 38 So. 488 (contract for stock and notes).  
 1911, *Tainter v. Wentworth*, 107 Me. 439, 78 Atl. 572 (warranty of a piano's quality).  
 1904, *Hightower v. Henry*, 85 Miss. 476, 37 So. 745 (contract of rent; oral contract to build a fence, excluded).  
 1910, *Cooper v. Kennedy*, 86 Nebr. 119, 124 N. W. 1131 (in a deed of realty, the reservation of growing crops may be made by oral agreement).  
 1904, *Hallenbeck v. Chapman*, 71 N. J. L. 477, 58 Atl. 1096 (repairs). 1905, *Grueber Eng. Co. v. Waldron*, 71 N. J. L. 597, 60 Atl. 386 (building contract). 1907, *Loxley v. Studebaker*, 75 N. J. L. 599, 68 Atl. 98 (broker's contract).  
 1909, *Lossing v. Cushman*, 195 N. Y. 386, 88 N. E. 649 (building plans provided for a "cellar"; a prior agreement that the cellar need be only 8 × 12, excluded). 1909, *Lese v. Lamprecht*, 196 N. Y. 32, 89 N. E. 365 (contract to convey; oral agreement making an exception to the covenant against incumbrances, etc., excluded on the facts). 1912, *Studwell v. Bush Co.*, 206 N. Y. 416, 100 N. E. 129 (services in a warehousing business).  
 1905, *Orion K. Mills v. U. S. F. & G. Co.*, 137 N. C. 565, 50 S. E. 304 (surety bond).  
 1906, *Alsterberg v. Bennett*, 14 N. D. 596, 106 N. W. 49 (oral covenant with quitclaim deed).  
 1913, *Mandler v. Starks*, 35 Okl. 809, 131 Pac. 912 (covenant against incumbrances).  
 1905, *Bowen v. Mutual Life Ins. Co.*, 20 S. D. 103, 104 N. W. 1040 (insurance premium receipt).  
 1913, *Cressey v. International Harvester Co.*, 9th C. C. A., 206 Fed. 29 (contract as collecting agent; the employer's obligation, stated as the consideration for the agent's obligation, was to pay a monthly salary of \$125 and expenses; held that an oral contemporary promise of the employer to pay a bonus or commission additionally was not enforceable; citing § 2430 above).  
 1913, *Vance v. Heath*, — Utah —, 129 Pac. 365 (construction and lease contract).  
 1906, *Hubenthal v. Spokane & I. R. Co.*, 43 Wash. 677, 86 Pac. 955 (reservation of a right of way). 1910, *Tobin v. McArthur*, 56 Wash. 523, 106 Pac. 180 (excavation contract).  
 1904, *Fosha v. Prosser*, 120 Wis. 336, 97 N. W. 924 (sale of a business).

#### § 2444. Negotiable Instruments; Agreements affecting the Express Terms.

[*Note 1; add:*]

*Contra*: 1906, *Evans v. Freeman*, 142 N. C. 61, 54 S. E. 847 (note for \$50, given for a machine; agreement that it should be paid out of proceeds of sales, admitted).

[*Note 6, par. 1; add:*]

*Accord*: 1904, *McNeil v. Cullen*, 37 N. Sc. 18 (demand note; agreement not to demand payment unless on the death of children, etc., excluded).

1906, *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831 (peculiar facts).

[*Note 6 — continued*]

*Contra*: 1908, Commonwealth Trust Co. v. Coveney, 200 Mass. 379, 86 N. E. 895 (agreement to renew repeatedly until repaid by certain profits). 1905, O'Brien v. Paterson B. & M. Co., 69 N. J. Eq. 117, 61 Atl. 437 (note given on the agreement that it should not be enforced so long as the maker bought beer of the payee; agreement given effect, on the theory that the whole transaction was virtually a mortgage).

[*Note 7; add:*]

1912, Vineberg v. Jones, Que. C. R., 8 D. L. R. 513 (agreement to pay only on condition, not enforced).

1905, Western Carolina Bank v. Moore, 138 N. C. 529, 51 S. E. 79 (note given for bank-stock, etc.; agreement that the maker should not be liable, excluded).

1904, Schmidt v. Schmidt's Estate, 123 Wis. 295, 101 N. W. 678 (father's action on the son's promissory note; agreement to consider it only as evidence of an advancement, excluded, under Stats. 1898, § 3959, requiring advancements to be in writing in some form).

[*Note 8; add:*]

1909, Conrad v. Clarke, 106 Minn. 430, 119 N. W. 214.

1905, People's Nat'l Bank v. Schepflin, 73 N. J. L. 29, 62 Atl. 333. 1905, Morgan v. Thompson, 72 N. J. L. 244, 62 Atl. 410.

[*Note 10; add, under Accord:*]

1905, Trammell v. Swift, F. Wks., 121 Ga. 778, 49 S. E. 739.

1906, Kaufman v. Barbour, 98 Minn. 158, 107 N. W. 1128.

1912, First National B'k v. Burney, 90 Nebr. 432, 133 N. W. 647, 91 Nebr. 269, 136 N. W. 37.

[*Note 10; add, at the end:*]

So, too, the question whether an agreement between *maker and indorser*, that the former shall be *surety* only, is enforceable, seems to rest on the same considerations; compare the following: 1813, Fentum, v. Pocock, 5 Taunt. 192; 1857, Pooley v. Harradine, 7 E. & B. 431; 1905, Jennings v. Moore, 189 Mass. 197, 75 N. E. 214.

Distinguish the following question: 1906, City Deposit Bank v. Green, 130 Ia. 384, 106 N. W. 942 (joint and several note; agreement for several liability only, excluded).

#### § 2445. Same: Agreements affecting the Implied Terms.

[*Note 1; add:*]

1913, Berenson v. Conant, 214 Mass. 127, 101 N. E. 60 (but here held valid for a one taking with notice; Neg. Instr. Act, § 138 applied).

[*Text*, p. 3451, end of par. (4):]

*omit*: "and this is generally conceded"; and *insert*: "but Courts differ upon this point."

[*Note 6; add:*]

1905, Harnett v. Holdredge, 5 Nebr. 114, 97 N. W. 443; 73 Nebr. 570, 103 N. W. 277.

1908, Haddock B. & Co. v. Haddock, 192 N. Y. 499, 85 N. E. 682 (under the Negotiable Instruments Code).

*Contra*: 1909, Hackley Nat'l Bank v. Barry, 139 Wis. 96, 120 N. W. 275.

An *indorsement of payment* is subject to the usual rule for receipts (*ante*, § 2432), and may therefore be contradicted: 1905, McCaffrey v. Burkhardt, 97 Minn. 1, 105 N. W. 971.

## § 2446. Rule binding upon the Parties to the Document only.

[Note 3; add:]

1906, *State v. Davison*, — N. H. —, 64 Atl. 761 (embezzlement of corporate funds; the intent of the defendant, expressed in their oral statements, allowed to be shown, in spite of a written bill of sale).

[Note 5; add:]

1905, *Wilson v. State*, — Ala. —, 39 So. 776 (charge of removing corn with intent to defraud creditors, viz. one Mrs. J. having a claim for advances; "the written contract determines the relation that existed between Mrs. J. and the defendant," and proof by parol was excluded).

1907, *Good & Co. v. Central C. & C. Co.*, 7 Ind. Terr. 268, 104 S. W. 613 (railroad contractor).

1912, *Rampton v. Dobson*, 156 Ia. 315, 136 N. W. 682 (assessment by the county; whether a contract for the sale of land was assessable as a credit; the parties' understanding that it was only an option, admitted; Evans, J., diss., places the case on the present ground).

1911, *Levine v. Mitchell & S. Co.*, 144 Ky. 380, 138 S. W. 261 (pledge of diamonds). 1914, *Williams v. National Cash Register Co.*, 157 Ky. 836, 164 S. W. 112 (liability of principal for agent's torts).

1904, *Wilson v. Mulloney*, 185 Mass. 430, 70 N. E. 448 (assignment of a mortgage, etc.).

1905, *Flynn v. Butler*, 189 Mass. 377, 75 N. E. 730 (joint tortfeasors; a release of claims to one tortfeasor, held not variable by parol evidence).

1903, *First Nat'l Bank v. Tolerton*, 5 Nebr. 43, 97 N. W. 248 (chattel mortgage).

1906, *Shreve v. Crosby*, 72 N. J. L. 491, 63 Atl. 333 (stock transactions).

1909, *Brown v. Wisner*, 51 Wash. 509, 99 Pac. 581 (action by a broker for commissions on a sale; the rule held not to apply to the contract between defendant and vendee).

[Text, p. 3455, after § 2447; add a new § 2448:]

§ 2448. **Loss of the Instrument; Oral Transaction is still Immaterial.** It follows, from the theory of the present rule (*ante*, § 2425), that if the instrument is *lost*, it is nevertheless the *factum probandum*, being the embodiment of the transaction. The superseded oral transactions do not therefore become the object of proof.<sup>1</sup> Nevertheless, so far as the parties' intentions, or other

<sup>1</sup> 1904, *Capell v. Fagan*, 29 Mont. 507, 77 Pac. 55 (misusing the word "evidence"); and cases cited *ante*, § 2427, n. 11.

conduct, would ordinarily be evidence of an act done, so here such circumstances may be evidentially offered to show by probability the contents of the lost instrument as consummated.<sup>2</sup>

<sup>2</sup> *Ante*, §§ 1735, 1737; § 112; § 392, n. 1, n. 10; § 273, n. 1; § 377, n. 4, 5.

*Contra*: 1891, *Nicholson v. Tarpey*, 89 Cal. 617, 26 Pac. 1101 (deed). 1899, *Nicholson v. Tarpey*, 124 Cal. 442, 57 Pac. 457 (similar).

The opinion in *Taylor v. Riggs*, 1 Pet. 591, 599 (1828), sometimes cited *contra*, is based in reality upon the principle of § 2105, *ante*.

## § 2450. Integration required by Law; (1) Judicial Records.

[Note 1, par. 1; add:]

1911, *Desha's Adm'r's v. Harrison Co.*, 141 Ky. 692, 133 S. W. 545 (county fiscal court's record of claim presented and allowed).

[Note 2; add:]

1908, Graden v. Mais, 77 Kan. 702, 95 Pac. 412 (administrator's deed; oral notice of hearing, not valid).

[Note 4; add:]

1905, Holford v. James, 136 Fed. 553, C. C. A. (lost pleadings; parol evidence received).

[Note 5; add:]

1906, Boonville Nat'l Bank v. Blakey, 166 Ind. 427, 76 N. E. 529.

1905, Hofacre v. Monticello, 128 Ia. 239, 103 N. W. 488.

1907, Thompson v. Great Western Acc. Ass'n, 136 Ia. 557, 114 N. W. 31 (court's correction of erroneous entry by clerk). 1907, Puckett v. Gunther, 137 Ia. 647, 114 N. W. 34 (prior case distinguished). 1913, Hamill v. Schlitz Brewing Co., — Ia. —, 143 N. W. 99 (procedure for making corrections).

1910, Ralls v. Sharp's Adm'r, 140 Ky. 744, 131 S. W. 998 (*nunc pro tunc* entry after term time).

1904, Fort Worth & D. C. R. Co. v. Roberts, 98 Tex. 42, 81 S. W. 25 (entry *nunc pro tunc* where no minute was made).

1908, Guinn v. Warbutton, 64 W. Va. 76, 60 S. E. 1100 (whether prior notice is necessary for a correction made during the same term).

[Note 7, par. 1; add:]

1910, Yokell v. Elder, 20 N. D. 142, 127 N. W. 514 (following Baxter v. Pritchard, *supra*).

1905, Gibson v. Holmes, 78 Vt. 110, 62 Atl. 11 (certified copy of docket entries in a Massachusetts court, excluded, "as those entries were no record, but only minutes from which to make a record").

[Note 8, par. 1; add:]

1909, Puckett v. Gunther, 142 Ia. 35, 120 N. W. 123 (the spreading of the record by the clerk at a later time is not a judicial act and may be made on Sunday; the conflicting doctrines discussed; interesting and valuable opinion by Evans, C. J.). 1909, Burke v. Burke, 142 Ia. 206, 119 N. W. 129 (judgment and minute made in term time; formal entry prepared in vacation; the judgment held to have been rendered in term time). 1909, Owens v. National Hatchet Co., — Ia. —, 121 N. W. 1076 (minutes unspread may suffice for an appeal).

[Note 12; add:]

1911, Seattle v. Northern Pacific R. Co. 63 Wash. 167, 114 Pac. 1041 (whether a liability was covered in a former judgment; the trial Court's instructions excluded).

[Note 14; add:]

1905, Baker Co. v. Huntington, 46 Or. 275, 79 Pac. 187 (acceptance of a sheriff's bond may be shown orally, if no court record exists).

# § 2451. Same: (2) Corporate Acts and Records, etc.

[Note 3; add:]

1904, Chippewa Bridge Co. v. Durand, 122 Wis. 85, 99 N. W. 603 (city council).

[Note 4; add:]

1905, Denver v. Spencer, 34 Colo. 270, 82 Pac. 590 (park commission; authorities collected in an opinion by Campbell, J.).

1910, Alton Mfg. Co. v. Garrett Biblical Institute, 243 Ill. 298, 90 N. E. 704 (board of trustees).

[*Note 4 — continued*]

1910, *Cook v. Manasquan*, 80 N. J. L. 206, 76 Atl. 310.

N. Y. St. 1909, c. 65, p. 22, Feb. 17 (adding § 9316 to the C. C. P.; recital in a record of a meeting etc.; that the meeting was notified, held, or adjourned, to be evidence).

1904, *Gove v. Tacoma*, 34 Wash. 434, 76 Pac. 73 (county board).

[*Note 5; add:*]

1909, *Just v. Idaho C. & I. Co.*, 16 Ida. 639, 102 Pac. 381 (not conclusive against minority stockholders).

1905, *State v. Farrier*, 114 La. 579, 38 So. 460 (lodge of Masons).

1909, *Derosia v. Loree*, 158 Mich. 64, 122 N. W. 357 (municipal corporation records).

1905, *Norwich Ins. Co. v. Oregon R. Co.*, 46 Or. 123, 78 Pac. 1025 (master mechanics' association).

*Contra*: 1906, *Rose v. Indept. C. Kadisho*, 215 Pa. 69, 64 Atl. 401.

For the *admissibility* of such records in general, see *ante*, §§ 1074, 1661.

### § 2452. Under Statutes; Wills, Ballots, Insurance Policies.

[*Note 3; add:*]

1896, *White's Goods*, L. R. 1 Ire. 269 (words added below the signature).

1905, *O'Carroll v. Hastings*, L. R. 2 Ire. 612.

*Lewis v. Lewis*, [1907] P. 1; *University College of North Wales v. Taylor*, [1908] P. 140.

1906, *Whitney v. Hanington*, 36 Colo. 407, 85 Pac. 84.

1904, *Bryan's Appeal*, 77 Conn. 240, 58 Atl. 748 (doctrine of "incorporation by reference" applied).

1907, *Hatheway v. Smith*, 79 Conn. 506, 65 Atl. 1058 (able opinion by Hamersley, J.; dealing with the distinction between a separate unattested and therefore void document incorporated by reference and a separate document aiding to interpret a description).

1907, *Palmer v. Owen*, 229 Ill. 115, 82 N. E. 275.

1907, *Schillinger v. Bawek*, 135 Ia. 131, 112 N. W. 210.

1909, *Drysdale's Succession*, 124 La. 256, 50 So. 30.

1909, *Bresler's Estate*, 155 Mich. 567, 119 N. W. 1104 (doctrine of incorporation by reference, applied).

1913, *Watson v. Hinson*, 162 N. C. 72, 77 S. E. 1089.

[*Note 6; add:*]

Pa. St. 1881, May 11, Pub. L. 20 (similar, and including by-laws of the insurer).

[*Note 7; add:*]

1904, *Hunziker v. Supreme Lodge*, 117 Ky. 418, 78 S. W. 201. 1910, *Southern States M. L. Ins. Co. v. Herlihy*, 138 Ky. 359, 128 S. W. 91.

1906, *Holden v. Prudential L. Ins. Co.*, 19 Mass. 153, 77 N. E. 309 (where the policy does not refer to the application, the latter may be used to show fraudulent misrepresentations; this seems unsound). 1906, *Paquette v. Prudential Ins. Co.*, 193 Mass. 215, 79 N. E. 250.

1907, *Langdeau v. John Hancock M. L. Ins. Co.*, 194 Mass. 56, 80 N. E. 452.

1913, *Continental Casualty Co. v. Owen*, 38 Okl. 107, 131 Pac. 1084.

1905, *Custer v. Fidelity M. A. Ass'n*, 211 Pa. 257, 60 Atl. 776 (citing prior cases).

1904, *Manhattan L. Ins. Co. v. Albro*, 127 Fed. 281, 62 C. C. A. 213 (Massachusetts statute construed).

### § 2453. Conclusive Certificates, distinguished.

[*Text*, p. 3463, last line; *add* a note 1:]

<sup>1</sup> Compare Mr. Gulson's analysis, in his treatise cited *ante*, § 1349.

**§ 2454. C. Writing as a Formality; Statute of Frauds.**

[*Note 16; add:*]

1904, *Halsell v. Renfrow*, 14 Okl. 674, 78 Pac. 118.

**§ 2455. Same: Discharge and Alteration of Specialties, etc.**

[*Note 6; add:*]

1906, *Beld v. Darst*, 146 Mich. 143, 109 N. W. 275 (per Hooker, J., diss.; the majority refusing to consider the point on appeal).

[*Note 7; add:*]

1904, *Vesey v. Rashleigh*, 1 Ch. 634 (distinguishing between an alteration and a novation).  
1904, *Putnam F. & M. Co. v. Canfield*, 25 R. I. 548, 56 Atl. 1033.

**§ 2459. D. Interpretation of Legal Acts; "Meaning" and "Intention" distinguished.**

[*Text*, p. 3472, l. 7 of the §, after "terms"; *add* a new note *a:*]

This distinction has been approved in the following opinion:

1909, *Lancaster & J. E. L. Co. v. Jones*, 75 N. H. 172, 71 Atl. 871.

**§ 2461. Standard of Interpretation; General Principle.**

[*Note 1; add:*]

Compare also the learned and enlightening article by Professor Roscoe Pound, "Spurious Interpretation," *Columbia Law Review*, VII, 379 (1907).

**§ 2462. Rule against Disturbing a Clear Meaning.**

[*Note 8; add:*]

The state of opinion at this epoch is well illustrated in the opinions on the rule in *Shelley's Case*, in the great decision of *Perrin v. Blake*, in 1770 (4 Burr. 2579). Even the rational Blackstone stands by the then orthodox principle, while Mansfield, with an illumined insight a century beyond his time, as usual, is found advancing the modern theory.

[*Note 17; add:*]

1902, *Marshall, J.*, in *Utter v. Sidman*, 170 Mo. 284, 294, 70 S. W. 705 (good opinion).

[*Text*, p. 3483, l. 19, after the quotation; *add* a note 18:]

<sup>18</sup> And now see the powerful opinion of Whitfield, C. J., in *Ball v. Phelan*, 94 Miss. 293, 49 So. 956 (1909).

**§ 2463. Same: Application of the Rule to Wills, Deeds, etc.**

[*Note 3; add:*]

*England*: 1906, *Re Corsellis*, 2 Ch. 316 (bequest to "all my nephews and nieces then living," applied to children of a deceased illegitimate sister; following *Re Jodrell and Hill v. Crook*).  
1906, *Re Glassington*, 2 Ch. 305 (devise of "real estate"; to apply the term to a certain freehold interest which was in law personalty, the testatrix' instructions stating that her only real estate consisted in this freehold interest were not held admissible, but on the facts the term "real estate" was nevertheless applied to the personalty interest in the freehold).  
1906, *Re Loveland*, P. 542, 1 Ch. 542 (the testator formally married his niece W. in Scotland,

## [Note 3 — continued]

but by Scotch law the marriage was invalid; after the marriage-ceremony he executed a will making a residuary devise to W. and to "all her children living at my decease, etc."; there was one such child; Swinfen Eady, J. : "I am satisfied, as matter of construction, that the word 'children' is used by the testator as including illegitimate children"; by this ruling it would seem that the unjust doctrine of *Dorin v. Dorin* was abandoned).

*Estate of Vines*, [1910] p. 147 (will conditional on dying before a certain time; if the words are ambiguous, the deceased's declarations are receivable).

*In re Pearce*, *Alliance Ass. Co. v. Pearce*, [1913] 2 Ch. 675 (bequest to "any the children or child of my said brother W. W. F."; W. F. had six children by a reputed but not lawful wife H., who died in 1900; by a lawful wife R. married in 1904 he had two more children; the six children by H. had been publicly received as legitimate, and were all known to testator, who liked some of them; held that only the two legitimate ones could take; another perverse remnant of medievalism; Lord Bowen's great judgment in *Re Jodrell* is not even cited by counsel or court).

*Ireland*: 1902, *Flood v. Flood*, L. R. 1 Ire. 538 (bequest of "all the preference stock or shares in the D. W. & W. R. Co. of which I may at the time of my death be possessed"; the testatrix never had any such shares; stock in the D. & K. R. Co. held to be signified).

1908, *M'Hugh v. M'Hugh*, 1 Ire. 155 (bequest "to my nieces and nephews" of shares of stock, to be put "in their father's and mother's name until they are 21 years old"; the testatrix had many nephews and nieces, the youngest of whom was at the date of the will 26 years old; the testatrix also had one married son who with his five children, aged 5, 4, 3, 2, and 1, lived with the testatrix; held, the bequest was void for uncertainty; this decision is not only as perversely wrong as has been seen for many a day, but shows in the opinion an unfamiliarity with the authorities which is disconcerting).

1908, *In re Wrenn*, 2 Ire. 370 (bequest to "my mother"; the testator's mother was long since deceased, but there survived a sister M., and a son of the sister, also children of a deceased sister and brother; the will was drafted by the sister M.'s son; the testator told him to make the bequest to "your mother," and the son inadvertently wrote "my mother"; held, that the sister M. should take; this is as extreme a case as is on record; but it is notable that the Court took the sensible way of striking out for probate the word "my," on the principle of § 2421, *ante*, 21; and then of interpreting the word "mother"; note also that this ruling restores the credit of this court as blemished by *M'Hugh v. M'Hugh*, *supra*).

*Canada*: 1908, *Marks v. Marks*, 40 Can. Sup. 210 (bequest in 1904 to "my wife"; the testator had married A. in 1873, left her in 1878, and married S. in 1902 and was living with her; held that "my wife" meant the woman so treated by him, and not necessarily the legal one; *MacLennan, J.*, diss.).

## [Note 5; add:]

1912, *Coon v. McNelly*, 254 Ill. 39, 98 N. E. 218 ("my grandchildren" applied by the testator's circumstances and usage to mean grandchildren of the testator's wife by a former husband).

1909, *Ball v. Phelan*, 94 Miss. 293, 49 So. 956 (implied limitation of a remainder in fee to children of a life estate).

*Contra*: 1911, *Suman v. Harvey*, 114 Md. 241, 79 Atl. 197 ("to my heirs-at-law and next of kin"; the testatrix left next of kin four first cousins, but a now deceased first cousin left surviving a son; held that expressions of intention to provide for and to include the deceased cousin and her son in the will were inadmissible; the opinion does not discuss the real difficulties involved).

## [Note 6; add:]

1900, *Northeastern R. Co. v. Hastings*, App. Cas. 260 (railway lease; *Halsbury, L. C.* : "No amount of acting by the parties can alter or qualify words which are plain and unambiguous").

[*Note 6 — continued*]

1904, *Union Selling Co. v. Jones*, 128 Fed. 672 (contract for binder twine, etc.; prior negotiations excluded; illustrating the difficulty of drawing the line between this principle and that of § 2465, n. 5, *post*).

[*Note 8; add:*]

1905, *Gardiner v. McDonough*, 147 Cal. 313, 81 Pac. 964 (sale of "peas" and "pinks," interpreted by usage to mean "white beans" and "pink beans," and "per 100" to mean "per 100 pounds").

1905, *Rochester German Ins. Co. v. Peaslee G. Co.*, 120 Ky. 752, 87 S. W. 1115 ("noon" may be shown by custom to signify standard, not solar time).

1904, *Barker v. Citizens' M. F. Ins. Co.*, 136 Mich. 626, 99 N. W. 866 ("winter season" in the logging season).

1912, *Turlock F. J. Co. v. Pacific & P. S. B. Co.*, 71 Wash. 128, 127 Pac. 842 ("fermentation" in a grapejuice contract).

[*Note 9; add:*]

*Contra*: 1908, *Birely v. Dodson*, 107 Md. 229, 68 Atl. 488. 1904, *Vogt v. Shienebeck*, — Mich. —, 100 N. W. 820 (the meaning of "f. o. b." "is so plain that it was not permissible to explain it by custom or otherwise").

[*Note 11; add:*]

1904, *Norman P. S. Co. v. Ford*, 77 Conn. 461, 59 Atl. 499 (parties' private meaning for the words "on contract" in certain books of entry, admitted).

## § 2464. Usage of Trade or Locality, etc.

[*Note 2; add:*]

1904, *Tower Co. v. Southern Pac. Co.*, 184 Mass. 472, 69 N. E. 348 (a usage to class oil-clothing as "inflammable goods" for stowage purposes, admitted; "when a custom is general as applied to a particular transaction," actual knowledge by the other party need not be proved; yet the presumption is "not one of law for the Court").

1908, *Continental Hose Co. v. Fargo*, 17 N. D. 5, 114 N. W. 834 ("paid firemen"; the burden is on the party asserting a technical meaning).

[*Note 3; add:*]

1891, *Dashwood v. Magniac*, 3 Ch. 306, 354, 366 (a will empowering trustees to fell timber; usage admitted to interpret).

1904, *Soper v. Tyler*, 77 Conn. 104, 58 Atl. 699 (contract with a Boston grain dealer is subject to the Boston usage in the grain trade).

1906, *People v. Wiemers*, 225 Ill. 17, 80 N. E. 45 ("crushed cobble" in an ordinance). 1908, *Steidtmann v. Lay Co.*, 234 Ill. 84, 84 N. E. 640 ("f. o. b.").

1904, *Stoner v. Zachary*, 122 Ia. 287, 97 N. W. 1098 (meaning of "Nfy." on a bill of lading, among carriers).

1905, *Citizens' State Bank v. Chambers*, 129 Ia. 414, 105 N. W. 692 (interest and commissions). 1906, *Tubbs v. Mechanics' Ins. Co.*, 131 Ia. 217, 108 N. W. 324 (usage as to "machinery" in a fire insurance policy, excluded).

1905, *Home Ins. Co. v. Continental Ins. Co.*, 180 N. Y. 389, 73 N. E. 65 ("usage and object of underwriters in inserting the 'pro rata' clause in policies of reinsurance," excluded).

1904, *O'Brien Lumber Co. v. Wilkinson*, 123 Wis. 272, 101 N. W. 1050 (custom of loading cars).

Compare the rulings as to *expert testimony* to meanings of words (*ante*, § 1955).

## § 2465. Parties' Mutual Understanding; Identifying a Description.

[Note 1, par. 1; *add*.:]

1908, *Strong v. Carver C. G. Co.*, 197 Mass. 53, 83 N. E. 328 (contract for license to use patented machines).

1906, *Grout v. Moulton*, 79 Vt. 122, 64 Atl. 453 ("satisfactory demonstration" of an automobile; the vendor's statements at the time of sale, not admitted to explain the term).

[Note 1, par. 2; *add*.:]

1907, *Inman Mfg. Co. v. American Cereal Co.*, 133 Ia. 71, 110 N. W. 287.

[Note 3; *add*.:]

1836, *Squire v. Campbell*, 1 Myl. & C. 459 (a lease of houses was made, describing the land as "on the north side of a new street then forming"; the plan of the streets was shown at the time, and portrayed an open passage, which passage it was orally represented would be left free to a width of 100 feet; afterwards an obstructing statue was sought to be erected; on a bill by the lessees for an injunction, held that the plan could be used to identify the "new street," on an issue whether the proposed statue would destroy its character; but that the representations as to the width of the passage could not be treated as a part of a contract).

1906, *Van Diemen's Land Co. v. Marine Board*, App. Cas. 92 (the propriety of resorting to user of the parties, to explain a grant, considered).

1903, *Bell v. Staacke*, 141 Cal. 186, 74 Pac. 774 (conveyance construed by the parties' acts under it).

1907, *Harten v. Loffler*, 29 D. C. App. 490, 503 (contract to convey a piece of land "fronting on B. Avenue about 60 feet with a depth of about 200 feet," held a latent ambiguity; the parties' own construction of it, admitted).

1905, *Mayberry v. Beck*, 71 Kan. 609, 81 Pac. 191 ("except one acre, etc., deeded to Moore's Branch Church").

1904, *Graves v. Broughton*, 185 Mass. 174, 69 N. E. 1083 ("one undivided moiety" in a deed of partition, construed by subsequent conveyances, etc., to mean an estate in severalty).

1910, *Blais v. Clare*, 207 Mass. 67, 92 N. E. 1009 (construction of an easement).

1906, *Shenandoah L. & A. C. Co. v. Clarke*, 106 Va. 100, 55 S. E. 561 (parties' acts under a deed, considered).

[Note 5; *add*.:]

1906, *Buffington v. McNally*, 192 Mass. 198, 78 N. E. 309 (*Stoops v. Smith*, Mass., *supra*, in the text, followed).

[Note 6, par. 1; *add*.:]

1905, *Phoenix Assur. Co. v. Boyette*, 77 Ark. 41, 90 S. W. 284 ("£2000. on cotton in bales").

1906, *Mitau v. Roddan*, 149 Cal. 1, 84 Pac. 145 (inspection of crops). 1907, *Peterson v. Chaix*, 5 Cal. App. 525, 90 Pac. 948 ("more or less"; conversations, before or at the time not admitted; cases collected).

1905, *Wellmaker v. Wheatley*, 123 Ga. 201, 51 S. E. 436 ("Miss Lowe Wellmaker's place" identified by parol). 1909, *State Historical Ass'n v. Silverman*, 6 Ga. App. 560, 65 S. E. 293 (book-contract, the book to describe "important events in Georgia history"; parties' more detailed understanding, admitted). 1909, *Georgia Iron & C. Co. v. Ocean Acc. & G. Co.*, 133 Ga. 326, 65 S. E. 775 ("employee" in convict-labor contract; "the construction the parties themselves put upon the agreement," admitted).

1904, *Gage v. Cameron*, 212 Ill. 146, 72 N. E. 204 (contract to assume "existing mortgages," etc.; the mortgages, etc., identified by the circumstances). 1908, *McLean Co. Coal Co. v. Bloomington*, 234 Ill. 90, 84 N. E. 624 (coal contract; "the practical construc-

[*Note 6 — continued*]

tion of the instrument by the parties themselves is admissible"). 1908, *Cumberledge v. Brooks*, 235 Ill. 249, 85 N. E. 197 ("my undivided interest in the Chicago lots"). 1905, *Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582 (contract by letter to deed "the lots"; the correspondence and circumstances considered, to interpret the words). 1906, *Howard v. Adkins*, 167 Ind. 184, 78 N. E. 665 ("120 acres of land"). 1909, *Cleveland C. C. & St. L. R. Co. v. Gossett*, 172 Ind. 525, 87 N. E. 723 (the parties' construction of a railroad rule, admitted).

1904, *Hebb v. Welch*, 185 Mass. 335, 70 N. E. 440 ("all plumbing" interpreted by the parties' conversations, etc.). 1907, *Smith v. Vose & S. P. Co.*, 194 Mass. 193, 80 N. E. 527 (contract to drive a well "to procure water"; the parties' prior conversations, admitted to show that "water" meant drinkable water, of a quality equal to that procured for another person; the ruling seems erroneous as to the last part). 1909, *Jennings v. Puffer*, 203 Mass. 534, 89 N. E. 1036 (sale of "my estate" etc.; the description construed by a conversation stating it to be subject to a lease, etc.). 1910, *Putnam-Hooker Co. v. Hewins*, 204 Mass. 426, 90 N. E. 983 (sale of goods; previous negotiations admitted, not to show a parol warranty, but to interpret the terms used). 1911, *Hodgens v. Sullivan*, 209 Mass. 533, 95 N. E. 969 (contract to be void if a sale failed "as at present agreed"; circumstances admitted). 1906, *Wolverine L. Co. v. Phoenix Ins. Co.*, 145 Mich. 558, 108 N. W. 1088 ("mill buildings," etc., applied by the circumstances).

1908, *Murdock v. Gould*, 193 N. Y. 369, 86 N. E. 12 (contract for services in building; parol evidence excluded on the facts as involving virtually the insertion of other terms and not the interpretation of terms actually therein).

1905, *Ward v. Gay*, 137 N. C. 397, 49 S. E. 884 (sale of "all the pine, poplar, and cypress trees now standing, etc."; the circumstances admitted, to apply the terms of description). 1907, *Watson v. Lamb*, 75 Oh. 481, 79 N. E. 1075 (a contract to sell "my hogs"; an oral specification of eighty and sixty-five hogs, excluded, but the circumstances were considered to ascertain what hogs were referred to by "my hogs").

1904, *American S. F. Co. v. Gerrer's Bakery*, 14 Okl. 258, 78 Pac. 115 (meaning of "consignee" in a sale-contract).

1908, *Ranney v. Byers*, 219 Pa. 332, 68 Atl. 971 ("the Byers place," in a declaration of trust, identified).

1906, *Morrison v. Hazzard*, 99 Tex. 583, 92 S. W. 33 ("25 feet" in a lot).

1908, *Hamilton Coal Co. v. New York & P. C. & C. Co.*, 2d C. C. C., 160 Fed. 75 ("our Big Vein, Cumberland" coal; prior negotiations of parties, admitted). 1909, *Harten v. Loeffler*, 212 U. S. 397, 29 Sup. 351 (contract to sell land described as having a frontage of "about 60 feet, with a depth of about 200 feet"; a line run from the 60-foot point would cut through a building on the land; held that the circumstances and the conversations at the time of making the contract could be used to interpret and identify the boundary). 1912, *Standard Scale & S. Co. v. Reiter*, C. C. A., 199 Fed. 91 (contract to employ as "manager"; the parties' conversations admitted). 1913, *Miller v. Spring Garden Ins. Co.*, 9th C. C. A., 202 Fed. 442 ("ordinary alterations and repairs"; parties' conversations, admitted).

1906, *Fayter v. North*, 30 Utah 156, 83 Pac. 742 (deed of land, with "all tenements, hereditaments, privileges, and appurtenances thereunto belonging, or therewith used and enjoyed"; a valuable irrigation ditch was on the land; conversations between vendor and vendee at the time of the sale, concerning the use of the ditch, were admitted "to show how the parties themselves construed and applied the contract to the subject matter").

1905, *Chesapeake & O. R. Co. v. Deepwater R. Co.*, 57 W. Va. 641, 50 S. E. 890 (corporate records). 1906, *Armstrong v. Ross*, 61 W. Va. 38, 55 S. E. 895 (contract for coal lands). 1903, *Newell v. New Holstein C. Co.*, 119 Wis. 635, 97 N. W. 487 (contract of sale). 1905, *Corbett v. Joannes*, 125 Wis. 370, 104 N. W. 69 (compromise of claims; "in such cases the contract may be read very differently from the literal sense thereof"). 1910, *Klueter v. Schlitz Brewing Co.*, 143 Wis. 347, 128 N. W. 43 ("as per your conversation"; the conversation admitted).

**§ 2466. Individual Party's Meaning ; (1) Deeds and Contracts.**

[Note 1; add:]

1905, *Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582 (contract by letters to deed property; the promisor's will, not admitted to interpret the description in the letters).

1904, *Graham v. Middleby*, 185 Mass. 349, 70 N. E. 416 (alteration of a bond).

1914, *Woburn Nat'l Bank v. Woods*, — N. H. —, 89 Atl. 491 (contract).

1913, *Schmitt v. Stoss*, 207 N. Y. 731, 100 N. E. 1119 (insurance policy; apparent meaning to the insured, as against the insurer's actual meaning, held to prevail).

1909, *Hackley Nat'l Bank v. Barry*, 139 Wis. 96, 120 N. W. 275 (promissory note indorsement).

[Note 5; add:]

1907, *Inman Mfg. Co. v. American Cereal Co.*, 133 Ia. 71, 110 N. W. 287 (the general principle considered).

**§ 2467. Same : (2) Wills.**

[Note 1; add:]

*England*: *In re Ofner*, *Samuel v. Ofner*, [1909] 2 Ch. 60 (bequest to "my grandnephew Robert O."; there was no Robert O., but there was a Richard O.; memorandum of the testator, showing that he called Richard "Robert," admitted; "a man always having called John 'Richard' is presumed in his will to have meant John when he says 'Richard'"). *In re Halston*, *Ewen v. Halston*, [1912] 1 Ch. 435 (devise to "John William H., the son of Israel H., of C. in the county of E.," in a will of 1891; Israel H. had four sons, John William H., who had died in 1874, only ten days old; James Malet H.; John Robert H., the claimant; and Horace Edward H.; there was evidence that the testator knew of the eldest child's death; the testator himself was named John William H.; devise awarded to John Robert H., citing *In re Ofner*, *supra*).

*Canada*: 1903, *Travers v. Casey*, 35 N. Br. 229, 233 ("all property," etc., construed by the testator's circumstances and prior actions).

[Note 2; add:]

1906, *Shipley v. Merc. T. & D. Co.*, 102 Md. 649, 62 Atl. 814 (meaning of the term "dower and thirds"; the testator's declarations as to how he had provided for his wife, excluded).

1905, *Ackerman v. Crouter*, 68 N. J. Eq. 49, 59 Atl. 574 (devise of "the farm I own at W. and known as the David D. A. W. farm"; that the testator "habitually spoke" of a certain three tracts as the "W. farm," admitted).

1913, *Arnold's Estate*, 240 Pa. 261, 87 Atl. 590 (testatrix' usage of the word "things," admitted; opinion not clear).

**§ 2470. Sources of Interpretation ; All Extrinsic Circumstances may be Considered.**

[Text, p. 3500, at the end of the quotations; add a new note 16:]

<sup>16</sup> 1911, *Northrup v. Columbian Lumber Co.*, 5th C. C. A., 186 Fed. 770, 775 (devise to various children; the facts of the testator's property, admitted; "evidence may be received as to every material fact relating to the person who claims under the will and to the property devised, and to the circumstances of the testator and his family and affairs, so as to lead to a correct decision" etc.; approving the text above).

**§ 2471. Exception for Declarations of Intention.**

[Note 2; add:]

1903, *Brown v. Quintard*, 177 N. Y. 75, 69 N. E. 225 (former revoked will, offered to aid in interpretation, excluded).

[Note 6; add:]

1905, *Holt's Estate*, 146 Cal. 77, 79 Pac. 585 (plaintiff was a daughter by a former marriage of the wife of the testatrix' brother; under a bequest to "my nieces," *semble*, the testatrix' declarations were admissible to show that she had "considered appellant as her niece").

[Note 6; add:]

1906, *Gilmore v. Jenkins*, 129 Ia. 686, 106 N. W. 193 ("to my five daughters, the undivided one fifth of etc."; the testator's intent to give each of them one fifth, excluded).

1905, *Best v. Berry*, 189 Mass. 510, 75 N. E. 743 (bequest to C. and B. to be divided equally; C. having died before the testatrix, a memorandum of the testatrix' intention was not admitted to show her intent as to the share undisposed of in the will). 1909, *Sibley v. Maxwell*, 203 Mass. 94, 89 N. E. 232 (direction in a will to deduct from a son's share "an account . . . the amount above written, \$13,959.14"; subsequent letters, etc., showing a reduction of the amount, excluded). 1910, *Walton v. Draper*, 206 Mass. 20, 91 N. E. 884 (death of devisees childless).

1906, *App v. App*, 106 Va. 253, 55 S. E. 672 (meaning of the will).

The rule applies equally to a contract:

1908, *Middleworth v. Ordway*, 191 N. Y. 404, 84 N. E. 290 (contract of adoption; instructions to the scrivener, excluded).

#### § 2472. Same: (1) Exception for Equivocation, etc.

[Note 2; add:]

1905, *Hubbuck's Estate*, Prob. 129 (cited *post*, § 2473, n. 1).

1912, *Re Piper*, Ont. H. C. J., 2 D. L. R. 132 (meaning of "residue"; testator's draft of the will, excluded).

1913, *Hitchcock v. Board of Home Missions*, 259 Ill. 288, 102 N. E. 741 ("be equally divided between Home Missions," etc.; the testatrix' conversations as to her intentions, admitted to show which board was signified).

1911, *Suman v. Harvey*, 114 Md. 241, 79 Atl. 197 (cited more fully *ante*, § 2463, n. 5).

[Note 3; add:]

1912, *Hooley v. Tripp*, Ont. D. C., 2 D. L. R. 136 (deed of "the west half of lot 8," which was an irregular triangle; parties negotiations considered; annotated case).

1911, *Decker v. Stansberry*, 249 Ill. 487, 94 N. E. 940 (deed of "the N. E.  $\frac{1}{4}$  and the undivided  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of Section 15"; issue whether this signified the N. E. of Sect. 15, or the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of Sect. 15; the grantor's ownership of the latter only, and the area of the acreage as described, were taken as facts justifying the latter meaning; the testimony of the justice of the peace preparing the deed, and the grantor's admissions, were considered).

1905, *Baker Co. v. Huntington*, 46 Or. 275, 79 Pac. 187 (sheriff's bond to perform "the duties of such office"; intention of the parties to apply it to his office as sheriff or as tax-collector also, admitted).

#### § 2473. Same: Blanks and Latent Ambiguities.

[Note 1, par. 1; add:]

1905, *Hubbuck's Estate*, Prob. 129 (a bequest "unto my grand-daughter all my real and personal etc."; there were three granddaughters, and a son claimed against them on the ground that the bequest was void; held not void, and evidence of declarations of intention admitted; "the distinction is that, in this case, it is not a total blank").

[*Note 1 — continued*]

1905, *Henderson v. Henderson*, L. R. 1 Ir. 353 (bequest to "my grandsons, R. W. H. and J. B. H."; testator had two grandsons who were brothers, W. R. H. and J. B. H., and a third grandson, R. W. H.; the testator's instructions to the scrivener, etc., admitted; but the case is erroneously referred to in the opinion as one of "latent ambiguity").

1905, *Crawford v. Verner*, 122 Ga. 814, 50 S. E. 958 (deed held void for uncertainty of description).

1905, *Harman v. People*, 214 Ill. 454, 73 N. E. 760 (tax judgment held not void for ambiguity, the evidence not showing that the property described could not be located).

1903, *La Vie v. Tooze*, 43 Or. 590, 74 Pac. 210 (power of attorney to "Conrad Krebs and — Krebs, composing the firm of Krebs Brothers"; the blank allowed to be applied by parol to Leonard and M. W. Krebs).

#### § 2474. Same: (2) Exception for Erroneous Description.

[*Note 5; add:*]

*In re Ofner*, Samuel v. Ofner, [1909] 2 Ch. 60 (bequest to "my grandnephew Robert O."; there was no relative Robert O.; but there was a grandnephew Richard O., and three other grandnephews, two of whom were otherwise provided for; Richard was a brother of one of them; a memorandum of the testator identifying "Robert O." as this brother, admitted; Doe v. Hiscocks mentioned in argument, and virtually departed from).

*In re Halston*, Ewen v. Halston, [1912] 1 Ch. 453 (the facts are stated *ante*, § 2467, n. 1; testator's expression that the land would be John Robert H.'s some day, admitted; Doe v. Hiscocks not cited, nor any of the foregoing cases).

[*Note 6; add:*]

1907, *Dominici's Estate*, 151 Cal. 181, 90 Pac. 448 (devise to "my sister L. J., and my nephew H. S., and his sister my niece, all residing in Luchow, Hanover, Germany," and a codicil reciting the death of "my sister L. J." with bequest of her share "to the other two residuary legates therein named, H. S., and to his sister my niece, whose name is M. K. and whose residence is Salzwedel, Altmark, Germany"; on inquiry, H. S. had an only sister C. S. still living at Luchow, and the M. K. at Salzwedel was daughter of another sister of the testator; testator's instructions to the scrivener, admitted, in spite of Civ. C. § 1340; distinguishing such instructions from fugitive oral expressions). 1912, *Donnellan's Estate*, Tracy v. O'Reilly, 164 Cal. 14, 127 Pac. 166 (bequest to "my niece Mary, a resident of New York, said Mary being the daughter of my deceased sister Mary"; there were two nieces, one named Mary, in Ireland, and one named Annie in New York; "extrinsic" evidence admissible).

1905, *Oliver v. Henderson*, 121 Ga. 836, 49 S. E. 743 (the facts are stated in the citation *post*, § 2477, n. 7; an allegation that the scrivener was instructed to write "78" and wrote "68" by mistake, was held immaterial).

1909, *Parks v. Baker*, 81 Kan. 351, 105 Pac. 439 ("north line of lot 12" etc.; "actual agreement" admitted).

1912, *Bullard v. Leach*, 213 Mass. 117, 100 N. E. 57, *semble* (bequest of moneys now deposited in the Worcester Five Cents Savings Bank; evidence held admissible that the testatrix had no deposit in that bank but had one in the Worcester Co. Institution for Savings, and that she "intended to designate the latter instead of the former").

1904, *Wheaton v. Pope*, 91 Minn. 299, 97 N. W. 1046 (devise to S. of "South west quarter of N. E.  $\frac{1}{4}$  section one in township, etc., running West 160 rods," making a tract of land whose "location would be in the S. W. quarter of section one, and such tract was never owned by the testator"; on evidence that the testator had described a particular tract to the scrivener as intended to be devised to this devisee, and that the scrivener had erroneously copied it, the devise thus interpreted was given effect).

§ 2475. **Same: (3) Exception for Rebutting an Equity, etc.**

[Note 2; add:]

*Contra*: 1910, *Arthur v. Arthur*, 143 Wis. 126, 126 N. W. 550 (under statutory implications; authorities collected).

[Note 4; add:]

*In re Shields, Corbould-Ellis v. Dales*, [1912] 1 Ch. 591 (ademption of a legacy by a duplicate gift in the testator's life time).

1906, *Bromley v. Atwood*, 79 Ark. 357, 96 S. W. 356 (intent of a bequest to forgive a debt; testatrix' statements admitted).

1911, *Blackett v. Ziegler*, 153 Ia. 344, 133 N. W. 901 (revivor of an earlier will by revocation of a later one; careful opinion, by Deemer, J.).

1910, *In re Battis*, 143 Wis. 234, 126 N. W. 9 (whether the presumption of revocation from marriage and birth may be rebutted by expressions of intent).

[Note 5; add:]

and in Wisconsin: 1904, *Sandon v. Sandon*, 123 Wis. 603, 101 N. W. 1089.

[Note 6, par. 1; add:]

*Accord*: 1904, *Brown v. Brown*, 71 Nebr. 200, 98 N. W. 718 (collecting the cases).

1906, *Brown v. Brown*, 77 Nebr. 125, 108 N. W. 180 (no authority cited).

1909, *Hedderich v. Hedderich*, 18 N. D. 488, 123 N. W. 276.

*Contra*: 1907, *Peet v. Peet*, 229 Ill. 341, 82 N. E. 376 ("the testator's statements, either before or after making the will," held inadmissible; but the circumstances of the testator's affairs, etc., are admissible; on the former part of the ruling the opinion purports to follow the *Hawhe* case, *supra*, but three judges dissent as to the result on the facts).

§ 2477. **Falsa Demonstratio; Application to Deeds and Wills.**

[Note 1; add:]

1905, *Garnier's Estate*, 147 Cal. 457, 82 Pac. 68.

1910, *Duncan v. Eagle Rock G. M. & R. Co.*, 48 Colo. 569, 111 Pac. 588.

1904, *Leverett v. Bullard*, 121 Ga. 534, 49 S. E. 591.

1906, *Kerr v. De Lancy*, — Ky. —, 91 S. W. 286 (extreme illustration). 1910, *Daniel v. New Era L. Co.*, 137 Ky. 535, 126 S. W. 108 (calls of a survey omitted).

1907, *Hart v. Murdock*, 80 Nebr. 274, 114 N. W. 268 (survey describing a course as "east" instead of "west").

1819, *Cherry v. Slade*, 3 Murph. N. C. 82 (leading opinion, by Taylor, C. J.). 1905, *Hill v. Dalton*, 140 N. C. 9, 52 S. E. 273.

1904, *Resurrection G. M. Co. v. Fortune G. M. Co.*, 128 Fed. 668, C. C. A. (mining claim).

1905, *Clayton v. Gilmer Co. Ct.*, 58 W. Va. 253, 52 S. E. 103.

This rule has been applied even to a description in a *statute*: 1904, *Zimmerman v. Brooks*, 118 Ky. 85, 80 S. W. 443.

[Note 3; add:]

1905, *Warner v. Marshall*, 166 Ind. 88, 75 N. E. 582 (contract by letter to deed certain lots; an inconsistent clause stating the value as \$ 10,000, held non-essential and rejectible).

[Note 5; add:]

*Eng.*: 1894, *Re Seal*, 1 Ch. 316, 321 (rule of *falsa demonstratio* considered).

*Ire.*: 1908, *M'Hugh v. M'Hugh*, 1 Ire. 155 (cited more fully *ante*, § 2463, n. 3; the opinion is apparently ignorant that the present doctrine was a simple exit for the dilemma created by the other rule).

[Note 5 — continued]

*Can.*: 1910, *Re Clement*, 22 Ont. L. R. 121 (devise of "the S. W.  $\frac{1}{4}$  of lot No. 3 in the 4th concession of the township of North Dorchester;" the testator owned the S.  $\frac{1}{2}$  of the N.  $\frac{1}{2}$  of lot 3, but not the S. W.  $\frac{1}{4}$ ; held void, there being no "words in the will which would be effective to dispose of the land actually owned by the testator if the wrong description were entirely omitted"; prior Ontario cases fully examined, per Riddell, J.).

1910, *Smith v. Smith*, 22 Ont. L. R. 127 (devise of "the S. W. 50 acres of lot 1, concession 12, Lobo"; the testator did own 50 acres in lot 1, but the N. W.  $\frac{1}{4}$ , not the S. W.  $\frac{1}{4}$ ; the will referred twice to "all my estate"; held effective, on the principle stated in *Re Clement, supra*).

[Note 7; add:]

*Ga.*: 1905, *Oliver v. Henderson*, 121 Ga. 836, 49 S. E. 743 (devise of a "lot of land (78) in the Second District of Dooly County"; the testator did not own lot 78, but lot 68; "it should have been alleged also that the testator owned only one lot in the Second District of D. Co., which lot was No. 68," and then the Court "might well have" given effect to the devise).

*Ill.*: 1905, *Lomax v. Lomax*, 218 Ill. 629, 75 N. E. 1076 (a will devised "the S. W. fractional quarter of Section 24, T. 40, R. 12, E. of the 3d P. M., containing about 55.87 acres more or less," and also devised "the rest, residue, and remainder of my estate"; the testator owned in S. 14, but not in S. 24; it was offered to show that "a mistake was made by the scrivener in drawing the will," in writing "24" for "14"; it appeared that no other quarter section in T. 40 contained approximately 55.87 acres, except the S. W.  $\frac{1}{4}$  in S. 14; the offer as made was rejected, and correctly, on the authority of *Kurtz v. Hibner*; but the Court was clearly wrong in not going further and applying the words "my estate" and "55.87 acres" to the S. W.  $\frac{1}{4}$  of S. 14, as done in *Bowen v. Allen*, *Decker v. Decker, supra*, regardless of the erroneous form of the offer). 1907, *Dillard v. Jones*, 229 Ill. 119, 82 N. E. 206 (certain intestates owned various property, including 10 acres off the north side of the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of Sect. 4, Township 8 S., Range 2 E.; on a bill for partition, the land was sold to the plaintiff; but throughout the proceedings was described as "S. E.  $\frac{1}{4}$ " instead of "N. E.  $\frac{1}{4}$ "; held that the decree and deed could be corrected to cover the land actually owned by the intestates). 1907, *Douglas v. Bolinger*, 228 Ill. 23, 81 N. E. 787. 1907, *Felkel v. O'Brien*, 231 Ill. 329, 83 N. E. 170 (bill to construe a devise of "the N. half of the S. E.  $\frac{1}{4}$  of Section 27, containing 80 acres more or less"; the testator did not own the whole N. half, but owned the E. half; held that the word "north" could be struck out by interpretation, thus reading "the half . . . containing 80 acres"). 1908, *Collins v. Capes*, 235 Ill. 560, 85 N. E. 934 (the testator devised to a son "the west half of the north-east quarter of section ten," etc., "containing about seventy-six acres," and then gave "all the balance and residue of my property" to his wife; he owned no west half but did own a north half of the quarter described, and no other land in that county; the Court applied the description to the north half, on the correct theory as laid down in *Decker v. Decker*; moreover the opinion expressly declares that the absence of the words "my real estate," found in the will of *Decker v. Decker*, is immaterial, since "the presumption is that the testator intended to dispose of property which he owned," citing three cases from other jurisdictions; thus the effect is to overrule the doctrine of *Kurtz v. Hibner* on that point as explained afterwards by *Caton, J.*, and assumed in later cases; the unfortunate thing about the opinion is (1) that it assumes to be following *Kurtz v. Hibner*, and (2) that it does not expressly point out that *Bingel v. Volz* and *Lomax v. Lomax* are also overruled so far as they ignored the present principle of implying the testator's intention; the odd thing is that express words of such intent, "the balance of my property," were actually in the present will, so that there was no need for the Court to imply them into it). 1909, *Gano v. Gano*, 239 Ill. 539, 88 N. E. 146 (devise of "the S. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  and the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of Section 14," etc.; testator did not own the S. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ , nor any part of the N. E.  $\frac{1}{4}$ , but owned all of the N. W.  $\frac{1}{4}$ ; moreover, he had 40 years before acquired property

[Note 7 — continued]

described as “the S. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$ ” by mutual mistake for “S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ ”; held, three judges dissenting, that the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  passed; following *Decker v. Decker*; but really the will’s description should have been treated as a settled term of description for the N. W.  $\frac{1}{4}$ , on the theory of §§ 2467, 2463, *ante*). 1910, *Graves v. Rose*, 246 Ill. 76, 92 N. E. 601 (devise of the “N. W.  $\frac{1}{4}$  of section 12,” and the “N. W.  $\frac{1}{2}$  of section 9”; the testator in fact owned the N. E.  $\frac{1}{4}$  of section 12 and the S. W.  $\frac{1}{4}$  of section 9; the devisees were already in possession of the tracts owned and said to be intended by the testator, under an alleged promise to convey; the devisees alleged that the wrong words were “used by mistake”; the other heirs prayed for a partition; the trial Court decreed that the letters N and W respectively should be “stricken out as surplusage,” and that the devisees should take the tracts thus described and already in their possession; held, erroneous, as “this was nothing but reformation for the purpose of correcting mistakes of the testator”; three judges dissenting; the majority opinion recognized that the letters N and W might be rejected, but held that not enough description remained in the will to identify the tracts; this is of course a tenable view, and is that of *Caton, J.*, above). 1911, *Clancy v. Clancy*, 250 Ill. 297, 95 N. E. 141 (testator devised “the S.  $\frac{1}{2}$  of the W.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of Sect. 4”; he owned only the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{2}$  in that section; held, that by ignoring the erroneous part of the description, nothing sufficient remained, and that the devise was void).

On the *Kurtz v. Hibner* doctrine in Illinois, it is now essential, for correct appreciation of the significance of the doctrine, to study Professor Henry Schofield’s masterly article, “The So-called Equity Jurisdiction to Construe and Reform Wills” (*Illinois Law Rev.*, VI, 485).

*Iowa*: 1907, *Whitehouse v. Whitehouse*, 136 Ia. 165, 113 N. W. 759 (*Eckford v. Eckford* followed).

*Massachusetts*: 1908, *Polsey v. Newton*, 199 Mass. 450, 85 N. E. 574 (bequest to “their three children” applied to the testatrix’ three grandchildren; two judges diss.).

*Missouri*: 1909, *Childers v. Pickenpaugh*, 219 Mo. 455, 118 S. W. 478 (*Riggs v. Myers* followed).

## § 2478. Sundry Rules; Interpretation of Statutes.

[Note 1; add:]

1905, *Nye v. Foreman*, 215 Ill. 285, 74 N. E. 140.

1905, *State v. Kelly*, 71 Kan. 811, 81 Pac. 450 (opinion by *Greene, J.*, collecting authorities).

1913, *Pelletier v. O’Connell*, — Me. —, 88 Atl. 55.

1905, *Chesapeake & O. R. Co. v. Deepwater R. Co.*, 57 W. Va. 641, 50 S. E. 890.

[Text, p. 3519; add a new par. (3):]

(3) To determine the validity of an election as expressing in *ballots* the will of the majority, it would seem that the general sense of a ballot as accepted by persons voting would be the standard; and that such standard could be and must be ascertainable by individual testimony or affidavits.\*

\* 1910, *People v. Sullivan*, 247 Ill. 176, 93 N. E. 97 (a ballot “For or Against etc.” followed by blanks for “Yes” and “No”; affidavits that voters meant by “Yes” to vote for the proposal, admitted).

## § 2484. Evidence sought by the Judge *ex mero motu*.

[Note 1; add:]

1902, *Carle v. People*, 200 Ill. 494, 66 N. E. 32 (State’s attorney allowed to state that he did not wish to call a certain eye-witness, and to request the Court to call him, and then

[Note 1 — continued]

to cross-examine him, the defendant also cross-examining). 1911, *People v. Cleminson*, 250 Ill. 135, 95 N. E. 157 (the trial Court should not call witnesses at the suggestion of the State's attorney, except when they are eye-witnesses and then only in unusual instances; *Carle v. People*, approved; here three witnesses were held improperly called by the judge for cross-examination by the State's attorney).

In *People v. Dickerson*, 164 Mich. 148, 129 N. W. 199 (1910), Mich. St. 1905, No. 175, providing that in homicide cases, on issues of expert knowledge, "the Court shall appoint one or more suitable disinterested persons, not exceeding three, to investigate such issues and testify at the trial," without preventing the parties' use of other witnesses, was held unconstitutional, mainly because "the power of selecting and appointing witnesses . . . is in no sense a judicial act." It is a pity that the Court suffered such a severe attack of dikastophobia on the sight of this harmless statute. As the history and authorities of the present subject are ignored in the opinion and as its fantastic logic would hardly be followed elsewhere, no further notice of its contents is needed.

The appointment of expert witnesses by the Court is one of the expedients proposed for reforming the shortcomings of the present system; see the articles cited *ante*, § 562, n. 1, and the statutes there quoted.

[Note 3; add:]

1911, *People v. Bernstein*, 250 Ill. 63, 95 N. E. 50 (on the facts, held that the trial judge's examination of two witnesses in chief was improper).

[Text, l. 3 from end of §, after "parties"; insert:]

or may *ex mero motu* exclude inadmissible evidence.<sup>4</sup>

<sup>4</sup> 1912, *Electric Park Amusement Co. v. Psychos*, 83 N. J. L. 262, 83 Atl. 766 (here the judge excluded an incompetent witness though the opponent had made no objection; the party offering the witness made the unconscionable claim that he had a right to put in any illegal evidence if the opponent failed to object; the Supreme Court sensibly refused to sanction this last step in the reduction of the trial judge to the helpless referee of an unscrupulous combat between skill and ignorance).

### § 2486. Burden of Proof; First Meaning; Test for this Burden.

[Note 2; add:]

1908, *Prentice v. Crane*, 234 Ill. 302, 84 N. E. 916 (that representations were not true). 1914, *Abbau v. Grassie*, 262 Ill. 636, 104 N. E. 1020 (lack of a license for contractor claiming mechanic's lien).

1907, *Beckman v. Lincoln & N. W. R. Co.*, 79 Nebr. 89, 112 N. W. 348 (land-condemnation proceedings).

1913, *Young v. Woodman*, — N. Mex. —, 135 Pac. 86 (non-execution of a contract).

[Note 3; add:]

1906, *Kettles v. People*, 221 Ill. 221, 77 N. E. 472 (practising dentistry without a license; the defendant has the burden of proving a license).

### § 2487. Same: Second Meaning; Duty of Producing Evidence.

[Note 8; add:]

1906, *Woodward v. Chicago M. & St. P. R. Co.*, 145 Fed. 577, 580, C. C. A.

1904, *Olmstead v. Oregon S. L. R. Co.*, 27 Utah 515, 76 Pac. 557.

The best example of this application of the theory is now found in the able opinion of

[*Note 8 — continued*]

Jaggard, J., in *Continental Ins. Co. v. Chicago & N. W. R. Co.*, 97 Minn. 467, 107 N. W. 548 (1906).

§ 2489. **Shifting the Burden of Proof.**

[*Note 2; add:*]

1909, *Ginn v. Dolan*, 81 Ohio 121, 90 N. E. 141 (notes given for valuable consideration).

§ 2491. **Presumptions of Law and of Fact.**

[*Note 2, l. 6; add:*]

1913, *Morris v. Minneapolis St. P. & S. S. M. R. Co.*, 25 N. D. 136, 141 N. W. 204.

[*Note 3; add:*]

1909, *John Hancock Ice Co. v. Perkiomen R. Co.*, 224 Pa. 74, 73 Atl. 194 (shifting the burden in cases of fire; theory examined).

[*Note 4; add:*]

Compare the discussion about the Coffin case, U. S., *post*, § 2511, n. 3.

[*Note 5; add:*]

1909, *Reclamation Dist. No. 70 v. Sherman*, 11 Cal. App. 399, 105 Pac. 277, 285.

1909, *Clifford v. Taylor*, 204 Mass. 358, 90 N. E. 862.

1907, *Sheldon v. Wright*, 80 Vt. 298, 67 Atl. 807.

A later opinion in Connecticut abandons this position: 1909, *Bergan v. Central Vermont R. Co.*, 82 Conn. 574, 74 Atl. 937 ("Presumptions like that appealed to have no probative force; they perform an office in the absence of evidence").

See an interesting note, upholding a different and median view, in the *Columbia Law Review* (1908), VIII, 127.

[*Note 6; add:*]

*Accord*: 1904, *Vincent v. Mutual R. F. L. Ass'n*, 77 Conn. 281, 58 Atl. 963, per Prentice, J.

1907, *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 170 Ind. 204, 82 N. E. 1025.

1911, *Scarpelli v. Washington W. P. Co.*, 63 Wash. 18, 114 Pac. 870.

§ 2493. **Conflicting Presumptions.**

[*Note 2; add:*]

1909, *State v. Forbes*, 75 N. H. 306, 73 Atl. 929 (example of counter-evidence not sufficing to take the case from the jury).

§ 2494. **Prima Facie Evidence; Sufficient Evidence, etc.**

[*Note 1; add:*]

1907, *Polhemus v. Prudential R. Co.*, 74 N. J. L. 570, 67 Atl. 303 ("the prima facie evidence became decisive of the issue").

1913, *Lehigh Valley R. Co. v. Clark*, 3d C. C. A., 207 Fed. 717 (effect of St. 1887, Feb. 4, c. 104, § 14, making the Interstate Commerce Commission's findings "*prima facie* evidence," considered).

[*Note 4; add:*]

1911, *Brock v. Metropolitan L. Ins. Co.*, 156 N. C. 112, 72 S. E. 213.

1913, *State v. Wilkerson*, 164 N. C. 431, 79 S. E. 888 (possession of liquor; opinion by Walker, J.).

[*Note 12; add:*]

1905, *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201.

1904, *Hehir v. Rhode Island Co.*, 26 R. I. 30, 58 Atl. 246 (good opinion by Tillinghast, J.).

[*Note 12, last line; add:*]

as also the opinion of Powell, J., in *Georgia R. & E. Co. v. Harris*, 1 Ga. App. 714, 57 S. E. 1076 (1907).

[*Note 13; add:*]

1904, *Vogeler v. Devries*, 98 Md. 302, 56 Atl. 782.

1903, *Lamkin v. Johnson*, 72 N. H. 344, 56 Atl. 750.

1906, *Chybowski v. Bucyrus Co.*, 127 Wis. 332, 106 N. W. 833.

[*Note 14; add:*]

1905, *Haughton v. Aetna L. Ins. Co.*, 165 Ind. 32, 73 N. E. 592.

1905, *Westfall v. Wait*, 165 Ind. 353, 73 N. E. 1089.

[*Note 17, par. 2; add:*]

1905, *Morey's Estate*, 147 Cal. 495, 82 Pac. 57.

1912, *Donovan v. Connecticut Co.*, 86 Conn. 82, 84 Atl. 288.

1909, *Wilson v. Jernigan*, 57 Fla. 277, 49 So. 44 (careful opinion by Shackelford, J., approving Professor Thayer's exposition and the passage from Lord Halsbury's opinion in *Metro-politan R. Co. v. Wright*).

1903, *Pittsburg, C. C. & St. Louis R. Co., v. Banfill*, 206 Ill. 553, 69 N. E. 499.

1904, *Craft v. Norfolk & S. R. Co.*, 136 N. C. 49, 48 S. E. 719.

1906, *Woodward v. Chicago, M. & St. P. R. Co.*, 145 Fed. 577, C. C. A.

1913, *Wilson v. Johnson*, — W. Va. —, 79 S. E. 734.

1911, *Kroger v. Cumberland F. P. Co.*, 145 Wis. 433, 130 N. W. 513 (careful opinions by Marshall, J., and Winslow, C. J., discussing the proper course and test where the appellate judges themselves differ in opinion).

§ 2495. *Same: Direction of a Verdict, etc.*

[*Note 4, par. 1; add:*]

A careful opinion, full of research, is that of Blodgett, J., in *Gunn v. Union R. Co.*, 27 R. I. 320, 62 Atl. 118 (1905).

[*Note 4; add a new par.:*]

But under the California Code (P. C. § 1118), and its followers, the Court may only *advise* the jury to acquit, and the jury need not follow the advice; therefore, a refusal to give such advice cannot be an error of law:

1910, *State v. Wright*, 20 N. D. 216, 126 N. W. 1023.

[*Note 6; add:*]

1905, *Van Cott v. North J. St. R. Co.*, 72 N. J. L. 229, 62 Atl. 407.

Compare the rule of § 2496, n. 3, *post*.

[*Note 7; add:*]

The ruling in *Ayers v. Wabash R. Co.*, 190 Mo. 228, 88 S. W. 608 (1905), is probably not *contra*.

[*Note 8; add:*]

*Accord*: 1906, *Young v. Chandler*, 102 Me. 251, 66 Atl. 539. 1905, *Uzzell v. Horn*, 71 S. C. 426, 51 S. E. 253.

[Note 8 — continued]

*Contra*: 1905, *Sperl's Estate*, — Minn. —, 103 N. W. 502 (for wills).  
1910, *Giles v. Giles*, 204 Mass. 383, 90 N. E. 595.

Whether the *appellate* Court can here override a trial Court by reversing a verdict if he does not, is a separate question:

1912, *Slocum v. New York Life Ins. Co.*, 228 U. S. 264, 33 Sup. 523 (where the trial judge refuses to direct a verdict for the defendant, and the jury finds a verdict for the plaintiff, and the appellate court is of opinion that there was not sufficient evidence for the jury, then the appellate court cannot order a verdict and judgment to be entered for the defendant but can only set aside the verdict and order a new trial; four judges dissenting).

This question is vital to the modern efforts for improving procedure by preventing needless new trials; and statutes have attempted to authorize it, notably Massachusetts and Pennsylvania. The constitutional inhibition, as declared by the majority opinion in the *Slocum* case, has been ably questioned in the report of a Committee of the American Bar Association (Proceedings, 1913, XXXVIII, 561). The most searching and exhaustive examination of the subject, setting forth both the history and the policy of such a practice, is now to be found in Professor Henry Schofield's articles, entitled "New Trials and the Seventh Amendment; *Slocum v. N. Y. Life Ins. Co.*" (Illinois Law Review, VIII, 287, 381, 465). See further: 1913, *Bothwell v. Boston E. R. Co.*, 215 Mass. 467, 102 N. E. 665; Mr. J. L. Thorndike, "Jury Trial in the United States Courts" (Harvard Law Rev., XXVI, 732).

[Note 10; *add*.:]

1910, *People v. Walker*, 198 N. Y. 329, 91 N. E. 806 (receiving stolen goods).  
Compare the treatment of this question in the following: 1891, *People v. Neumann*, 85 Mich. 98, 48 N. W. 290. 1904, *People v. Remus*, 135 Mich. 629, 98 N. W. 397.

But a peremptory instruction for *the defendant* is allowable: 1912, *Blankenship v. Com.*, 147 Ky. 768, 145 S. W. 752.

[Note 11; *add*.:]

1903, *Lee v. Missouri Pac. R. Co.*, 67 Kan. 402, 73 Pac. 110.

### § 2496. Same: Waiver of Motion, etc.

[Note 1; *add*.:]

1906, *State v. Banusik*, — N. J. L. —, 64 Atl. 994, *semble*.

For the effect of a *motion for a new trial* upon exceptions to rulings upon specific evidence, see *ante*, § 20, n. 8.

[Note 2, par. 1; *add*.:]

1905, *Sorensen v. Sorensen*, 68 Nebr. 483, 103 N. W. 455.

[Note 3, par. 1; *add* under *Accord*.:]

1913, *R. v. Wakelyn*, Alta. S. C., 10 D. L. R. 455 (corroboration of prosecutrix on a charge of rape under age).

1906, *Lyon v. United Moderns*, 148 Cal. 470, 83 Pac. 804.

1906, *Shields v. Johnson*, 12 Ida. 329, 85 Pac. 972.

1905, *Streator I. Tel. Co. v. Continental T. C. Co.*, 217 Ill. 577, 75 N. E. 546. 1905, *Warth v. Loewenstein*, 219 Ill. 222, 76 N. E. 378. 1909, *Reavely v. Harris*, 239 Ill. 526, 88 N. E. 238.

1904, *Esler v. Camden & S. R. Co.*, 71 N. J. L. 180, 58 Atl. 113 (nonsuit).

1907, *Spencer v. State*, 187 N. Y. 484, 80 N. E. 375 (applied to Court of Claims).

1904, *Koon v. Southern Ry.*, 69 S. C. 101, 48 S. E. 86.

[*Note 3 — continued*]

1905, *Columbia N. & L. R. Co. v. Means*, 136 Fed. 83, C. C. A.

1906, *Gardner v. Porter*, 45 Wash. 158, 88 Pac. 121.

[*Note 3, par. 1, at the end, under Contra; add.:*]

But in North Carolina the rule was changed by St. 1899, c. 131, amending St. 1897, c. 109: 1900, *Means v. Carolina C. R. Co.*, 126 N. C. 424, 35 S. E. 813. 1902, *Ratliff v. Ratliff*, 131 N. C. 428, 42 S. E. 887. 1904, *Jones v. Warren*, 134 N. C. 390, 46 S. E. 740. 1904, *Southern L. & T. Co. v. Benbow*, 135 N. C. 303, 47 S. E. 435. 1904, *Earnhardt v. Clement*, 137 N. C. 91, 49 S. E. 49 (failure to renew the motion). 1904, *Blalock v. Clark*, 137 N. C. 140, 49 S. E. 88 (same). The final result of the statutes of 1897, 1899, and 1901, is now phrased as follows: Rev. 1905, § 539: "Demurrer to Evidence. When . . . the plaintiff shall have produced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment, as in case of nonsuit. If the motion is allowed, the plaintiff may except and appeal to the Supreme Court. If the motion is refused, the defendant may except, and if the defendant introduces no evidence, the jury shall pass upon the issues in the case, and the defendant shall have the benefit of his exception on appeal to the Supreme Court. But after the motion is refused, he may waive his exception and then introduce his evidence just as if he had not made the motion. But he may again move to dismiss after all the evidence on both sides is in. If the motion is then refused, upon consideration of all the evidence, he may except; and after the jury shall have rendered its verdict, he shall have the benefit of such latter exception on appeal to the Supreme Court." This seems to be a fair solution, straightforwardly expressed, and should serve as a model statute in States where similar doubts have arisen.

[*Note 3, par. 2; add.:*]

For the effect of a motion by *both parties* to direct a verdict, see *Wolf v. Chicago S. P. Co.*, 233 Ill. 501, 84 N. E. 614 (1908).

#### § 2497. Measure of Persuasion. Proof beyond a Reasonable Doubt.

[*Note 4; add.:*]

1904, *People v. Perry*, 144 Cal. 748, 78 Pac. 284.

1909, *People v. Burke*, 157 Mich. 108, 121 N. W. 282.

1904, *State v. Newman*, 93 Minn. 393, 101 N. W. 499.

1910, *Blue v. State*, 86 Nebr. 189, 125 N. W. 136.

1910, *State v. Silverio*, 79 N. J. L. 482, 76 Atl. 1069.

1908, *Abbott v. Terr.*, 1 Okl. Cr. 1, 94 Pac. 179.

1914, *Harris v. State*, — Okl. Cr. —, 137 Pac. 365 (reading out of the law the definition in Rev. L. § 5876).

1914, *Wilson v. U. S.*, 232 U. S. 563, 34 Sup. 347.

1905, *State v. Overson*, 30 Utah 22, 83 Pac. 562 (as to circumstantial evidence).

1903, *Baker v. State*, 120 Wis. 135, 97 N. W. 566.

[*Note 5; add.:*]

So also *Burgess, J.*, in *State v. Bond*, 191 Mo. 555, 90 S. W. 830: "Definitions of it tend to confuse rather than to enlighten."

The best exposure of the doctrine's vagaries is found in an article by Professor Wm. Trickett, of the Dickinson School of Law, "Preponderance of Evidence and Reasonable Doubt," *The Forum* (Carlisle, Pa.), X, 75 (1906).

The following list, collecting some recent quibbles, may serve as a museum of legal curios for future generations:

1910, *State v. Schreiber*, *State v. Adams*, 79 N. J. L. 447, 75 Atl. 476.

1910, *State v. Leo*, 80 N. J. L. 21, 77 Atl. 523.

[*Note 6; add:*]

*Accord:* 1904, *State v. Blay*, 77 Vt. 56, 58 Atl. 794 ("No definition of the term need be given"). 1903, *Meehan v. State*, 119 Wis. 621, 97 N. W. 173.

[*Note 12; add, under Accord:*]

1904, *Delahoyde v. People*, 212 Ill. 554, 72 N. E. 732.

[*Note 12; add:*]

*Accord:* 1909, *People v. Bolik*, 241 Ill. 394, 89 N. E. 700. 1906, *Dunn v. State*, 166 Ind. 694, 78 N. E. 198, *semble* (this opinion illustrates the inherently quibbling nature of the question).

*Contra:* 1905, *State v. Johnson*, 14 N. D. 288, 103 N. W. 565.

1912, *Inklebarger v. State*, 8 Okl. Cr. 316, 127 Pac. 707.

§ 2498. **Same: Proof by Preponderance of Evidence.**

[*Note 1; add:*]

1906, *Sonnemann v. Mertz*, 221 Ill. 362, 77 N. E. 550 (where a preponderance suffices, it is incorrect to charge that the jury must be "satisfied").

1905, *Devencenzi v. Cassinelli*, 28 Nev. 222, 81 Pac. 41.

1904, *Chaffin v. Fries M. & P. Co.*, 135 N. C. 95, 47 S. E. 226.

1910, *Moore v. Adams*, 26 Okl. 48, 108 Pac. 392.

1905, *Grotjan v. Rice*, 124 Wis. 253, 102 N. W. 551. 1906, *Anderson v. Chicago Brass Co.*, 127 Wis. 273, 106 N. W. 1077 (a wondrous cobweb of pedantry is here woven to ensnare the jury's simple mind and the trial judge's tongue).

1907, *Pelton v. Spider Lake S. & L. Co.*, 132 Wis. 219, 112 N. W. 29 (instruction criticised).

[*Note 2; add:*]

1911, *Fish v. Poorman*, 85 Kan. 237, 116 Pac. 898 (testamentary incapacity).

[*Note 3; add:*]

1911, *Cooper v. Spring Valley W. Co.*, 16 Cal. App. 17, 116 Pac. 298.

1904, *Blackmore v. Ellis*, 70 N. J. L. 264, 57 Atl. 1047 (assault and battery).

1904, *Kurz v. Doerr*, 180 N. Y. 88, 72 N. E. 926 (assault by discharging a firearm).

*Contra:* 1913, *Usher v. Severance*, 86 Vt. 523, 86 Atl. 741 (assault and battery; but here only the presumption of innocence was involved).

[*Note 4; add:*]

1913, *M. S. v. Regan*, 232 U. S. 37, 34 Sup. 213 (action for penalty due under the alien immigration act).

*Contra:* 1908, *Barron v. Anniston*, 157 Ala. 399, 48 So. 58 (city ordinance against sale of liquor).

[*Note 7; add:*]

*Contra:* 1908, *In re Newby*, 82 Nebr. 235, 117 N. W. 691.

[*Note 8; add:*]

So in other actions for loss of support: 1904, *Woods v. Dailey*, 211 Ill. 495, 71 N. E. 1068 (action for loss of support, under the dramshop act).

[*Note 10; add:*]

1904, *Heyman v. Heyman*, 210 Ill. 524, 71 N. E. 591.

[Note 12; *add*.:]

*Contra*: 1907, *State v. Blydenbury*, 135 Ia. 264, 112 N. W. 634.

[Note 13; *add*.:]

1906, *Bowe v. Gage*, 127 Wis. 245, 106 N. W. 1074 (fraud in a sale). 1913, *Ball's Will*, *Ball v. Boston*, 153 Wis. 27, 141 N. W. 8 (fraud or undue influence on a testator; Barnes, J., diss., in an able opinion).

[Note 15; *add*.:]

1913, *Willis v. Zorger*, 258 Ill. 574, 101 N. E. 963 (contract to devise; citing prior cases). 1909, *Frye v. Gullion*, 143 Ia. 719, 121 N. W. 563 (deceased's oral gift or sale). 1904, *McKee v. Higbee*, 180 Mo. 263, 79 S. W. 407. 1905, *Russell v. Sharp*, 192 Mo. 270, 91 S. W. 134. 1909, *Tousey v. Hastings*, 194 N. Y. 79, 86 N. E. 831 (contract to bequeath). 1911, *Taylor v. Higgs*, 202 N. Y. 65, 95 N. E. 30.

[Note 16; *add*.:]

1910, *Wilson-Ward Co. v. Farmers' U. G. Co.*, 94 Ark. 200, 126 S. W. 847. 1909, *Prior v. Davis*, 58 Fla. 510, 50 So. 535. 1912, *Fife v. Cate*, 85 Vt. 418, 82 Atl. 741. 1909, *Percy v. First National Bank*, 110 Va. 129, 65 S. E. 475. *Contra*: 1913, *Panhandle Lumber Co. v. Rancour*, 24 Ida. 603, 135 Pac. 558.

[Note 17; *add*.:]

1910, *Lambert v. Hemler*, 244 Ill. 254, 91 N. E. 435 (adverse possession, by "clear and positive evidence"). 1910, *Ryder v. Ryder*, 244 Ill. 297, 91 N. E. 451 (parol trust, by "clear, definite, and unequivocal testimony"). 1913, *Johnston v. Linder*, — Ia. —, 143 N. W. 410 (impeaching a notary's certificate of acknowledgment). 1904, *Elliott v. Sheppard*, 179 Mo. 382, 78 S. W. 627 (impeaching a notary's certificate of acknowledgment). 1904, *McKee v. Higbee*, 180 Mo. 263, 79 S. W. 407 (specific performance). 1908, *Sheridan Co. v. McKinney*, 79 Nebr. 223, 115 N. W. 548 (impeaching a notary's certificate of acknowledgment). 1907, *Johnson Lumber Co. v. Leonard*, 145 N. C. 339, 59 S. E. 134 (certificate of married woman's privy examination). 1905, *Penland v. Ingle*, 138 N. C. 456, 50 S. E. 850 (a custom must be proved "clearly and convincingly"). 1908, *Abraham v. Miller*, 52 Or. 8, 95 Pac. 814 (sheriff's return, involving validity of a judgment). 1913, *Burke v. Burke*, 240 Pa. 379, 87 Atl. 960 (impeaching a notary's certificate of acknowledgment). 1905, *Swiger v. Swiger*, 58 W. Va. 119, 52 S. E. 23 (impeaching a certificate of acknowledgment). 1909, *Boring v. Ott*, 138 Wis. 260, 119 N. W. 865 (setting aside a judgment on the ground of perjury committed to obtain it; Marshall, J., diss.). 1910, *Lemke v. Hage*, 142 Wis. 178, 125 N. W. 440 (local usage affecting a contract). 1910, *Lepley v. Anderson*, 142 Wis. 668, 125 N. W. 433 (oral understanding nullifying a document).

So also for showing a *deed absolute* to be a *mortgage* only (under § 2437, *ante*):

1908, *Couts v. Winston*, 153 Cal. 686, 96 Pac. 357 (holding a deed absolute to be a mortgage). 1913, *Davis v. Pursel*, 55 Colo. 287, 134 Pac. 107. 1911, *Patterson v. Patterson*, 251 Ill. 153, 95 N. E. 1051 (that a deed was in effect a mortgage).

[Note 17 — *continued*]

1913, *Miller v. Mandel*, 259 Ill. 314, 102 N. E. 760 (to show a deed, absolute on its face, to have been subject to a collateral agreement in a lost document).

1906, *Betts v. Betts*, 132 Ia. 72, 106 N. W. 928.

1910, *Schurz v. Schurz*, 153 Ia. 187, 128 N. W. 944 (oral trust accompanying a deed absolute).

1910, *Schmidt v. Barclay*, 161 Mich. 1, 125 N. W. 729.

1905, *Stitt v. Rat Portage L. Co.*, 98 Minn. 52, 104 N. W. 561, *semble*.

1904, *Smyth v. Reed*, 28 Utah 262, 78 Pac. 478.

1913, *Hoover v. Bouffleur*, 74 Wash. 382, 133 Pac. 602 (that a deed absolute in form is a mortgage).

1913, *Mittlesteadt v. Johnson*, 75 Wash. 550, 135 Pac. 214 (that a deed absolute is a mortgage, in connection with collateral documents).

1908, *Hudkins v. Crim.*, 64 W. Va. 225, 61 S. E. 166 (oral trust of land).

Compare the rule for proving the *precise terms* of an oral contract or a lost will or deed (*ante*, §§ 2097-2106).

[Note 18; *add.*]

1906, *Dupuis v. Saginaw V. T. Co.*, 146 Mich. 151, 109 N. W. 413 (a quibbling opinion).

*Contra*: 1905, *McNeill v. Stitt*, 2 Cal. App. 13, 82 Pac. 1121.

1905, *McClelland v. Bullis*, 34 Colo. 69, 81 Pac. 771.

1909, *Chenoweth v. Burr*, 242 Ill. 312, 89 N. E. 1008.

1909, *Warren Construction Co. v. Powell*, 173 Ind. 207, 89 N. E. 857.

1905, *Heald v. W. U. Tel. Co.*, 129 Ia. 326, 105 N. W. 588; and statutes cited *ante*, § 2034, n. 1.

It is now said in Illinois that under some circumstances an instruction as to preponderance is objectionable if it does not state that "the element of numbers should be considered by them with all the other things"; 1907, *Elgin J. & E. R. Co. v. Lawlor*, 229 Ill. 621, 82 N. E. 407. But the vice of such a rule is the larger one of attempting to lay down rules of law to bind the jury in their exclusive function of estimating the credibilities of the case *without any trammels of law*. This is the growing danger of the times for the law of evidence, and it should be opposed wherever it appears.

## § 2500. **Sanity; (1) Testamentary and other Civil Causes.**

[Note 1; *add.*]

but recent decisions leave the law of that State uncertain; the ambiguity of the term "burden of proof" seems to be the cause.

1904, *Branstrator v. Crow*, 162 Ind. 362, 69 N. E. 668.

1907, *Steinkuehler v. Wempner*, 169 Ind. 154, 162, 81 N. E. 482 (changing the rule). 1909,

*Hoffbauer v. Morgan*, 172 Ind. 273, 88 N. E. 337 (the burden is on the proponents in a proceeding to probate, following *Steinkuehler v. Wempner*). 1910, *Pepper v. Martin*, 175 Ind. 580, 92 N. E. 777. 1914, *Herring v. Watson*, — Ind. —, 105 N. E. 900.

[Note 2; *add.*]

1903, *Latour's Estate*, 140 Cal. 414, 74 Pac. 441. 1904, *McKenna's Estate*, 143 Cal. 580, 77 Pac. 461.

1905, *Credille v. Credille*, 123 Ga. 673, 51 S. E. 628.

1906, *Todd v. Todd*, 221 Ill. 410, 77 N. E. 680. 1906, *Waters v. Waters*, 222 Ill. 26, 78 N. E. 1. 1912, *Norton v. Clark*, 253 Ill. 557, 97 N. E. 1079.

1906, *Dunahugh's Will*, 130 Ia. 692, 107 N. W. 925. 1908, *Ross v. Ross*, 140 Ia. 51, 117 N. W. 1105.

[*Note 2 — continued*]

- Kan.: 1907, *McConnell v. Keir*, 76 Kan. 527, 92 Pac. 540 (good opinion, by Porter, J.).  
 1904, *Henning v. Stevenson*, 118 Ky. 318, 80 S. W. 1135.  
 1905, *Gesell v. Baugher*, 100 Md. 677, 60 Atl. 481.  
 1907, *Mansbach's Estate*, 150 Mich. 348, 114 N. W. 65.  
 1907, *King v. Gilson*, 206 Mo. 264, 104 S. W. 52.  
 1913, *Bensberg v. Washington University*, 251 Mo. 641, 158 S. W. 330.  
 1907, *Powers' Estate*, 79 Nebr. 680, 113 N. W. 198 (not clear).  
 1904, *Hunt v. Phillips*, 34 Wash. 362, 75 Pac. 970.

Compare also the cases cited under other rules for proof of insanity, *ante*, § 233 (prior and subsequent insanity), § 1671 (inquisition of lunacy), *post*, § 2531 (presumption of continuance).

[*Note 3; add:*]

- 1911, *Pritchard v. Fowler*, 171 Ala. 662, 55 So. 147 (insanity at past intervals does not create a presumption of insanity at the time of a transaction).  
 1907, *Hudson v. Hudson*, 144 N. C. 449, 57 S. E. 162 (discussing the shifting of the burden after evidence of prior insanity).  
 1909, *Towner v. Towner*, 65 W. Va. 476, 64 S. E. 732 (discussing the effect of an adjudication in committal proceedings).

#### § 2501. Same: (2) Criminal Causes.

[*Note 1, in par. (1), First View; add:*]

- 1910, *Clemmons v. State*, 167 Ala. 20, 52 So. 467 (noting changes of rule in this State).  
 1913, *Roberson v. State*, — Ala. —, 62 So. 837.  
 1914, *State v. Johnson*, — Kan. —, 140 Pac. 839.  
 1912, *Com. v. Spencer*, 212 Mass. 438, 99 N. E. 266.  
 1911, *Adair v. State*, 6 Okl. Cr. 284, 118 Pac. 416 (*Davis v. U. S.* followed).  
 1913, *Matheson v. U. S.*, 227 U. S. 540, 33 Sup. 355 (*Davis v. U. S.* followed).  
 1909, *State v. Brown*, 36 Utah 46, 102 Pac. 641.

[*Note 1, in par. (2), Second View; add:*]

- 1913, *Witty v. State*, — Tex. Cr. —, 153 S. W. 1146.

[*Note 1, in par. (3), Third View; add:*]

- 1904, *People v. Suesser*, 143 Cal. 354, 75 Pac. 1093.  
 1907, *People v. Casey*, 231 Ill. 261, 83 N. E. 278.  
 1907, *State v. Johnston*, 118 La. 276, 42 So. 935.  
 1905, *State v. Austin*, 71 Oh. 317, 73 N. E. 218.  
 1911, *Com. v. Molten*, 230 Pa. 399, 79 Atl. 638.  
 1904, *State v. Quigley*, 26 R. I. 263, 58 Atl. 905 (good opinion by Douglas, J.).  
 1904, *State v. Clark*, 34 Wash. 485, 76 Pac. 98 (good opinion by Mount, J., with a full collection of cases from other jurisdictions).  
 1911, *State v. Cook*, 69 W. Va. 717, 72 S. E. 1025 (prior rulings affirmed).  
 1907, *Duthey v. State*, 131 Wis. 178, 111 N. W. 222.

[*Note 1, last par.; add:*]

- 1904, *Parrish v. State*, 139 Ala. 16, 36 So. 1012. 1904, *Talbert v. State*, 140 Ala. 96, 37 So. 78.  
 1905, *Allams v. State*, 123 Ga. 500, 51 S. E. 506.  
 1904, *State v. Lyons*, 113 La. 959, 37 So. 890 (reconsidering prior cases).

## § 2502. Undue Influence and Fraud; (1) Testamentary Execution.

[Note 1; add:]

- 1910, *Miller v. Carr*, 94 Ark. 176, 126 S. W. 1068.  
 1906, *Compber v. Browning*, 219 Ill. 429, 76 N. E. 678.  
 1913, *Kindberg's Will*, 207 N. Y. 220, 100 N. E. 789 (burden is on contestant; explaining prior cases).  
 1905, *Cowdry's Will*, 77 Vt. 359, 60 Atl. 141.  
 1905, *Winn v. Itzel*, 125 Wis. 19, 103 N. W. 220.  
 1913, *Ball's Will*, *Ball v. Boston*, 153 Wis. 27, 141 N. W. 8.

## § 2503. Same: (2) Confidential Relations, etc.

[Note 1; add:]

- Eng.*: 1875, *Fulton v. Andrew*, L. R., 7 H. L. 448, 471 (beneficiary drafting or framing a will).  
*Can.*: 1903, *Stewart v. Walker*, 6 Ont. L. R. 495, 510 (solicitor drawing a will and receiving benefits under it).  
 1907, *Mayrand v. Dussault*, 38 Can. Sup. 460 (brother).  
*U. S.*: 1913, *Hawthorne v. Jenkins*, — Ala. —, 62 So. 505 (parent and child).  
*U. S.*: 1905, *Morey's Estate*, 147 Cal. 495, 82 Pac. 57 (will).  
 1910, *Broadbudd v. Monroe*, 13 Cal. App. 464, 110 Pac. 158 (mother and daughter).  
 1905, *Re Birdseye*, 77 Conn. 623, 60 Atl. 111 (will).  
 1913, *Madre v. Gaskins*, 39 D. C. App. 19 (friend).  
 1904, *Weston v. Teufel*, 213 Ill. 291, 72 N. E. 908 (beneficiary of a will). 1906, *Compber v. Browning*, 219 Ill. 429, 76 N. E. 768 (testator and beneficiary). 1907, *Sears v. Vaughan*, 230 Ill. 572, 82 N. E. 881 (cases reviewed). 1908, *Fish v. Fish*, 235 Ill. 396, 85 N. E. 662 (nephew managing aunt's property). 1908, *Gilmore v. Lee*, 237 Ill. 402, 86 N. E. 568 (priest). 1908, *Hudson v. Hudson*, 237 Ill. 9, 86 N. E. 661. 1909, *Hensan v. Cooksey*, 237 Ill. 620, 86 N. E. 1107 (deed to a son). 1910, *Dick v. Albers*, 243 Ill. 231, 90 N. E. 683 (son). 1912, *Yess v. Yess*, 255 Ill. 414, 99 N. E. 687 (son as beneficiary; issue held proper for the jury).  
 1907, *Vannest v. Murphy*, 135 Ia. 123, 112 N. W. 236 (son's fiduciary relation to mother).  
 1912, *Shacklette v. Goodall*, 151 Ky. 20, 151 S. W. 23 (uncle and nephew). 1913, *McDowell v. Edwards' Adm'r*, 156 Ky. 475, 161 S. W. 534 (infirm person and custodian).  
 1905, *Kennedy v. McCann*, 101 Md. 643, 61 Atl. 625 (gift). 1908, *Saxton v. Krumm*, 107 Md. 393, 68 Atl. 1056 (mistress). 1908, *Zimmerman v. Freshour*, 108 Md. 115, 69 Atl. 796 (principal and agent). 1909, *Reck's Ex'r v. Reck*, 110 Md. 497, 73 Atl. 144 (deed by father to son).  
 1906, *Hill v. Hall*, 191 Mass. 253, 77 N. E. 831 (attorney).  
 1905, *Sperl's Estate*, — Minn. —, 103 N. W. 502.  
 1913, *Cornet v. Cornet*, 248 Mo. 184, 154 S. W. 121 (brothers).  
 1908, *Smith v. Moore*, 149 N. C. 185, 62 S. E. 892 (mother-in-law and son-in-law). 1910, *In re Everett's Will*, 153 N. C. 83, 68 S. E. 924 (brother as beneficiary and executor; presumption held applicable on the facts).  
 1909, *McAdams v. McAdams*, 80 Oh. 232, 88 N. E. 542 (father and son, the latter being an attorney).  
 1907, *Schuyler v. Stephens*, 28 R. I. 506, 68 Atl. 311 (physician and patient).

## § 2504. Same: Fraudulent Conveyances against Creditors.

[Note 1; add:]

- 1905, *Thompson v. Williams*, 100 Md. 195, 60 Atl. 26.

§ 2505. **Marriage; (1) Consent from Cohabitation, etc.**

[Note 1; add:]

- 1904, *Re Shephard*, 1 Ch. 456.  
 1904, *Klenke v. Noonan*, 118 Ky. 436, 81 S. W. 241.  
 1910, *Bishop v. Brittain Inv. Co.*, 229 Mo. 699, 129 S. W. 668.

[Note 2; add:]

- 1912, *Prince v. Edwards*, 175 Ala. 532, 57 So. 714.  
 1906, *Smith v. Fuller*, — Ia. —, 108 N. W. 765.  
 1903, *Shank v. Wilson*, 33 Wash. 612, 74 Pac. 812.

[Note 3, par. 1; add:]

- 1909, *Reifschneider v. Reifschneider*, 241 Ill. 92, 89 N. E. 255 (marriage-ceremony in Indiana).  
 1904, *State v. Eggleston*, 45 Or. 346, 77 Pac. 738 (adultery; marriage by a justice).

§ 2506. **Same: (2) Capacity, as affected by Intervening Divorce, etc.**

[Note 1; add:]

- 1912, *Roxbury v. Bridgewater*, 85 Conn. 196, 82 Atl. 193 (prior marriage, without proof of divorce).  
 1907, *Murchison v. Green*, 128 Ga. 339, 57 S. E. 709 (bigamous marriage, and death).  
 1905, *Hoch v. People*, 219 Ill. 265, 76 N. E. 356 (wife-murder).  
 1904, *Scott's Adm'r v. Scott*, — Ky. —, 77 S. W. 1122 (first and second wives claiming insurance benefits).  
 1906, *State v. Rocker*, 130 Ia. 239, 106 N. W. 645 (murder; defendant's wife as witness).  
 1906, *Smith v. Fuller*, — Ia. —, 108 N. W. 765 (dower; plaintiff was married in 1872 to S., who disappeared in three months, and in 1875 she was married to the intestate; the second marriage presumed legal).  
 1905, *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084 (collecting prior cases in this State).  
 1909, *Turner v. Williams*, 202 Mass. 500, 89 N. E. 110 (action for the value of property settled upon a deceased wife E. by the deceased husband J., induced by her false representations that she was single; E. married N. in 1858; by 1870 he deserted; in 1874 E. married J.; J. died in 1895; N. was heard from indefinitely as alive in 1888; held, that the first burden was on the plaintiff, but that no presumption of singleness in 1874 could be made; and that the case was open on all the facts; hence no verdict for the defendant could be directed).  
 1908, *Colored Knights of Pythias v. Tucker*, 92 Miss. 501, 46 So. 51 (subsequent marriage; whether an intervening divorce will be presumed).  
 1909, *Maier v. Brock*, 222 Mo. 74, 120 S. W. 1167 (five marriages).  
 1909, *Sparks v. Ross*, 75 N. J. Eq. 586, 73 Atl. 241. 1911, *Vreeland v. Vreeland*, 78 N. J. Eq. 256, 79 Atl. 336 (alimony; defence, void marriage, the plaintiff having a first husband living and not divorced).  
 1910, *Purdy v. State*, 86 Nebr. 638, 126 N. W. 90 (adultery).  
 1912, *Dunlap v. State*, 126 Tenn. 415, 150 S. W. 86 (bigamy; presumption as to first wife's decease).

§ 2507. **Negligence and Accident; (1) Contributory Negligence.**

[Note 1; add:]

- 1908, *Hainlin v. Budge*, 56 Fla. 342, 47 So. 825.  
 1906, *Diamond B. C. Co. v. Cuthbertson*, 166 Ind. 290, 76 N. E. 1060.

[Note 1 — continued]

Mass. St. 1914, c. 553 (burden of proof of contributory negligence, placed on the defendant).  
 1905, *Simms v. Forbes*, 86 Miss. 412, 38 So. 546.  
 1904, *Rapp v. Sarpy Co.*, 71 Nebr. 382, 98 N. W. 1042, 102 N. W. 242.  
 1909, *Cincinnati, H. & D. R. Co. v. Frye*, 80 Oh. 289, 88 N. E. 642.

§ 2508. Same: (2) Loss by Bailee.

[Note 1; add:]

Can.: 1908, *Gremley v. Stubbs*, 39 N. Br. 21 (bailee returning horse).  
 1911, *Pratt v. Waddington*, 23 Ont. 178 (death of horse in bailee's hands).  
 U. S.: 1904, *Dieterle v. Bekin*, 143 Cal. 683, 77 Pac. 664 (warehouseman of goods destroyed by fire).  
 1909, *Baltimore Refrigerating & H. Co. v. Kreiner*, 109 Md. 361, 71 Atl. 1066 (cold storage).  
 1908, *Yazoo & M. V. R. Co. v. Hughes*, 94 Miss. 242, 47 So. 662 (warehouseman).  
 1912, *Stone v. Case*, 34 Okl. 5, 124 Pac. 960 (piano lease).

[Note 2; add:]

1904, *Yazoo & M. V. R. Co. v. Humphrey*, 83 Miss. 721, 36 So. 154 (injury to passenger; applying Rev. Code 1892, § 1808).  
 1903, *Jones v. Kansas C. F. S. & M. R. Co.*, 178 Mo. 528, 77 S. W. 890 (employee).  
 1907, *Harper F. Co. v. Southern Express Co.*, 144 N. C. 639, 57 S. E. 458 (subsequent carrier).  
 1903, *East Tennessee & W. N. C. R. Co. v. Lindamood*, 111 Tenn. 457, 78 S. W. 99 (employee).

§ 2509. Same: (3) Defective Machines, Vehicles, and Apparatus.

[Text, p. 3556, l. 1, from below; insert this quotation:]

1903, *Lamar, J.*, in *Chenall v. Palmer B. Co.*, 117 Ga. 106, 43 S. E. 443.

"There is a disposition to argue that every injury is the result of somebody's negligence, but in many cases they are mere accidents or casualties for which, humanly speaking, no one is to blame; in others, the person injured is at fault; in some, his negligence contributes to the result; in others, a fellow servant was to blame. In all such instances the maxim, '*Res ipsa loquitur*,' affords little or no assistance to the jury, for, even supposing that the injury itself proclaims negligence, it says nothing as to who was negligent, and fixes no basis for determining whether the plaintiff, the defendant, a fellow servant, or some stranger may not have been at fault. There are other cases where, when it is shown that the defendant owned or controlled the thing which, when properly constructed, maintained, or operated, did not, in the ordinary course of events, so act as to injure those near by, proof that damage was caused by such thing affords reasonable evidence that the injury was occasioned by want of ordinary care. *Prima facie*, that want of due care should be referred to him under whose management and control the instrument of injury was found. The jury would not be warranted in reasoning, in a strictly logical form: 'Buildings do not collapse without negligence. This building collapsed. Therefore there was negligence,' — for buildings do fall without any one being to blame, and as a result of flood and storm. But ordinarily extraordinary and external causes may be treated as the exception, to be established by the defendant. All that the plaintiff should be required to do in the first instance is to show that the defendant owned, operated, and maintained, or controlled and was responsible for the management and maintenance of, the thing doing the damage; that the accident was of a kind which, in the absence of proof of some external cause, does not ordinarily happen without negligence. When he has shown this, he has cast a burden on the defendant, who may then proceed to show that the accident was occasioned by *vis major*, or by other causes for which he was not responsible."

[*Note 2; add:*]

CANADA, *Dom.*: 1906, *Guardian F. & L. Ass. Co. v. Quebec R. L. & P. Co.*, 37 Can. Sup. 676 (fire from electric wires). 1910, *Dominion Fish Co. v. Isbester*, 43 Can. Sup. 637 (fire on shipboard).

*Man.*: 1910, *Isbester v. Dominion Fish Co.*, 19 Man. 430, 442 (fire on a ship). 1913, *Schwartz v. Winnipeg E. R. Co.*, Man. C. C. A., 9 D. L. R. 708 (alighting from street-car). *Ont.*: 1912, *Carlisle v. Grand Trunk R. Co.*, Ont. H. C. J., 1 D. L. R. 130 (baggage injured by explosion in baggage-room).

[*Note 2; add:*]

*Ark.*: 1912, *Denton v. Mammoth S. E. L. & P. Co.*, 105 Ark. 161, 150 S. W. 572 (electric wires).

*Cal.*: 1907, *Valente v. Sierra R. Co.*, 151 Cal. 534, 91 Pac. 481 (train collision). 1909, *Wyatt v. Pacific Electric R. Co.*, 156 Cal. 170, 103 Pac. 892 (street-car's abrupt start). *Colo.*: 1905, *Denver v. Spencer*, 34 Colo. 270, 82 Pac. 590 (falling of a park stand). 1911, *Denver City T. Co. v. Hills*, 50 Colo. 328, 116 Pac. 125 (passenger tripping in trolley-rope). *Del.*: 1906, *Wood v. Wilmington C. R. Co.*, 5 Pen. Del. 369, 64 Atl. 246 (electric shock on a car-track).

*Ga.*: 1905, *Central of Ga. R. Co. v. Bagley*, 121 Ga. 781, 49 S. E. 780 (killing of animal by a train).

*Ill.*: 1904, *Illinois C. R. Co. v. Swift*, 213 Ill. 307, 72 N. E. 737 (pile-driving machinery). 1905, *Elgin A. & S. Traction Co. v. Wilson*, 217 Ill. 47, 75 N. E. 436 (rule applied to a collision between two cars of the defendant). 1907, *Chicago U. Traction Co. v. Giese*, 229 Ill. 260, 82 N. E. 232 (derailment). 1908, *Greinke v. Chicago City R. Co.*, 234 Ill. 564, 85 N. E. 327 (passenger). 1908, *Barnes v. Danville St. R. & L. Co.*, 235 Ill. 566, 85 N. E. 921 (passenger). 1909, *O'Callaghan v. Dellwood Park Co.*, 242 Ill. 336, 89 N. E. 1006 (scenic railway).

*Ind.*: 1904, *Indianapolis St. R. Co. v. Schmidt*, 163 Ind. 360, 71 N. E. 201 ("When an accident happens to a passenger, a presumption of negligence on the part of the carrier arises").

1911, *Indiana Union T. Co. v. Maher*, 176 Ind. 289, 95 N. E. 1012 (passenger in a collision).

*Ia.*: 1904, *Fitch v. M. C. & C. L. Traction Co.*, 124 Ia. 665, 100 N. W. 618 (passenger). 1906, *Huggard v. Glucose S. R. Co.*, 132 Ia. 724, 109 N. W. 475 (falling of an iron pipe). 1906, *Croft v. Chicago, R. I. & P. R. (Co.)*, 134 Ia. 411, 109 N. W. 723 (derailment). 1908, *Lunde v. Cudahy Packing Co.*, 139 Ia. 688, 117 N. W. 1063 (engine fly-wheel).

*Kan.*: 1908, *Chicago, R. I. & P. R. Co. v. Brandon*, 77 Kan. 612, 95 Pac. 573 (derailment). 1908, *Shawnee L. & P. Co. v. Sears*, — Kan. —, 95 Pac. 449 (electric light wire). 1913, *Root v. Cudahy P. Co.*, 88 Kan. 413, 129 Pac. 147 (elevator falling).

*Ky.*: 1911, *Shinn Glove Co. v. Sanders*, 147 Ky. 349, 144 S. W. 11 (water-tank falling). 1913, *Corbin v. Benton*, — Ky. —, 152 S. W. 241 (pavement accident).

*Md.*: 1905, *State v. U. S. Railways & El. Co.*, 101 Md. 183, 60 Atl. 249 (passenger). 1912, *Baltimore & O. R. Co. v. Wilson*, 117 Md. 198, 83 Atl. 248 (bridge collapsing). 1913, *Casparis Stone Co. v. Boncore*, 121, Md. 449, 88 Atl. 250 (quarry-blasting).

*Mass.*: 1904, *Hofnauer v. White Co.*, 186 Mass. 47, 70 N. E. 1038 (rule not applied to the fall of a box from a shelf). 1904, *Dronney v. Doherty*, 186 Mass. 205, 71 N. E. 547 (elevator accident; the accident held not sufficient evidence *per se* of negligence). 1904, *Coolley v. Collins*, 186 Mass. 507, 71 N. E. 980 (rule not applied to let the plaintiff go to the jury on an issue of employee's negligence, from the mere fact of a railroad torpedo being found at a crossing). 1906, *Byrne v. Boston W. H. & R. Co.*, 191 Mass. 40, 77 N. E. 696 (injury at a printing machine). 1907, *Saures v. Stevens Mfg. Co.*, 196 Mass. 543, 82 N. E. 694 (leakage of electricity).

1907, *Leavitt v. Fiberloid Co.*, 196 Mass. 440, 82 N. E. 682 (spontaneous combustion of goods). 1908, *Minihan v. Boston Elevated R. Co.*, 197 Mass. 367, 83 N. E. 871 (elevated car). 1909, *Carroll v. Boston Elev. R. Co.*, 200 Mass. 527, 86 N. E. 793 (derailment). 1909, *Beattie v. Boston Elev. R. Co.*, 201 Mass. 3, 86 N. E. 920 (explosion). 1909, *Mc-*

## [Note 2 — continued]

*Namara v. Boston & Maine R. Co.*, 202 Mass. 491, 89 N. E. 131 (blowing off of roof of a freight-car). 1910, *Minihan v. Boston Elev. R. Co.*, 205 Mass. 402, 91 N. E. 414 (derailment). 1910, *Martin v. Boston & N. St. R. Co.*, 205 Mass. 16, 91 N. E. 159 (explosion on an electric car). 1912, *Chiuccariello v. Campbell*, 210 Mass. 532, 96 N. E. 1101 (machinery starting up without obvious cause). 1912, *Trim v. Fore River S. B. Co.*, 211 Mass. 593, 98 N. E. 591 (fall of an angle iron). 1912, *Carney v. Boston Elevated R. Co.*, 212 Mass. 179, 98 N. E. 605 (spark dropping from elevated electric road). 1913, *Cook v. Newhall*, 213 Mass. 392, 101 N. E. 72 (machinery automatically starting). 1913, *Killam v. Wellesley & B. St. R. Co.*, 214 Mass. 283, 101 N. E. 374 (inference from the starting of a car, as to its being started by authority). 1913, *Poole v. Boston & M. R. Co.*, 216 Mass. 12, 102 N. E. 918 (train breaking apart). 1913, *St. Louis v. Bay State St. R. Co.*, 216 Mass. 255, 103 N. E. 639 (electrocution of animal at street rail). 1914, *Hull v. Berkshire R. Co.*, — Mass. —, 104 N. E. 747 (trolley-pole breaking). 1914, *Conley v. United Drug Co.*, — Mass. —, 105 N. E. 975 (explosion of gas-tank).

*Mich.*: 1891, *Barnowski v. Helson*, 89 Mich. 523, 50 N. W. 989, with note in 15 L. R. A. 33. 1909, *Sewell v. Detroit United Ry.*, 158 Mich. 407, 123 N. W. 2 (collision).

*Minn.*: 1907, *Waller v. Ross*, 100 Minn. 7, 110 N. W. 252 (fall of an awning; good opinion by Jaggard, J.). 1909, *Olson v. Pike*, 107 Minn. 411, 120 N. W. 378 (scaffold-rope).

*Miss.*: 1909, *Mobile, J. & K. C. R. Co. v. Kea*, 96 Miss. 195, 50 So. 628 (Code 1906, § 1985, held not applicable on the facts).

*Mo.*: 1904, *Redmon v. Metropolitan St. R. Co.*, 185 Mo. 1, 84 S. W. 26 (passenger). 1904, *Allen v. St. Louis T. Co.*, 183 Mo. 411, 81 S. W. 1142 (passenger).

*Nebr.*: 1905, *Omaha St. R. Co. v. Boesen*, 74 Nebr. 764, 105 N. W. 303 (derailment).

*N. H.*: 1911, *Boucher v. Boston & M. R. Co.*, 76 N. H. 91, 79 Atl. 993 (railway car-window falling).

*N. J.*: 1913, *Levendusky v. Empire R. M. Co.*, 84 N. J. L. 698, 87 Atl. 338 (explosion of boiler).

*N. Y.*: 1906, *Duhme v. Hamburg-Amer. Packet Co.*, 184 N. Y. 404, 77 N. E. 386 (breaking of a hawser). 1908, *Cunningham v. Dody*, 191 N. Y. 152, 83 N. E. 688 (highway). 1909, *Robinson v. Consol. Gas Co.*, 194 N. Y. 37, 86 N. E. 805 (scaffolding). 1909, *Henson v. Lehigh Valley R. Co.*, 194 N. Y. 205, 87 N. E. 85 (employee). 1909, *Eaton v. N. Y. C. & H. R. R. Co.*, 195 N. Y. 267, 88 N. E. 378 (injury by a passing train). 1909, *Ferrick v. Eidlitz*, 195 N. Y. 248, 88 N. E. 33 (fall of roofing). 1912, *Hardie v. Boland Co.*, 205 N. Y. 336, 98 N. E. 661 (fall of chimney).

*N. C.*: 1904, *Womble v. Merchants' G. Co.*, 135 N. C. 474, 47 S. E. 493 (elevator accident). 1905, *Stewart v. Van D. C. Co.*, 138 N. C. 60, 50 S. E. 562 (elevator injury). 1905, *Ross v. Double S. C. Mills*, 140 N. C. 115, 52 S. E. 121 (mill machinery; good opinion by Connor, J.). 1905, *Lyles v. Brannon C. Co.*, 140 N. C. 25, 52 S. E. 233 (soda-water tank explosion). 1908, *Winslow v. Norfolk Hardwood Co.*, 147 N. C. 275, 60 S. E. 1130 (derailment of train).

*Okl.*: 1909, *St. Louis & S. F. R. Co. v. Gosnell*, 23 Okl. 588, 101 Pac. 1126 (passenger). 1913, *Muskogee Electric T. Co. v. McIntire*, 37 Okl. 684, 133 Pac. 213 (derailment).

*Or.*: 1909, *Crosby v. Portland R. Co.*, 53 Or. 496, 101 Pac. 204 (sagging trolley wire). 1909, *Chenoweth v. Southern Pacific Co.*, 53 Or. 111, 99 Pac. 86 (method of rebuttal, discussed). 1909, *Rogers v. Portland Lumber Co.*, 54 Or. 387, 102 Pac. 601 (sawmill).

*Pa.*: 1908, *Ginn v. Pennsylvania R. Co.*, 220 Pa. 552, 69 Atl. 992 (passenger injured by broken window). 1911, *Rocap v. Bell Telephone Co.*, 230 Pa. 597, 79 Atl. 769 (electric wire shock).

*R. I.*: 1905, *Venbuve v. Lafayette W. Mills*, 27 R. I. 89, 60 Atl. 770 (oily factory floor). 1905, *Wilbur v. Rhode Island Co.*, 27 R. I. 205, 61 Atl. 601 (passenger). 1905, *Edwards v. Manufacturers' B. Co.*, 27 R. I. 248, 61 Atl. 646 (elevator).

*S. C.*: 1912, *McLeod v. Atlantic Coast L. R. Co.*, 93 S. C. 71, 76 S. E. 19 (cattle on railroad track).

*U. S.*: 1891, *Gleeson v. Virginia M. R. Co.*, 140 U. S. 435, 441, 11 Sup. 859 (landslide on a

[Note 2 — continued]

railway track). 1905, Cincinnati, N. O. & T. P. R. Co. v. South F. C. Co., 139 Fed. 528, 533 (fire started by a railroad collision). 1906, North Jersey St. R. Co. v. Purdy, 142 Fed. 955, C. C. A. (passenger). 1906, Southern P. Co. v. Cavin, 144 Fed. 348, C. C. A. (passenger). 1909, Nebraska Bridge S. & L. Co. v. Jeffery, 8th C. C. A., 169 Fed. 609 (breaking of a rope). 1909, Erie R. Co. v. Schomer, 6th C. C. A., 171 Fed. 798 (freightcar-handhold). 1909, Waters-Pierce Oil Co. v. Deselms, 212 U. S. 159, 29 Sup. 270 (explosion of oil). 1912, San Juan Light & T. Co. v. Requena, 224 U. S. 89, 32 Sup. 379 (death by contact with wires). 1913, Sweeney v. Erving, 228 U. S. 233, 33 Sup. 416 (X-ray burns).  
*Utah*: 1904, Wells v. Utah C. Co., 27 Utah 524, 76 Pac. 560. 1908, Dearden v. San Pedro L. A. & S. L. R. Co., 36 Utah 147, 93 Pac. 271 (collision by a chain-break).  
*Va.*: 1904, Norfolk R. & L. Co. v. Spratley, 103 Va. 379, 49 S. E. 502 (electric wire). 1904, Moore Lime Co. v. Johnston's Adm'r, 103 Va. 84, 48 S. E. 557 (stationary engine). 1912, Washington-Virginia R. Co. v. Bouknight, 113 Va. 696, 75 S. E. 1032 (derailment).  
*Wash.*: 1903, Towle v. Stimson M. Co., 33 Wash. 305, 74 Pac. 471 (sawmill). 1904, Allen v. Northern P. R. Co., 35 Wash. 221, 77 Pac. 204 (railroad passenger getting on the car). 1905, Williams v. Spokane F. & N. R. Co., 39 Wash. 77, 80 Pac. 1100 (passengers in a collision). 1905, Firebaugh v. Seattle El. Co., 40 Wash. 658, 82 Pac. 995 (passenger on a streetcar). 1909, De Yoe v. Seattle Electric Co., 53 Wash. 588, 102 Pac. 446 (street railway). 1911, Lynch v. Ninemire P. Co., 63 Wash. 423, 115 Pac. 838 (vat explosion).  
*W. Va.*: 1911, Weaver Mercantile Co. v. Thurmond, 68 W. Va. 530, 70 S. E. 126 (bursting of a wooden tank).  
*Wis.*: 1905, Tiborsky v. Chicago, M. & St. P. R. Co., 124 Wis. 243, 102 N. W. 549 (railroad obstructing the sidewalk).  
*Wyo.*: 1912, Acme C. P. Co. v. Westman, 20 Wyo. 143, 122 Pac. 89 (bursting of a coal-bin).

[Note 4; add:]

CANADA: *Man. St.* 1909, 9 Edw. VII, c. 19, § 2. 1913, Cochran v. Lloyd, N. Br. S. C., 11 D. L. R. 721 (under Consol. St. 1903, c. 94).  
 UNITED STATES: 1909, Southern R. Co. v. Dickens, 161 Ala. 144, 49 So. 766.  
 1907, Southern R. Co. v. Thompson, 129 Ga. 367, 58 S. E. 1044.  
 1908, Osburn v. Oregon R. & N. Co., 15 Ida. 478, 98 Pac. 627 (method of rebuttal discussed).  
 1912, Fodey v. Northern Pacific R. Co., 21 Ida. 713, 123 Pac. 835.  
 1907, Stewart v. Iowa C. R. Co. 136 Ia. 182, 113 N. W. 764.  
 1904, Atchison, T. & S. F. R. Co. v. Geiser, 68 Kan. 281, 75 Pac. 68. 1911, Tuttle v. Missouri Pacific R. Co., 86 Kan. 28, 119 Pac. 370.  
 1904, Dyer v. Maine C. R. Co., 99 Me. 195, 58 Atl. 994.  
 1907, Dolph v. Lake Shore & M. S. R. Co., 149 Mich. 278, 112 N. W. 981. 1907, Clark v. Grand Trunk W. R. Co., 149 Mich. 400, 112 N. W. 1121.  
 1906, Continental Ins. Co. v. Chicago & N. W. R. Co., 97 Minn. 467, 107 N. W. 548 (best opinion, by Jaggard, J., under the rule of *prima facie* negligence).  
 1908, Grimm v. Omaha El. L. & P. Co., 79 Nebr. 395, 114 N. W. 769.  
 1911, Kornegay v. Atlantic C. L. R. Co., 154 N. C. 389, 70 S. E. 731. 1911, Maguire v. Seaboard A. L. R. Co., 154 N. C. 384, 70 S. E. 737.  
 1904, Anderson v. Oregon R. Co., 45 Or. 211, 77 Pac. 119.  
 1913, Iowa Cent. R. Co. v. Hampton E. L. & P. Co., 8th C. C. A., 204 Fed. 961 (construing Iowa Code 1897, § 2056).  
 1912, Northwestern M. F. Ass'n v. Northern P. R. Co., 68 Wash. 292, 123 Pac. 468. 1911, Thorgrimsen v. Northern Pacific R. Co., 64 Wash. 500, 117 Pac. 406.

[Note 5, par. 1; add:]

Fla. Gen. St. 1906, § 3148 (for personal injury, the presumption is "in all cases against the railroad company"). 1913, Hammond v. Jacksonville El. Co., 66 Fla. 145, 63 So. 709 (applying the statute).

[*Note 5 — continued*]

1906, *Illinois C. R. Co. v. Stanley*, — Ky. —, 96 S. W. 846.  
 Miss. Code 1905, § 1985 (presumption to arise for any personal injury inflicted by "the running of the locomotive or cars").  
 1913, *Alabama & V. R. Co. v. Thornhill*, — Miss. —, 63 So. 674 (examining the decisions under the statute).  
 N. C. Rev. 1905, § 2645 (like Code 1883, § 2326). 1908, *Cox v. Aberdeen & A. R. Co.*, 149 N. C. 117, 62 S. E. 884.

[*Text*, p. 3558, l. 2, after "live-stock"; *insert*.:]

, or the doing of any *personal injury*,

[*Note 5*, par. 2; *add*.:]

1906, *Williams v. Sleepy H. M. Co.*, 37 Colo. 62, 86 Pac. 337 (employee's knowledge of danger).  
 1907, *National Biscuit Co. v. Wilson*, 169 Ind. 442, 82 N. E. 916 (elevator).  
 1907, *Curtin v. Boston Elev. R. Co.*, 194 Mass. 260, 80 N. E. 522.  
 1906, *Fearington v. Blackwell D. T. Co.*, 141 N. C. 80, 53 S. E. 662 (elevator). 1906, *Fitzgerald v. Southern R. Co.*, 141 N. C. 530, 54 S. E. 391 (loading coal).  
 1905, *Northern Pacific R. Co. v. Dixon*, 139 Fed. 737, C. C. A. (collision). 1905, *Shandrew v. Chicago St. P. M. & O. R. Co.*, 142 Fed. 320, 323, C. C. A.

# § 2510. Same: (4) *Death by Violence.*

[*Note 1*; *add*.:]

1903, *Pomfret v. Lancashire & Y. R. Co.*, 2 K. B. 718.  
 1911, *Grand Trunk R. Co. v. Griffith*, 45 Can. Sup. 380 (death at a crossing).  
 1904, *Billing v. Semmens*, 7 Ont. L. R. 340 (factory machine).  
 1906, *Little Rock R. & E. Co. v. Green*, 78 Ark. 129, 93 S. W. 752.  
 1913, *Chiara v. Stewart Mining Co.*, 24 Ida. 473, 135 Pac. 245 (mine employee).  
 1906, *Chicago & A. R. Co. v. Wilson*, 225 Ill. 50, 80 N. E. 56. 1909, *Collison v. Illinois Central R. Co.*, 239 Ill. 532, 88 N. E. 251. 1909, *Wilkinson v. Aetna Life Ins. Co.*, 240 Ill. 205, 88 N. E. 550. 1914, *Newell v. Cleveland C. C. & St. L. R. Co.*, 261 Ill. 505, 104 N. E. 223.  
 1910, *Grand Trunk Western R. Co. v. Reynolds*, 175 Ind. 161, 92 N. E. 733.  
 1905, *Rietveld v. Wabash R. Co.*, 129 Ia. 249, 105 N. W. 515. 1906, *Christopherson v. Chicago, M. & St. P. R. Co.*, 135 Ia. 409, 109 N. W. 1077. 1906, *Ellis v. Republic Oil Co.*, 133 Ia. 11, 110 N. W. 20 (oil explosion). 1910, *Korah v. Chicago R. I. & P. R. Co.*, 149 Ia. 711, 128 N. W. 529. 1913, *Platter v. Minneapolis & St. Louis R. Co.*, — Ia. —, 143 N. W. 992.  
 1904, *Kansas C. L. R. Co. v. Gallagher*, 68 Kan. 424, 75 Pac. 469. 1906, *Atchison T. & S. F. R. Co. v. Baumgartner*, 74 Kan. 148, 85 Pac. 822.  
 1914, *O'Brien v. Boston Elev. R. Co.*, — Mass. —, 104 N. E. 442. 1914, *Chester v. Murtfeldt Co.*, 216 Mass. 537, 104 N. E. 483. 1914, *McCulloch v. Needham*, — Mass. —, 104 N. E. 484.  
 1909, *Nilson v. Chicago B. & Q. R. Co.*, 84 Nebr. 595, 121 N. W. 1128.  
 1905, *Stevens v. United G. & E. Co.*, 73 N. H. 159, 60 Atl. 848. 1909, *Gibson v. Maine C. R. Co.*, 75 N. H. 342, 74 Atl. 589. 1913, *Greenwood v. Boston & M. R. Co.*, — N. H. —, 88 Atl. 217 (inference repudiated).  
 1909, *Kunkel v. Minneapolis St. P. & S. S. M. R. Co.*, 18 N. D. 367, 121 N. W. 830.  
 1913, *Worthington v. Elmer*, 6th C. C. A., 207 Fed. 306 (railroad brakeman).  
 1912, *Lewis v. Rio Grande W. R. Co.*, 40 Utah 483, 123 Pac. 97 (death at a grade crossing).  
 1908, *Shum's Adm'x v. Rutland R. Co.*, 81 Vt. 186, 66 Atl. 945 (reviewing cases).  
 1904, *Newport N. P. Co. v. Beaumeister*, 102 Va. 677, 47 S. E. 821.

[*Note 2; add:*]

1906, *Grand Lodge v. Banister*, 80 Ark. 190, 96 S. W. 742.  
 1905, *Preferred Acc. Ins. Co. v. Fielding*, 35 Colo. 19, 83 Pac. 1013.  
 1909, *Mittelstadt v. Modern Woodmen*, 143 Ia. 186, 121 N. W. 803. 1909, *Gray v. Chicago R. I. & P. R. Co.*, 143 Ia. 268, 121 N. W. 1097. 1909, *Van Norman v. Modern Brotherhood*, 143 Ia. 536, 121 N. W. 1080. 1913, *Allen v. Travelers' Protective Ass'n*, — Ia. —, 143 N. W. 574, 585, per Deemer, J.  
 1907, *Lindahl v. Supreme Court I. O. F.*, 100 Minn. 87, 110 N. W. 359 (suicide). 1907, *Kornig v. Western Life Ind. Co.*, 102 Minn. 31, 112 N. W. 1039.  
 1903, *Stevens v. Continental C. Co.*, 12 N. D. 463, 97 N. W. 862.  
 1910, *Bircher v. Modern Brotherhood*, 25 S. D. 325, 126 N. W. 583.  
 1905, *Starr v. Aetna L. Ins. Co.*, 41 Wash. 199, 83 Pac. 113 (accident).

§ 2511. Crimes: (1) Innocence, Malice, Intent, etc.

[*Note 1; add:*]

This little bundle of humor ("Scintillac Juris") is now known to be of Mr. Justice Darling's authorship, and has reached its sixth edition (1914; London, Stevens & Haynes).

[*Note 3, par. 1, l. 20; add:*]

1910, *Holt v. U. S.*, 218 U. S. 245, 31 Sup. 2 (the trial Court's refusal to give an instruction stating that "this presumption of innocence is evidence in the defendant's favor," held not improper, citing *Agnew v. U. S.*, and the above text; the statement was said to have "a tendency to mislead"). 1912, *Keliher v. U. S.*, C. C. A., 193 Fed. 8 (*Holt v. U. S.*, 218 U. S. 253, followed, not *Coffin v. U. S.*).

[*Note 3, par. 2, l. 2; add:*]

1906, *Williams v. State*, 144 Ala. 14, 40 So. 205.  
 1910, *Bailey v. State*, 168 Ala. 4, 53 So. 296, 390 (per Bailey, J., diss.).  
 1904, *People v. Moran*, 144 Cal. 48, 77 Pac. 777.  
 1906, *McDuffee v. State*, 55 Fla. 125, 46 So. 721.  
 1907, *Com. v. Sinclair*, 195 Mass. 100, 80 N. E. 799 ("The presumption of innocence is not a matter of evidence").  
 1910, *Berry v. State*, 4 Okl. Cr. 202, 111 Pac. 676. 1910, *Culpepper v. State*, 4 Okl. Cr. 103, 111 Pac. 679 (careful opinion, by Richardson, J., approving Professor Thayer's demonstration of the fallacy, and containing all the reasoning on the subject). 1911, *Adair v. State*, 6 Okl. Cr. 284, 118 Pac. 416 (*Culpepper v. State* followed).  
 1904, *State v. Quigley*, 26 R. I. 263, 58 Atl. 905 ("when the evidence works conviction beyond a reasonable doubt, the presumption of innocence withdraws its protection").

[*Note 3, par. 2; at the end, add:*]

1911, *Freeman v. Blount*, 172 Ala. 655, 55 So. 293.  
 1912, *Webb v. State*, 11 Ga. App. 850, 76 S. E. 990.  
 1905, *Everett v. People*, 216 Ill. 478, 75 N. E. 188 (*Coffin v. U. S.* approved). 1906, *Flynn v. People*, 222 Ill. 303, 78 N. E. 617 (a fine word-juggle). 1910, *People v. Ambach*, 247 Ill. 451, 93 N. E. 310 (an instruction which does not make plain that the presumption of innocence continues in every stage is erroneous).  
 1903, *State v. Brady*, 121 Ia. 561, 97 N. W. 62. 1903, *State v. Linhoff*, 121 Ia. 632, 97 N. W. 77.  
 1907, *State v. Wolfley*, 75 Kan. 406, 93 Pac. 337.  
 1904, *U. S. v. Griego*, 12 N. M. 84, 75 Pac. 30.  
 1913, *Monaghan v. State*, — Okl. Cr. App. —, 134 Pac. 77.  
 1907, *Thomas v. U. S.*, *Taggart v. U. S.*, 8th C. C. A., 156 Fed. 897, 913.

[*Note 3 — continued*]

1905, *Cowdry's Will*, 77 Vt. 359, 60 Atl. 141 (where Rowell, C. J., even after referring to Professor Thayer's criticism of the Coffin Case, seems unable to make up his mind on the subject and decides to let the criticised rule remain, "as it is so embedded in our law" (?) and "works well enough in practice").

1906, *State v. Mayo*, 42 Wash. 540, 85 Pac. 251.

See an interesting note, upholding a median view, in the *Columbia Law Review* (1908), VIII, 127.

[*Note 4, par. 1, as to deadly weapons; add:*]

1912, *Welty v. State*, — Ind. —, 100 N. E. 73.

1911, *State v. Truskett*, 85 Kan. 804, 118 Pac. 1047 (careful opinion, by Benson, J., upon the nature of the presumption).

1910, *Com. v. Greene*, 227 Pa. 86, 75 Atl. 1024.

[*Note 4, par. 2; add:*]

1904, *State v. Poe*, 123 Ia. 118, 98 N. W. 587.

Nor from any other conduct of the defendant evidencing *consciousness of guilt*:

1909, *Mills v. State*, 133 Ga. 155, 65 S. E. 368 (virtually reading P. C. 1895, § 989, out of the law; here, the accused's failure to produce evidence).

§ 2512. *Same*: (2) *Self-Defence, Alibi, etc.*

[*Note 1; add:*]

*Accord*: 1911, *State v. Leakey*, 44 Mont. 354, 120 Pac. 234.

1910, *Prince v. U. S.*, 3 Okl. Cr. 706, 109 Pac. 241 (for Arkansas law). 1911, *Tinker v. State*, 5 Okl. Cr. 584, 115 Pac. 473.

1912, *State v. Dewey*, — Utah —, 127 Pac. 275.

*Contra*: 1908, *Com. v. Deitrick*, 221 Pa. 7, 70 Atl. 275.

[*Note 2; add:*]

1907, *McEwen v. State*, 152 Ala. 38, 44 So. 619 (former instructions reviewed).

1904, *Anderson v. Terr.*, 9 Ariz. 50, 76 Pac. 636.

1905, *Zipperian v. People*, 33 Colo. 134, 79 Pac. 1018 (prosecution has the burden entirely).

1905, *State v. Morris*, 128 Ia. 717, 105 N. W. 213.

1911, *State v. Ardoin*, 128 La. 14, 54 So. 407 (the burden is not on the accused).

1907, *State v. Hazlet*, 16 N. D. 426, 113 N. W. 374 (careful examination of the cases, in the light of the peculiar State statute).

1908, *Com. v. Palmer*, 222 Pa. 229, 71 Atl. 100. 1911, *Com. v. Colandro*, 231 Pa. 343, 80 Atl. 571 (the defendant must prove by a preponderance).

1904, *State v. McDaniel*, 68 S. C. 304, 47 S. E. 384.

[*Note 3; add:*]

1906, *Barton v. Terr.*, 10 Ariz. 68, 85 Pac. 730.

1911, *State v. Brauneris*, 84 Conn. 222, 79 Atl. 70.

1908, *McDuffee v. State*, 55 Fla. 125, 46 So. 721.

1908, *Smith v. State*, 4 Ga. App. 807, 61 S. E. 737.

1905, *Flanagan v. People*, 214 Ill. 170, 73 N. E. 347. 1905, *Briggs v. People*, 219 Ill. 330, 76 N. E. 499 (phrasing of instruction considered).

1904, *State v. Worthen*, 124 Ia. 408, 100 N. W. 330 (peculiar rule).

1908, *State v. Nelson*, 17 N. D. 13, 114 N. W. 478.

1903, *Legere v. State*, 111 Tenn. 368, 77 S. W. 1059.

[Note 4; add:]

*Duress* should be likewise treated:

1911, *State v. Sappienza*, 84 Oh. 63, 95 N. E. 381 (duress "is an affirmative defence," to be established by a preponderance of evidence).

§ 2513. Same: (3) Possession of Stolen Goods.

[Note 3; add:]

1904, *R. v. Theriault*, 11 Br. C. 117.

1909, *Douglass v. State*, 91 Ark. 492, 121 S. W. 923. 1909, *Wiley v. State*, 92 Ark. 586, 124 S. W. 249.

1905, *People v. Davis*, 147 Cal. 346, 81 Pac. 718.

1904, *State v. Carr*, 4 Del. 523, 57 Atl. 370.

1908, *McDonald v. State*, 56 Fla. 74, 47 So. 485. 1909, *Bass v. State*, 58 Fla. 1, 50 So. 531.

1908, *State v. Peck*, 14 Ida. 712, 95 Pac. 515. 1909, *People v. Deluce*, 237 Ill. 541, 86 N. E.

1080. 1908, *Mason v. State*, 171 Ind. 78, 85 N. E. 776.

1904, *State v. Raphael*, 123 Ia. 452, 99 N. W. 151. 1909, *State v. Carter*, 144 Ia. 280, 121

N. W. 694. 1911, *State v. Kimes*, 152 Ia. 240, 132 N. W. 180. 1913, *State v. Clark*, — Ia. —, 140 N. W. 821.

1911, *Pittsburg C. C. & St. L. R. Co. v. Austin's Adm'r*, 141 Ky. 722, 133 S. W. 780 (personal injury law).

1904, *State v. Drew*, 179 Mo. 315, 78 S. W. 594. 1906, *State v. Wright*, 199 Mo. 161, 97 S. W. 874. 1909, *Rogers v. Wilson*, 220 Mo. 213, 119 S. W. 369. 1910, *State v. Court*, 225

Mo. 609, 125 Mo. 451. 1910, *State v. Hammons*, 226 Mo. 604, 126 S. W. 422.

1906, *Terr. v. Livingston*, 13 N. M. 318, 84 Pac. 1021.

1904, *State v. Lax*, 71 N. J. L. 386, 59 Atl. 18.

1913, *State v. Anderson*, 162 N. C. 571, 77 S. E. 238.

1913, *State v. Schonberg*, 24 N. D. 532, 140 N. W. 105.

1908, *Slater v. U. S.*, 1 Okl. Cr. 275, 98 Pac. 110. 1909, *Cox v. Terr.*, 2 Okl. Cr. 668, 104 Pac. 378.

1909, *State v. Minnick*, 54 Or. 86, 102 Pac. 605.

1909, *State v. Winter*, 83 S. C. 153, 65 S. E. 209.

1911, *State v. Potello*, 40 Utah 56, 119 Pac. 1023 (construing Comp. L. 1907, § 4355).

1911, *State v. Hatfield*, 65 Wash. 550, 118 Pac. 735.

[Note 6, l. 6; add:]

1909, *Sorenson v. U. S.*, 8th C. C. A., 168 Fed. 785 (possession of a watch by the defendant's wife, not admitted).

[Note 7; add:]

1905, *State v. Richmond*, 186 Mo. 71, 84 S. W. 880 (declaring both the *Guild* and the *Bulla* cases to be correct!).

[Note 8; add:]

1906, *Gunter v. State*, 79 Ark. 432, 96 S. W. 181 (burglary).

1904, *People v. Lang*, 142 Cal. 482, 76 Pac. 232.

1907, *Miller v. People*, 229 Ill. 376, 82 N. E. 391.

1903, *State v. Brady*, 121 Ia. 561, 97 N. W. 62. 1913, *State v. Stutches*, — Ia. —, 144 N. W. 597.

1909, *State v. Sparks*, 40 Mont. 82, 105 Pac. 87.

1905, *Winsky v. State*, 126 Wis. 99, 105 N. W. 480.

The same question arises as to a presumption of *fabrication* or of *knowledge*, from the *utterance* or *possession* of a *forged* instrument:

1907, *State v. Waterbury*, 133 Ia. 135, 110 N. W. 328.

1903, *State v. Psyche*, 179 Mo. 140, 77 S. W. 836.

[Note 9; add:]

1911, *State v. Kelly*, 22 N. D. 5, 132 N. W. 223 (liquor).

§ 2514. Same: (4) Capacity (Infancy, etc.).

[Note 3; add:]

1906, *State v. Fisk*, 15 N. D. 589, 108 N. W. 485 (rape; under the statute, the State must show criminal intent, for a child between 7 and 14; collecting the authorities at common law).

[Note 5; add:]

*Contra*: 1904, *State v. Corriveau*, 93 Minn. 38, 100 N. W. 638.

[Note 6; add:]

1906, *State v. Harvey*, 130 Ia. 394, 106 N. W. 938 (arson).  
1904, *Com. v. Adams*, 186 Mass. 101, 71 N. E. 78.

§ 2515. Ownership; (1) Possession of Land, etc.

[Note 2; add:]

1906, *Glos v. Ault*, 221 Ill. 562, 77 N. E. 939 (possession under claim of ownership being *prima facie* evidence of ownership, a deed from such a possessor may be *prima facie* evidence of ownership).

[Note 3, par. 1; add:]

*E.g.*, *Richmond v. Jones*, 1910, 111 Va. 214, 68 S. E. 181 (ejectment; defendant set up a prior grant; burden of proof held to be on plaintiff throughout).

[Note 4, par. 1; add:]

1906, *Roberts v. Ringemann*, 145 Ala. 678, 40 So. 81 (personalty levied on).  
1905, *Vinson v. Knight*, 137 N. C. 408, 49 S. E. 891 (trover).

It seems practical to hold, as Courts are more inclined to do, that the operation of railroad premises may be sufficient evidence of ownership or control of the rolling stock: 1904, *Chicago & E. I. R. Co. v. Schmitz*, 211 Ill. 446, 71 N. E. 1050.

1904, *Spink v. N. Y. N. H. & H. R. Co.*, 26 R. I. 115, 58 Atl. 499 (operation of locomotives raises a presumption of ownership or at least control). Compare the admissibility of reputation for this purpose (*ante*, § 1587).

§ 2516. Same: (2) Possession of Negotiable Instrument.

[Note 1; add:]

1910, *King v. Bellamy*, 82 Kan. 220, 108 Pac. 118.  
1912, *Reed v. McCready*, 170 Mich. 532, 136 N. W. 488.  
1904, *Huntley v. Hutchinson*, 91 Minn. 244, 97 N. W. 971.  
1905, *Cuyler v. Wallace*, 183 N. Y. 291, 76 N. E. 1 (insurance policy).  
1905, *Tyson v. Joyner*, 139 N. C. 69, 51 S. E. 803 (indorsed in blank).

§ 2517. Payment; (1) Lapse of Time.

[Note 1; add:]

1909, *Roach v. Cox*, 160 Ala. 425, 49 So. 578 (surety).  
1910, *Jenkins v. Andover Theol. Seminary*, 205 Mass. 376, 91 N. E. 552 (mortgagor's possession for 20 years).  
1905, *Ayres v. Ayres*, 69 N. J. Eq. 343, 60 Atl. 422 (note).

[Note 1 — continued]

- 1905, Conkling v. Weatherwax, 181 N. Y. 258, 73 N. E. 1028 (legacy).  
 1911, Wright v. Hull, 83 Oh. 385, 94 N. E. 813 (receipt).  
 1905, Allison's Ex'r v. Wood, 104 Va. 765, 52 S. E. 559 (bond).  
 1911, Holway v. Sanborn, 145 Wis. 151, 130 N. W. 95 (rebutting evidence, considered).

§ 2518. Same: (2) Possession of Instrument or Receipt.

[Note 2; add:]

- 1904, Sarraile v. Calmon, 142 Cal. 651, 76 Pac. 497 (note).

§ 2520. Execution of Deeds (Delivery, etc.).

[Note 3; add, under Accord:]

- 1905, Cribbs v. Walker, 74 Ark. 104, 85 S. W. 244 (here considering the contrary presumption of non-delivery from grantor's possession after death).  
 1908, Walker v. Warner, 31 D. C. App. 76, 86.  
 1908, Potter v. Barringer, 236 Ill. 224, 86 N. E. 233. 1911, Schroeder v. Smith, 249 Ill. 574, 94 N. E. 969.  
 1906, Shetler v. Stewart, 133 Ia. 320, 107 N. W. 310 (deed; contrary presumption from grantor's possession, considered).  
 1906, Amos-Richia v. Northwestern M. L. Ins. Co., 143 Mich. 684, 107 N. W. 707 (insurance policy; presumption not raised on the facts).  
 1909, Wilson v. Wilson, 85 Nebr. 167, 122 N. W. 856.  
 1906, Pierson v. Fisher, 48 Or. 223, 85 Pac. 621.  
 1906, Webb v. Ritter, 60 W. Va. 193, 54 S. E. 484 (deed).  
 1913, Butts v. Richards, 152 Wis. 318, 140 N. W. 1.

[Note 3; add. a new par. 3:]

Where a deed is found in the *grantor's possession*, the presumption is the opposite:

- 1911, Cassidy v. Holland, 77 S. D. 287, 130 N. W. 771.

For the rule as to the presumption of delivery to aid a *voluntary deed* between *family members* or confidential parties, see the following: 1905, Henry v. Henry, 215 Ill. 205, 74 N. E. 126 (deed found in the grantor's custody after death). 1905, Coleman v. Coleman, 216 Ill. 261, 74 N. E. 701 ("The law presumes more in favor of the delivery of deeds in case of voluntary settlements, especially when made to infants, than it does in ordinary cases of bargain and sale"). 1905, Thompson v. Calhoun, 216 Ill. 161, 74 N. E. 775 (similar; here a deed to an adult son).

[Note 4, par. 1; add:]

- 1906, Hanchett v. Haas, 219 Ill. 546, 76 N. E. 845. 1906, Calkins v. Calkins, 220 Ill. 111, 77 N. E. 102. 1908, Blankenship v. Hall, 233 Ill. 116, 84 N. E. 192. 1911, Schroeder v. Smith, 249 Ill. 574, 94 N. E. 969. 1911, Spencer v. Razor, 251 Ill. 278, 96 N. E. 300.  
 1905, Webb v. Webb, 130 Ia. 457, 104 N. W. 438. 1911, Stiles v. Beed, 151 Ia. 86, 130 N. W. 376. 1913, Tucker v. Glew, — Ia. —, 139 N. W. 565.  
 1907, Pentico v. Hays, 75 Kan. 76, 88 Pac. 738.  
 1906, Collings v. Collings, — Ky. —, 92 S. W. 577.  
 1904, Peters v. Berkemeier, 184 Mo. 393, 83 S. W. 747. 1910, Chambers v. Chambers, 227 Mo. 262, 127 S. W. 86.  
 1865, Younge v. Guilbeau, 3 Wall. 636.

[Note 4, par. 2; add:]

- 1909, Hansen v. Owens, 132 Ga. 648, 64 S. E. 800 (where a recorded deed bears the purporting signature of one proved to have been an illiterate, but the authority of the illiterate to

[*Note 4 — continued*]

another person in law might make the signature valid, the presumption of genuineness ceases; on the evidence the jury decides).

So also the statutory *certificate of acknowledgment* alone:

1907, *Tucker v. Helgren*, 102 Minn. 382, 113 N. W. 912 (giving effect to Rev. L. 1905, § 4710).

Compare here the rule for admissibility of certified copies and certificates of acknowledgment (*ante*, §§ 1676, 1680).

For the burden of proof under statutes requiring a *sworn denial* of execution, see *post*, § 2596, *ante*, § 2146.

[*Note 5; add:*]

1910, *People v. Campbell*, 160 Mich. 108, 125 N. W. 42 (note).

1909, *Barden v. Hornthal*, 151 N. C. 8, 65 S. E. 513 (not decided; whether an indorsement is presumed to have been of the date of the note's execution).

1905, *Leonard v. Fleming*, 13 N. D. 629, 102 N. W. 308.

[*Note 6; add:*]

1913, *Calligan v. Calligan*, 259 Ill. 52, 102 N. E. 247.

1908, *Conway v. Rock*, 139 Ia. 162, 117 N. W. 273.

But not the time of *affixing a seal*, unless recited: 1910, *In re Pirie*, 198 N. Y. 209, 91 N. E. 587 (citing cases).

[*Text*, p. 3567, par. (b); *add:*]

The *authority of an agent*, purporting to execute for his principal, is not presumed.<sup>66</sup>

<sup>66</sup> 1888, *Fadner v. Hibler*, 26 Ill. App. 639. 1890, *Darst v. Doom*, 38 Ill. App. 397.

1877, *Swaine v. Marriott*, 28 N. J. Eq. 589.

1905, *McClung v. McPherson*, 47 Or. 73, 82 Pac. 13. Otherwise for an *ancient document* (*ante*, § 2144).

Compare the effect of an *admission* in such cases (*ante*, § 2134).

## § 2522. Same: (4) Lost Grant, etc.

[*Note 2; add:*]

1903, *Flanagan v. Mathieson*, 70 Nebr. 223, 97 N. W. 287.

1913, *Oregon & Cal. R. Co. v. Grubissich*, 9th C. C. A., 206 Fed. 577 (railroad land in Oregon; the above statement approved by Gilbert, J., for the majority).

1905, *Logan v. Ward*, 58 W. Va. 366, 52 S. E. 398 (land).

## § 2523. Same: (5) Will (Execution and Revocation).

[*Note 1; add:*]

The presumption of genuineness from the *age* and *custody* of an *ancient document* may also apply to wills (*ante*, § 2145).

[*Note 2; add:*]

1913, *St. Mary's Home v. Dodge*, 257 Ill. 518, 101 N. E. 46.

1910, *Sellards v. Kirby*, 82 Kan. 291, 108 Pac. 73.

1904, *Colbert's Estate*, 31 Mont. 461, 78 Pac. 971, 80 Pac. 248.

1905, *Williams v. Miles*, 73 Nebr. 193, 102 N. W. 482.

1903, *Stevens v. Stevens*, 72 N. H. 360, 56 Atl. 916.

[*Note 2 — continued*]

- 1911, *Cunnion's Will*, 201 N. Y. 123, 94 N. E. 648.  
 1904, *Gfeller v. Lappe*, 208 Pa. 48, 57 Atl. 59.  
 1912, *Zeigenhagen's Will*, 148 Wis. 382, 134 N. W. 905.

[*Note 3; add:*]

For the burden of proof under the Ohio statute as to *lost wills probated by an established copy*, see the following:

- 1905, *Hutson v. Hartley*, 72 Oh. 262, 74 N. E. 197.

[*Text*, p. 3569, last line of § 2523; *add* a new paragraph:]

- (c) *Intestacy* upon death is presumed.<sup>4</sup>

<sup>4</sup> 1911, *Sielbeck v. Grothman*, 248 Ill. 435, 94 N. E. 67.

### § 2525. Same: (7) *Alteration of Documents.*

[*Note 1; add:*]

- 1905, *Crediton v. Exeter*, L. R. 2 Ch. 455, 458.  
 1910, *R. v. Graves*, 21 Ont. 329, 340 (record of conviction).  
 1903, *Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107 (lease). 1905, *Merritt v. Dewey*, 218 Ill. 599, 75 N. E. 1066 (note). 1906, *Gage v. Chicago*, 225 Ill. 218, 80 N. E. 127 (certified copy of an ordinance).  
 1905, *Thomas v. Thomas*, 129 Ia. 159, 105 N. W. 403.  
 1908, *Scott v. Thrall*, 77 Kan. 688, 93 Pac. 563 (will; good opinion by Benson, J.).  
 1904, *Wheaden v. Turregano*, 112 La. 931, 36 So. 808 (lease).  
 1909, *Foss v. McRae*, 105 Me. 140, 73 Atl. 827 (careful opinion).  
 1904, *Graham v. Middleby*, 185 Mass. 349, 70 N. E. 416 (bond).  
 1907, *Colby v. Foxworthy*, 80 Nebr. 239, 114 N. W. 174 (note).  
 1912, *Wicker v. Jones*, 159 N. C. 102, 74 S. E. 801 (deed; careful opinion by Allen, J.).  
 1911, *Cornog v. Wilson*, 231 Pa. 281, 80 Atl. 174 (note).  
 1905, *Philip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 52 S. E. 515 (contract).

### § 2526. *Gifts and Trusts, etc.*

[*Note 2; add:*]

- 1905, *Hoon v. Hoon*, 126 Ia. 391, 102 N. W. 105 (conveyance).

### § 2527. *Legitimacy.*

[*Note 3, par. 1; add:*]

- 1904, *Canaan v. Avery*, — Conn. —, 58 Atl. 509 (the wife's adultery during the gestation-period cannot be shown).  
 1905, *Godfrey v. Rowland*, 16 Haw. 377, 502.  
 1912, *People v. Case*, 171 Mich. 282, 137 N. W. 55.  
 1906, *Breidenstein v. Bertram*, 198 Mo. 328, 95 S. W. 828 (Rev. St. 1899, § 2917, providing that subsequent marriage and the recognition of the child legitimates it, *semble*, does not make such recognition conclusive).  
 1911, *Powell v. Fowler*, 84 Oh. 165, 95 N. E. 660 (bastardy filiation proceedings; modified rule adopted).  
 1904, *Kennington v. Catoe*, 68 S. C. 470, 47 S. E. 719 (legitimacy of a son born 11 months after marriage; unchaste conduct with other men before marriage and after birth, excluded).  
 1911, *Osborne v. Ramsay*, C. C. A., 191 Fed. 114 (presumption applied).

§ 2528. **Chastity; Child Bearing.**

[*Note 1; add, under Accord:*]

1904, *Caldwell v. State*, 73 Ark. 139, 83 S. W. 929 (seduction). 1905, *Rucker v. State*, 77 Ark. 23, 90 S. W. 151 (seduction).

[*Note 2; add:*]

1912, *Knight v. State*, 64 Tex. Cr. 541, 144 S. W. 967 (collecting the authorities).

Furthermore, even though it be presumed, the State in a prosecution for *seduction* may on the case in chief offer evidence of the chastity:

1912, *Knight v. State*, 64 Tex. Cr. 541, 144 S. W. 967. This really involves the principle of Order of Evidence (*ante*, § 1869).

[*Note 3; add:*]

1913, *Ewell v. Ewell*, 163 N. C. 233, 79 S. E. 509.

§ 2529. **Identity of Person, etc.**

[*Note 3; add:*]

*Canada*: 1906, *R. v. Byron*, 37 N. Br. 383 (certificate of prior conviction, held sufficient on the facts).

1910, *R. v. Atkinson*, 44 N. Sc. 521 (certificate of prior conviction of "Benjamin Atkinson" of the same address, held sufficient).

*United States*: 1913, *Thompson v. State*, 66 Fla. 206, 63 So. 423 (second offence; more evidence than mere identity of names required).

1908, *Clifford v. Pioneer Fireproofing Co.*, 232 Ill. 150, 83 N. E. 448 (conviction of Eugene Meyers, admitted; "where the names are identical," no other evidence is needed).

1905, *State v. Loser*, 132 Ia. 419, 104 N. W. 337 (conviction of "William S. B.," admitted to impeach William B.). 1906, *State v. Smith*, 129 Ia. 709, 106 N. W. 187 (former conviction of "John A. Smith," not admitted against John Smith with other evidence of identity; *Deemer, J., diss.*).

1913, *Ayers v. Ratschesky*, 213 Mass. 589, 101 N. E. 78 (prior conviction of a witness; identity of name, occupation, and residence, held sufficient on the facts).

1912, *State v. Wooten*, 92 S. C. 61, 75 S. E. 212 ("W. E. Wooten" and "Ed. Wooten").

1905, *Colbert v. State*, 125 Wis. 423, 104 N. W. 61 (former conviction; identity of name suffices).

[*Note 4; add:*]

1911, *Bellis' Case*, 6 Cr. App. 283 (rape under age; some evidence of identity of the girl besides the name on the birth certificate, required).

1911, *Birtles' Case*, 6 Cr. App. 177 (bigamy; similar, for a marriage certificate).

1905, *Snowman v. Mason*, 99 Me. 490, 59 Atl. 1019 (*Wedgwood's Case* followed, in a suit for criminal conversation).

1905, *Bowman v. Little*, 101 Md. 273, 61 Atl. 223, 657, 1084 (marriage certificate; evidence of identity held insufficient; *Pearce, J., dissenting*, and properly, from the extraordinary opinion of the majority).

1906, *State v. Thompson*, 31 Utah, 228, 87 Pac. 709 (adultery; some evidence of identity required). 1912, *State v. Springer*, 40 Utah, 471, 121 Pac. 976 (adultery; there must be some other evidence of identity than the names in the marriage certificate).

[*Note 5; add:*]

1913, *Swindall v. Ford*, — Ala. —, 63 So. 651 ("B. M. Ford" presumed the same, in a deed acknowledgment).

1906, *People v. Wong Sang Lung*, 3 Cal. App. 221, 84 Pac. 843 (not presumed where there

[*Note 5 — continued*]

are other persons of the same name in the neighborhood). 1908, *Napa S. Hospital v. Dasso*, 153 Cal. 698, 96 Pac. 355 ("Tasso" and "Dasso" presumed the same, in an order of hospital commitment).

1904, *Martin v. Brand*, 182 Mo. 116, 81 S. W. 443 (land-patent entry).

1905, *Fowler v. Stebbins*, 136 Fed. 365, C. C. A. 209 (parties to a judgment). 1906, *McInerney v. U. S.*, 145 Fed. 729, 739, C. C. A. (immigrant).

**§ 2530. Continuity : (1) In general (Ownership, etc.).**

[*Note 2; add:*]

*Insanity*: 1904, *Branstrator v. Crow*, 162 Ind. 362, 69 N. E. 668.

1905, *State v. Austin*, 71 Oh. 317, 73 N. E. 218.

*Residence*: 1910, *Holtan v. Beck*, 20 N. D. 5, 125 N. W. 1048 (residence for six months in the same precinct, not presumed on the facts).

1907, *State v. Jackson*, 79 Vt. 504, 65 Atl. 657 (domicile of an ancestor).

[*Note 2, last paragraph; add:*]

1905, *Friend v. Yahr*, 126 Wis. 291, 104 N. W. 997 (possession of documents, presumed to continue).

**§ 2531. Same : (2) Life and Death.**

[*Note 1; add:*]

1905, *Re Aldersey*, 2 Ch. 181 (Kekewich, J.: "Phene's Trusts is not precisely this case, though it is not very far from it").

[*Note 3, par. 1; add:*]

1911, *Allman v. McCabe*, 2 Ire. 398 (a lease made in 1822 for the term of 21 years after the death of the survivor of three persons, D. C., then aged 11, B. T. aged 15, R. F. aged 9; B. T. was proved to have died in 1888; a witness testified that he had lived in the town for 18 years prior to 1888 and had inquired for D. C. and R. F. but never heard of them; the trial took place in 1910; held, that D. C. and R. F. were presumed to have died before 1888, and that the 21 years began to run in 1888).

1908, *Re Ancient Order of United Workmen and M. A. Marshall*, 18 Ont. L. R. 129 (husband disappearing after entering a sailboat).

[*Note 3, par. 2; add:*]

1909, *Hansen v. Owens*, 132 Ga. 648, 64 S. E. 800.

1910, *Kennedy v. Modern Woodmen*, 243 Ill. 560, 90 N. E. 1084 (neither a mere rumor that the alleged deceased has been alive in the interval, nor the party-claimant's failure to follow up such a rumor by inquiry, suffice to prevent the operation of the presumption). Ind. St. 1907, c. 31, p. 50, Feb. 21 (presumption after five years' absence from usual place of business and departure to parts unknown, upon publication of notice in newspaper, etc.).

1909, *Magness v. Modern Woodmen*, 146 Ia. 1, 123 N. W. 169 (here the rule is stated rather too strictly for raising the presumption).

1905, *Modern Woodmen v. Gerdorn*, 72 Kan. 391, 82 Pac. 1100 (interesting opinion by Burch, J., emphasizing the necessity of inquiry and of consequent lack of news).

1905, *Chapman v. Kullman*, 191 Mo. 237, 89 S. W. 924 (statute applied).

1912, *Fuller v. New York Life Ins. Co.*, C. C. A., 199 Fed. 897 (excellent opinion by J. B. McPherson, J.).

1909, *Miller v. Sovereign Camp*, 140 Wis. 505, 122 N. W. 1126 (diligent search is not necessary).

[*Note 3 — continued*]

But the rule in *Louisiana* is of different tenor: 1906, *Iberia Cypress Co. v. Thorgeson*, 116 La. 218, 40 So. 682 (disappearance for seven years, not sufficient on the facts, under the peculiar language of the Louisiana Civil Code, art. 70; the opinion ignores the reasoning of the common-law rule).

[*Note 3, par. 2; correct:*]

For "*Hoyt v. Beach*, 104 Ia. 257," read "*Sherrod v. Ewell*, 104 Ia. 253."

[*Note 4, par. 1; add:*]

1833, *Doe v. Nepean*, 5 B. & Ad. 86.

1905, *Re Aldersey*, 2 Ch. 181, 185 (rule of *Nepean v. Knight* applied).

1913, *Caldwell v. Modern Woodmen*, 89 Kan. 11, 130 Pac. 642 (the jury may infer a death before that time, on the circumstances).

1906, *Spahr v. Mutual L. Ins. Co.*, 98 Minn. 471, 108 N. W. 4 (the defendant's policy on S.'s life lapsed on June 1, 1898; on April 4, 1898, S. left his home, and was never again seen or heard of; on July 7, 1905, this action was begun; held that S. was presumed to be dead, but not to have died at any particular time before or after June 1, 1898).

[*Note 5; add:*]

*In re Jackson*, *Jackson v. Ward*, [1907] 1 Ch. 354 (no presumption of death without issue).

*Contra*: 1908, *Barson v. Mulligan*, 191 N. Y. 306, 84 N. E. 75 (B., unmarried, having disappeared 37 years ago, his death was presumed (1) without issue and (2) intestate).

## § 2532. Survivorship.

[*Note 1; add:*]

1908, *St. John v. Andrews Institute*, 191 N. Y. 254, 83 N. E. 981.

1907, *Walton v. Burchel*, 121 Tenn. 715, 121 S. W. 391.

## § 2533. Seaworthiness.

[*Note 1; add:*]

1910, *The America*, D. C. S. D. N. Y., 174 Fed. 724 (mere sinking does not raise a presumption of unseaworthiness, where the charterer is in possession, in an action by the charterer against the owner).

## § 2534. Regularity; (1) Performance of Official Duty, etc.

[*Note 1, par. 1; add:*]

1908, *People v. Siemsen*, 153 Cal. 387, 95 Pac. 863 (district attorney filing an information).

1909, *Hansen v. Owens*, 132 Ga. 648, 64 S. E. 800 (presumption from notary's regular attestation of a deed).

1904, *McKinstry v. Collins*, 76 Vt. 221, 56 Atl. 985 (assault by an officer serving process; presumption applied).

1904, *Marchant's Estate*, 121 Wis. 526, 99 N. W. 320 (statutory proceedings).

## § 2535. Same: (2) Appointment and Authority of Officers.

[*Note 3; add:*]

1906, *Barry v. Smith*, 191 Mass. 78, 77 N. E. 1099 (board of health).

§ 2536. *Similarity of Foreign Law.*

[Text, p. 3585, paragraphs (1) and (2) :]

For these rules, substitute those set forth by Professor Albert M. Kales, in his article "Presumption of Foreign Law," *Harvard Law Review*, XIX, 401 (1906), where the cases are exhaustively collected. His conclusions merit acceptance.

To the cases cited by him, add the following more recent ones :

- 1903, *Merritt v. Copper Crown Co.*, 36 N. Sc. 383, 393 (rules of construction by West Virginia law, presumed the same).
- 1906, *Southern Express Co. v. Owens*, 146 Ala. 412, 41 So. 752 (common carrier's contract; common law of South Carolina presumed the same). 1907, *Watford v. Alabama & F. L. Co.*, 152 Ala. 178, 44 So. 567 (personal injury received in Florida).
- 1904, *Rooney v. Southern B. & L. Ass'n*, 119 Ga. 941, 47 S. E. 345 (Alabama contract; common law as to usury presumed). 1904, *Savannah F. & W. R. Co. v. Evans*, 121 Ga. 391, 49 S. E. 308 (statute of Florida as to signals at crossings, not noticed). 1906, *Thomas v. Clarkson*, 125 Ga. 72, 54 S. E. 77 (Alabama law as to usury; the common law presumed to obtain there, but the Alabama judicial rulings were not to control in its interpretation). 1906, *Ellington v. Harris*, 127 Ga. 85, 56 S. E. 134 (marriage).
- 1910, *Maloney v. Winston Bros. Co.*, 18 Ida. 740, 111 Pac. 1080 (mining law).
- 1904, *Sokel v. People*, 212 Ill. 238, 72 N. E. 382 (marriage in Turkey). 1905, *Scholten v. Barber*, 217 Ill. 148, 75 N. E. 460 (extension of time to a surety on a note made in Missouri; common law assumed to be the same). 1905, *Leathe v. Thomas*, 218 Ill. 246, 75 N. E. 810 (action on a Missouri judgment; the Missouri statute upon set-off, not noticed).
- 1903, *Baltimore & O. S. W. R. Co. v. Hollenbeck*, 161 Ind. 452, 69 N. E. 136 (wage-claim, already paid under garnishment in Kentucky; the Indiana statute of exemptions not presumed to be adopted by statute in Kentucky). 1908, *Wabash R. Co. v. Hassett*, 170 Ind. 370, 83 N. E. 705 (personal injury and death).
- 1904, *Banco de Sonora v. Bankers' M. C. Co.*, 124 Ia. 576, 100 N. W. 532 (law of Mexico as to age of majority, not presumed to be the same). 1906, *Westheimer v. Habinck*, 131 Ia. 643, 109 N. W. 189 (shipment of liquor; presumption of similarity for Missouri law, not enforced "if the assumption would impose a penalty or work a forfeiture"). 1908, *Varner v. Interstate Exchange*, 138 Ia. 201, 115 N. W. 1111 (foreclosure of trust deed by sale by sheriff in Missouri; bill in equity being required by law in Iowa, the Missouri law was presumed the same).
- 1904, *First Nat'l Bank v. Nordstrom*, 70 Kan. 485, 78 Pac. 804 (note payable in Iowa; law of Iowa presumed the same). 1906, *St. Louis & S. F. R. Co. v. Johnson*, 74 Kan. 83, 86 Pac. 156 (death in Indian Territory; common law presumed the same).
- 1904, *Klenke v. Noonan*, 118 Ky. 436, 81 S. W. 241 (common law as to marriage, presumed to obtain in Ohio). 1910, *Yellow P. L. Co. v. Ford*, 141 Ky. 5, 131 S. W. 1010 (personal injury law).
- 1904, *State v. Allen*, 113 La. 705, 37 So. 614 (bigamy; the Indiana law of validity of a marriage presumed to be the same as in Louisiana).
- 1904, *Callender, M. & T. Co. v. Flint*, 187 Mass. 104, 72 N. E. 345 (guaranty; Rhode Island). 1904, *Cherry v. Sprague*, 187 Mass. 113, 72 N. E. 456 (note; South Dakota). 1906, *Farmers' Nat'l Bank v. Venner*, 192 Mass. 531, 78 N. E. 540 (default of a N. Y. note; the law of N. Y. presumed the same). 1907, *Demelman v. Brazier*, 193 Mass. 588, 79 N. E. 812 (days of grace in New York law). 1907, *Com. v. Stevens*, 196 Mass. 280, 82 N. E. 33 (Georgia statute as to marriage, not presumed the same). 1908, *Gordon v. Knott*, 199 Mass. 173, 85 N. E. 184 (English contract). 1913, *Holden v. McGillicuddy*, 215 Mass. 563, 102 N. E. 923 (Vermont law as to negligence per se, presumed the same).
- 1912, *Hartwell v. Parks*, 240 Mo. 537, 144 S. W. 793 (regularity of a probate record).
- 1905, *McKnight v. Oregon S. L. R. Co.*, 33 Mont. 40, 82 Pac. 661 (injury to personalty in Idaho; the statute of Idaho not noticed).

[*Text*, p. 3585 — *continued*]

- 1906, *Robb v. Washington & J. College*, 185 N. Y. 485, 78 N. E. 359 (restraint on alienation; Pennsylvania not presumed to have a statute like New York).  
 1904, *Lassiter v. Norfolk & C. R. Co.*, 136 N. C. 89, 48 S. E. 642 (Virginia statute as to death by wrongful act; subject discussed in two opinions).  
 1909, *Schlotterbeck v. Schwinn*, 23 Okl. 681, 103 Pac. 854 (usury statute of Indian Territory). 1912, *Cole v. District Board*, 32 Okl. 692, 123 Pac. 426 (Kentucky law for colored person's school rights).  
 1904, *Linton v. Moorhead*, 209 Pa. 646, 59 Atl. 264 (married woman's power of attorney in England; law of England presumed the same, for lack of proof).  
 1904, *Columbian B. & L. Ass'n v. Rice*, 68 S. C. 236, 47 S. E. 63 (Virginia contract; common law as to usury presumed, and the statute not presumed to be the same as in N. C.).  
 1904, *Baird v. Vines*, 18 S. D. 52, 99 N. W. 89 (non-negotiable note; law of Montana presumed the same).  
 1905, *Iowa L. & T. Co. v. Schnose*, 19 S. D. 248, 103 N. W. 22 (mortgage in Iowa; law of Iowa presumed the same).  
 1904, *Ex parte Latham*, 47 Tex. Cr. 208, 82 S. W. 1046 (community property in Oklahoma; law of Oklahoma presumed the same).  
 1904, *The Matterhorn*, 128 Fed. 863, 63 C. C. A. 331 (maritime law of another country; its difference must be proved).  
 1905, *Frank v. Gump*, 123 Va. 205, 51 S. E. 358 (Maryland contract; common law presumed the same).  
 1907, *Norfolk & W. R. Co. v. Denny's Adm'r*, 106 Va. 383, 56 S. E. 321 (statutory action for death).  
 1905, *Edleman v. Edleman*, 125 Wis. 270, 104 N. W. 56 (alimony in divorce; Tennessee property law presumed the same).

§ 2537. **Contracts.**

[*Note 1*; *add*, under *Warranties*.]

- 1904, *Vincent v. Mutual R. F. L. Ass'n*, 77 Conn. 281, 58 Atl. 963 (age).

[*Note 1*, at the end; *add*.:]

- Conditions in a bond or mortgage*: 1906, *Temple v. Phelps*, 193 Mass. 297, 79 N. E. 482.  
*Payment of the premium of an insurance policy*: 1904, *Thomas v. Northwestern M. L. Ins. Co.*, 142 Cal. 79, 75 Pac. 665.  
*Good faith of a purchaser for value without notice*: 1909, *Arnd v. Aylesworth*, 145 Ia. 185, 123 N. W. 1000.

For *accident insurance*, see *ante*, § 2510.

§ 2538. **Statute of Limitations.**

[*Note 3*; *add*.:]

- 1906, *Schell v. Weaver*, 225 Ill. 159, 80 N. E. 95.

§ 2540. **Sundry Burdens and Presumptions.**

[*Note 1*; *add*.:]

- 1905, *Hill v. Dalton*, 140 N. C. 9, 52 S. E. 273 (statutory proceeding to establish a boundary).

§ 2550. **Judge and Jury; Admissibility of Evidence.**

[*Note 1*; *add*.:]

- 1904, *Parrish v. State*, 139 Ala. 16, 36 So. 1012 (expert's competency).

[Note 1 — *continued*]

1905, *Hoch v. People*, 219 Ill. 265, 76 N. E. 356 (the Court decides upon the facts making a second wife competent).

1911, *State v. Lee*, 127 La. 1077, 54 So. 356 (defendant claimed not to be M. L. the murderer; the wife of M. L. being called in his behalf to identify him, held that the judge was to pass upon the relationship, for the purpose of declaring her disqualified or not).

1913, *Slotofski v. Boston Elev. R. Co.*, 215 Mass. 318, 102 N. E. 417 (the judge's exclusion of a deceased's declarations, after hearing evidence to their making and finding that they were in his opinion not made, held to be a just exercise of his power on the facts; where the judge's preliminary finding is adverse, the party may not offer or argue the evidence to the jury, as he may when the finding is in favor of admissibility in the case of confessions, *ante*, § 861, n. 3).

1905, *State v. Hancock*, 28 Nev. 300, 82 Pac. 95 (wife as witness).

1906, *State v. Monich*, 74 N. J. L. 522, 64 Atl. 1016 (confessions, expertness, dying declarations; good opinion by Pitney, J.).

1911, *Clendennin v. Clancy*, 82 N. J. L. 418, 81 Atl. 750 (competency of witness).

1906, *People v. Dolan*, 186 N. Y. 4, 78 N. E. 569 (producing original documents).

1913, *Western N. L. Ins. Co. v. Williamson H. F. Co.*, 37 Okl. 213, 131 Pac. 691.

1913, *Gila Valley G. & N. R. Co. v. Hall*, 232 U. S. 94, 34 Sup. 229 (whether a person speaking was so near H. as to be heard by H. thus admitting what the person said: "the finding of the trial judge upon such a preliminary question of fact is not subject to be reversed on appeal or error if it be fairly supported by the evidence"; this phrasing seems to accord little enough credit to the trial judge; why cannot the Federal Supreme Court lend its aid to restore the trial judge from a marionette to a Minos? See the comments of Professor Henry Schofield, on the desirability of letting the rules of procedure encourage trial judges to be strong, in his article "New Trials and the Seventh Amendment" (Illinois Law Review, VIII, 287, *passim*).

1912, *Mullins v. Com.*, 113 Va. 787, 75 S. E. 193 (conversation of accused).

[Note 3; *add*.:]

1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127 ("If in a criminal case the decision is against the defendant, he has another chance before the jury, so far as it depends upon a question of fact").

1904, *King v. Hanson*, 13 N. D. 85, 99 N. W. 1085 (privileged letter, whose authenticity was denied; the letter left to the jury to decide upon).

[Note 6, par. 1; *add*, at the end:]

The more recent doctrine in Massachusetts seems to have abandoned this pristine attitude: 1905, *Com. v. Tucker*, 189 Mass. 457, 76 N. E. 127 (not citing *Com. v. Robinson*).

*Other issues of fact for the judge:*

1909, *Waller's Case*, 3 Cr. App. 213, 222, 1 K. B. 364 (under a statute permitting proof of former convictions to affect sentence, with consent of the Director of Public Prosecutions, the proof of such consent is a matter of fact for the judge).

## § 2551. Sufficiency of Evidence.

[Note 2; *add*.:]

Some practical comments on the operation of this rule in experience will be found in Mr. (Assistant District Attorney) Arthur Train's valuable book, "The Prisoner at the Bar" (1906), pp. 180-189.

In *U. S. v. Foster* (1910), D. C. W. D. Va., 183 Fed. 627, McDowell, J., sets forth with admirable clearness and good sense the attitude to be taken by the judge in charging the jury upon the facts. As one reads his opinion, the reflection cannot be avoided that all

[*Note 2 — continued*]

lawyers who would ponder it would heartily join to restore in the State courts that practice which it was intemperate folly to abandon. Were Judge McDowell's principles in general force, the jury system would be freed from much of the ground for criticism so often heard nowadays.

§ 2552. **Negligence.**

[*Note 6; add:*]

1905, *Chicago & E. I. R. Co. v. Crose*, 214 Ill. 602, 73 N. E. 865. 1905, *Chicago City R. Co. v. Nelson*, 215 Ill. 436, 74 N. E. 458.

1905, *Buehner Chair Co. v. Feulner*, 164 Ind. 368, 73 N. E. 816. 1905, *Diamond B. C. Co. v. Cuthbertson*, 164 Ind. 368, 73 N. E. 818.

1909, *Johnson v. Chicago R. I. & P. R. Co.*, 80 Kan. 456, 103 Pac. 90 (careful opinion, by Benson, J.).

1909, *Harris v. Missouri K. & T. R. Co.*, 24 Okl. 341, 103 Pac. 758.

1909, *Missouri Pac. R. Co. v. Castle*, 8th C. C. A., 172 Fed. 841 (a statute declaring "questions of negligence" to be for the jury, held to apply to "questions of fact only").

§ 2553. **Reasonableness.**

[*Note 4; add:*]

1910, *Kroll v. Close*, 82 Oh. 190, 92 N. E. 29 (probate judge's allowance of reasonable funeral expenses; his finding held not a finding of fact).

§ 2555. **Facts Judicially Noticed; Trial by Inspection, etc.**

[*Note 5, par. 2; add, under Accord:*]

1905, *Clark v. Eltinge*, 38 Wash. 376, 80 Pac. 556.

[Text, p. 3595; insert a new par. (4):]

(4) Where a legislative act is argued to be *unconstitutional*, and this is to depend upon the unreasonableness, or lack of possible reasonableness, of the law in its purpose or operation, and thus the external facts furnishing the possible legislative motive or the possible actual effect must be considered, this incidental question of fact is not for the jury, but for the Court. Hence, no testimony, of experts or others, would be admitted for the jury. But by what theory or method shall the Court receive information of the alleged facts? This is an interesting inquiry, hitherto not carefully worked out by the Courts. The principle of judicial notice has usually been loosely invoked.\*

\* See some acute comments on the question in Professor Henry Schofield's article, "New Trials and the Seventh Amendment" (Illinois Law Rev., VIII, p. 403, note 65); also the following recent cases:

1910, *Ritchie v. Wayman*, 244 Ill. 509, 91 N. E. 694 (female labor law; the Court noticed the "general consensus of opinion" as to the justifiable conditions leading to such a law, namely, woman's physical organization, her maternal functions, the rearing of children, and the maintenance of home; in truth, the Court found this consensus in passages quoted in a voluminous brief of one of the parties). 1912, *People v. Elerding*, 254 Ill. 579, 583, 98 N. E. 982 (labor law; repeating the expression, from *Ritchie v. Wayman*, that "the Court would take judicial knowledge" as to woman's health being subject to be affected by hours of labor).

1913, *Pittsburg, C., C. & St. Louis R. Co. v. State*, — Ind. —, 102 N. E. 25.

[Text, p. 3595 — continued]

For the question whether the facts of *election* etc. affecting the operativeness of a statute conditioned on a *referendum* or local option vote for becoming operative shall be inquired into and decided by the Court or submitted to the jury, see the following opinions: 1907, *State v. O'Brien*, 35 Mont. 482, 90 Pac. 514.

#### § 2556. Construction of Documents.

[Note 1; add:]

1906, *Turner v. Osgood A. C. Co.*, 223 Ill. 629, 79 N. E. 306.  
1903, *Smith v. Sovereign Camp*, 179 Mo. 119, 77 S. W. 862 (insurance policy).  
1911, *Lynes v. Northern Pacific R. Co.*, 43 Mont. 317, 117 Pac. 81 (railway rules).  
1905, *Senterfeit v. Shealy*, 71 S. C. 259, 51 S. E. 142 (the judge may instruct as to the legal effect of a deed).

[Note 2; add:]

1905, *Locke v. Lyon M. Co.*, — Ky. —, 84 S. W. 307.  
1909, *Ætna Indemnity Co. v. Waters*, 110 Md. 673, 73 Atl. 712.

[Note 3; add:]

1912, *O'Regan v. Canadian P. R. Co.*, N. Br. S. C., 9 D. L. R. 849 (for lost documents, the judge construes the meaning, the jury decides on the evidence of the contents).

[Note 4, par. 1; add:]

1905, *Ellis v. Block*, 187 Mass. 408, 73 N. E. 475 (function of the jury construed, in an opinion not clear).  
1908, *Taplin v. Marcy*, 81 Vt. 428, 71 Atl. 72 (sale of logs; two letters held not to be exclusively for the Court's construction, but to be submitted with other evidence to the jury).

#### § 2557. Criminal Intent.

[Note 3, l. 6; add:]

1910, *Oakes v. State*, 98 Miss. 80, 54 So. 79.

#### § 2558. Foreign Law.

[Note 1; add:]

1906, *Christiansen v. Graver T. Works*, 223 Ill. 142, 79 N. E. 97 (cause of action in Indiana; the statutes and decisions of Indiana held to have been properly introduced and read "before the Court and out of the presence of the jury").  
1906, *Mercantile Guaranty Co. v. Hilton*, 191 Mass. 141, 77 N. E. 312 (here the Court went to the pedantic length of refusing to consider New York decisions, cited in argument but not offered at the trial, upon the interpretation of a New York statute; because "this is here a question of fact").  
1909, *Electric Welding Co. v. Prince*, 200 Mass. 386, 86 N. E. 947 (stating new shadings, which exhibit the irrational nature of the rule leaving foreign law to the jury).  
1912, *Hite v. Keene*, 149 Wis. 207, 134 N. W. 383 (Swiss law; a code section, as interpreted by experts; held to be for the jury).

#### § 2559. Local Law.

[Note 1, l. 2; add:]

1909, *State v. Daley*, — Or. —, 103 Pac. 502.

§ 2566. **Judicial Notice ; Anomalous Meanings.**

[Note 4; add:]

*Statham v. Statham and Gaekwar of Baroda*, [1912] P. 92 (like *Mighell v. Sultan of Jahore*, *supra*).

§ 2568. **Notice must be Requested, etc.**

[Note 3; add:]

1913, *Line v. Line*, 119 Md. 403, 86 Atl. 1032 (if below no request for notice is made, on appeal notice need not be taken; here, of a date making a bond invalid).

§ 2569. **Judge's Private Knowledge, etc.**

[Note 4, par. 2; add:]

1907, *State v. Porter*, 76 Kan. 411, 91 Pac. 1073 (value of attorneys' fees taxable in a case tried before the judge).

[Note 8; add:]

The question of the method of informing the Court on facts relevant to the *constitutionality of a statute* is in need of special and frank consideration; see the citations *ante*, § 2555, n. 4.

§ 2570. **Judicial Notice by the Jury's Own Knowledge.**

[Text, p. 3605, l. 15; insert the following quotations:]

1895, *Hackney, J., Jenney Electric Co. v. Branham*, 145 Ind. 314, 41 N. E. 448 (permitting the use of experience in judging of the credibility of witnesses): "It is argued that such a rule would permit the disposition of a cause upon the whims of jurors, rather than upon the law and the evidence as they were learned in the trial. Jurors should be, and, as a rule, are, selected because of their extensive experiences among men. The school of experience which men attend in their varied relations among men imparts a keenness of mental vision which enables them the more readily to see the motives and to judge of the selfish or unselfish interests of men. This education, be it much or little, is a part of the juror, and should not, if possible, be laid aside in passing upon the inducements which may surround a witness to speak falsely. It is this education which to a great extent enables a juror to discover in the faltering manner or the downcast eye whether the statement of the witness is made in modesty or in the guilt of falsehood. The value of experience is not to be given up when the man becomes a juror, and is required to apply the tests of credit to the heart and mind of the witness, but whatever qualification that experience gives should be employed to the end that the whole truth may be known and acted upon."

1884, *Lyon, J., in Washburn v. R. Co.*, 59 Wis. 364, 370: "A jury is not bound to give and cannot give any weight to testimony which, although undisputed by witnesses, is contrary to what every person of ordinary intelligence knows to be true. To illustrate, should a witness testify that at Boston on a certain day the sun arose at midnight, or that the Mississippi river empties into Lake Michigan, or that white is black, the testimony would be rejected at once. . . . Beyond this the jury cannot properly go. To allow jurors to make up their verdict on their individual knowledge of disputed facts material to the case, not testified to by them in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination and the benefit of all the tests of credibility which the law affords. Besides, the evidence of such knowledge or of the grounds of such opinions could not be preserved in a bill of exceptions or questioned on appeal."

[*Note 3; add:*]

1908, *Shum's Adm'x v. Rutland R. Co.*, 81 Vt. 186, 69 Atl. 945 (reviewing cases).

[*Note 5; add:*]

1907, *Morehead's Trustee v. Anderson*, 125 Ky. 77, 100 S. W. 340.

[*Note 8, par. 2; add:*]

1908, *Georgia R. & E. Co. v. Dougherty*, 4 Ga. App. 585, 62 S. E. 157 (same).

[*Note 9, par. 1; add:*]

1912, *Graham v. Grand Trunk R. Co.*, Ont. C. A., 1 D. L. R. 554 (death at a switch; knowledge of locality used).

1905, *Ward v. State*, — Ala. —, 39 So. 923 (default of duty as road overseer; common knowledge as to the condition of the county roads, not available).

1906, *Hayes v. Wagner*, 220 Ill. 256, 77 N. E. 211 (the jury may weigh the evidence "in the light of their common observation and experience").

1912, *Downing v. Farmer's M. F. Ins. Co.*, — Ia. —, 138 N. W. 917 (whether a mare was killed by lightning; the jury not allowed to consider "their own observation and experience, if any, with reference to losses of that nature"; and thus the law on the one hand proceeds to eliminate the use of such intelligence as the jury has, while on the other arise lamentations over its lack of intelligence).

1911, *Solberg v. Robbins Lumber Co.*, 147 Wis. 259, 133 N. W. 28 (but this knowledge need not be common to all the jurors; here the jurors were allowed to use their understanding of the construction of the machines in issue, in weighing the evidence; sensible opinion, by Barnes, J.).

[*Text, p. 3607, l. 4; add a new § 2571:*]

#### § 2571. Future of the Doctrine of Judicial Notice.

The doctrine of Judicial Notice contains the kernel of great possibilities, as yet not used, for improving trial procedure in the courts of to-day. Professor Thayer pointed this out many years ago:<sup>1</sup> "Courts may judicially notice much which they cannot be required to notice. That is well worth emphasizing; for it points to a great possible usefulness in this doctrine, in helping to shorten and simplify trials. It is an instrument of great capacity, in the hands of a competent judge; and it is not nearly as much used, in the region of practice and evidence, as it should be. . . . The failure to exercise it tends daily to smother trials with technicality and monstrously lengthens them out."

*Why* has this principle not been adequately used by judges?

One reason is that they apparently forget that (as Professor Thayer says) they *may* in particular cases notice much that they cannot be *required* to notice by general rule. *E.g.*, a rule requiring them to notice always the incumbency of a sheriff's office may go too far; but they may in a given case be justified in declaring a specific sheriff to be notorious; and so on, in a thousand classes of facts.

Another reason is that they apparently forget that the principle allows them to notice in *specific* cases, even though no *general rule* for the whole class of such cases could be laid down. This is because notoriety *in fact* is the

<sup>1</sup> "Preliminary Treatise on Evidence" (1898), 300.

[Text, p. 3607 — *continued*]

principle, and facts are not susceptible of inflexible rule. The precedents of former judges, in declining to notice or assenting to notice specific facts, do not restrict the present judge from noticing a new fact, provided only that the new fact *is* notorious to the community.

With these aspects of the principle in mind, a large field opens for reducing the tedious proof of notorious facts. The principle is an instrument of a usefulness hitherto unimagined by judges. Let them make liberal use of it; and thus avoid much of the needless scandal that now is raised by the artificial impotence of judicial proceedings.<sup>2</sup>

<sup>2</sup> The cases of *People v. Schmitz*, cited *post*, § 2576, n. 1, and *People v. Sixby*, cited *post*, § 2578, n. 1, are merely examples of the farcical exhibitions that repeatedly scandalize our system of legal proof.

§ 2572. **Laws Judicially Noticed; (1) Domestic Statutes, etc.**

[Note 6; *add*.:]

So also for sundry kinds of laws: 1904, *Davis v. State*, 141 Ala. 84, 37 So. 454 (local stock-law, noticed).

[Note 9; *add*.:]

1905, *Atlanta & W. P. R. Co. v. Atlanta B. & A. R. Co.*, 124 Ga. 125, 52 S. E. 320 (railroad charter granted by the Secretary of State under a general law, noticed).

[Note 10, par. 1; *add*, under *Contra*.:]

1904, *Chesapeake & O. C. Co. v. Western Md. R. Co.*, 99 Md. 570, 58 Atl. 34 (St. 1904, c. 56, affecting a specific railroad company, noticed).

[Note 10, par. 2, l. 4; *add*.:]

1909, *Dunn, Matter of*, 212 U. S. 374, 29 Sup. 299 (Federal incorporation by act of Congress, noticed).

[Note 11; *add*.:]

1905, *Foley v. Ray*, 27 R. I. 127, 61 Atl. 50.

[Note 14; *add*.:]

1905, *New York, N. H. & H. R. Co. v. Offield*, 78 Conn. 1, 60 Atl. 740.

[Note 15, l. 1; *add*.:]

1909, *Metteer v. Smith*, 156 Cal. 572, 105 Pac. 735 (city ordinance).

1904, *O'Brien v. Woburn*, 184 Mass. 598, 69 N. E. 350 (city).

*Contra*: 1909, *Mayhew v. Eugene*, 56 Or. 102, 104 Pac. 727 (municipal criminal ordinance, noticed under local statutes, B. & C. Comp. § 90).

[Note 15, at the end; *add*.:]

1906, *Hill v. Atlanta*, 125 Ga. 697, 54 S. E. 354.

Ill. St. 1905, May 18, § 54 (the Municipal Court of Chicago shall notice general ordinances of Chicago and municipal bodies included therein, and public laws of a U. S. State or Territory). St. 1905, May 18 (Primary Elections), § 119 (this act to be noticed in any municipality to which it applies).

1912, *People v. Quider*, 172 Mich. 280, 13 N. W. 546 (similar).

[*Note 15 — continued*]

1904, *Portland v. Yick*, 44 Or. 439, 75 Pac. 706 (and on appeal the Circuit Court will do the same; and will also notice the municipal council's journals).

[*Note 16; add:*]

1905, *Carr v. First National Bank*, 35 Ind. App. 216, 73 N. E. 947 (U. S. Post-Office departmental regulations, noticed).

1881, *Low v. Hanson*, 72 Me. 105 ("rules and regulations of one of the departments established in accordance with the statute" are noticed).

1906, *State v. Southern R. Co.*, 141 N. C. 846, 54 S. E. 294 (Federal quarantine regulations of Department of Agriculture, noticed).

1905, *Sprinkle v. U. S.*, 141 Fed. 811, 819, C. C. A. (regulations of the commissioner of internal revenue, noticed). 1906, *Nagle v. U. S.*, 145 Fed. 302, C. C. A. (post-office regulations not noticed; "it is a hopeless task for an appellate court to determine what such regulations were at any particular time [without formal pleading and evidence]; it must either accept counsel's statement, or itself make inquiry of the particular department; neither of which practices is to be commended"). 1912, *Robinson v. Baltimore & O. R. Co.*, 222 U. S. 506, 32 Sup. 114 (a statute making admissible the reports of the Interstate Commerce Commission's decisions does not oblige a trial Court to take judicial notice of such decisions; but surely the learned Court should have guarded its opinion against leaving the impression that it sanctioned the petty and unpractical view that such decisions were not justly noticeable by the common law principle).

#### § 2573. Same: (2) Foreign Law.

[*Note 2, par. 1; add:*]

1896, *Union C. Ins. Co. v. Pollard*, 94 Va. 146, 152, 26 S. E. 421. 1896, *App v. App*, 106 Va. 253, 55 S. E. 672 (Pennsylvania probate law).

[*Note 3; add:*]

1904, *Metropolitan Stock Exchange v. Lyndonville N. Bank*, 76 Vt. 303, 57 Atl. 101.

[*Note 4; add:*]

1912, *Republic of France v. Peugnet*, Sask. S. C., 1 D. L. R. 204 (extradition treaty noticed, without putting in evidence the "Canada Gazette," under Rev. St. C. 1906, c. 155, § 8, Extradition Act).

1904, *LaRue v. Kansas M. L. Ins. Co.*, 68 Kan. 539, 75 Pac. 494 (Spanish treaty of the Philippines).

1913, *Butschkowski v. Bracks*, 94 Nebr. 532, 143 N. W. 923.

1906, *Peano v. Brennan*, 20 S. D. 342, 106 N. W. 409 (Indian treaty).

[*Note 6; add:*]

1907, *Moore v. Pywell*, 29 D. C. App. 312 (action for death based on a Maryland statute not pleaded; the statute noticed).

1884, *Lamar v. Micou*, 114 U. S. 218, 5 Sup. 857 (whether in statutes or in decisions).

1912, *Monongahela R. C. C. & C. Co. v. Schinnerer*, C. C. A., 196 Fed. 375 (whether in statute or in decisions).

So too in *Canada*:

1907, *Logan v. Lee*, 39 Can. Sup. 311, 313 (the Dominion Supreme Court notices laws "in any of the provinces or territories of Canada").

[*Note 9; add:*]

1912, *Pa Pelekane's Title*, 21 Haw. 175, 187 (Hawaiian Islands before annexation, noticed).

[Note 12; *add.*:]

1909, *Electric Welding Co. v. Prince*, 200 Mass. 386, 86 N. E. 947.

§ 2574. **Political Facts; (1) International Affairs, etc.**

[Note 1; *add.*:]

and this includes a *civil war*, as well as *insurrection* in some forms: 1862, *Prize Cases*, 2 Black 635, 667 (civil war with the Southern Confederacy).

1904, *LaRue v. Kansas M. L. Ins. Co.*, 68 Kan. 539, 75 Pac. 494 (insurrection in the Philippines before 1901).

§ 2575. **Same: (2) Domestic Political Organisation, etc.**

[Note 1, par. 1; *add.*:]

1909, *Lyman v. State*, 90 Ark. 596, 119 S. W. 1116 (location of a city in a county, noticed).

1906, *Topeka v. Cook*, 72 Kan. 595, 84 Pac. 376 (location of an alley within city limits, not noticed).

1906, *State v. Ricksecker*, 73 Kan. 495, 85 Pac. 547 (that C. was a city of the second class, noticed).

1906, *Worden v. Cole*, 74 Kan. 226, 86 Pac. 464 (location of a railroad company as to a section of public land, under a Federal statute, noticed).

1904, *Stealey v. Kansas City*, 179 Mo. 400, 78 S. W. 599 (that a certain avenue was within five miles of the city limits, not noticed).

1909, *Rea v. State*, 3 Okl. Cr. 281, 105 Pac. 386 (that no county of Pontotoc existed before State organization in 1907, noticed):

1904, *Baker v. State*, 47 Tex. Cr. 482, 83 S. W. 1122 (Government ownership of a Federal fort on a city line, noticed, but not the precise boundary on the ground).

1905, *West Seattle v. W. S. L. & I. Co.*, 38 Wash. 359, 80 Pac. 549 (location of land within a city two-mile limit, not noticed).

§ 2576. **Domestic Officials, etc.**

[Note 1; *add.*:]

1908, *People v. Schmitz*, 153 Cal. xviii, 94 Pac. 419 (judicial notice not taken that S. was mayor of San Francisco; see the comments thereon, by Francis J. Henry, Chief Justice Beatty, and the present writer, collected at p. 1144 of the present writer's "Cases on Evidence," 2 ed., 1913).

1909, *Kellogg v. Finn*, 22 S. D. 578, 119 N. W. 545 (Federal surveyor-general, noticed).

1909, *Perovich v. Perry*, 9th C. C. C., 167 Fed. 789 ("Bonaparte" noticed to be Charles J. B., U. S. Attorney-General, signed to a telegram refusing commutation of sentence).

§ 2577. **Same: (4) Official Acts, Elections, etc.**

[Note 3; *add.*:]

Ill. St. 1905, May 18 (Primary Elections), § 119 (the holding of any election under this act on a primary election day, to be noticed in any municipality to which the act applies).

1909, *State v. Swink*, 151 N. C. 726, 66 S. E. 448 (special liquor election for a district; result not noticed).

1904, *State v. Scampini*, 77 Vt. 92, 59 Atl. 201 (time and result of an election noticed, when it determines the time of taking effect of a public statute).

[Note 4; *add.*:]

1906, *Ferrell v. Ellis*, 129 Ia. 614, 105 N. W. 993 (population of towns, by the Federal census, noticed).

1906, *Page v. McClure*, 79 Vt. 83, 64 Atl. 451 (town population, noticed by the Federal census to be under 4,000).

[*Note 5; add:*]

*Accord*: 1904, *Portland v. Yick*, 44 Or. 439, 75 Pac. 706.

*Contra*: 1904, *Peckham v. People*, 32 Colo. 140, 75 Pac. 422.

**§ 2578. Judicial Proceedings; (1) Officers and Rules of Court.**

[*Note 1; add:*]

1904, *Fisher v. Chicago*, 213 Ill. 268, 72 N. E. 680 (county judge, noticed).

1913, *Rockford v. Mower*, 259 Ill. 604, 102 N. E. 1032 (county court notices the city clerks within the county).

[*Note 3; add:*]

1911, *Nickey v. Leader*, 235 Mo. 30, 138 S. W. 18 (terms of court; a discussion showing how silly is frequently the practice of Supreme Judicial Cerebration on a simple matter of fact which could have been settled by a word from either counsel).

[*Note 4; add:*]

1913, *Sixby v. Chicago C. R. Co.*, 280 Ill. 478, 103 N. E. 249 (rules of city courts, not noticed; § 20 of Chicago Mun. Ct. Act, requiring that Court's rules to be noticed, held void as violating the uniformity clause of the Constitution).

**§ 2579. Same: (2) Records of Proceedings.**

[*Note 2; add:*]

1905, *Gay v. Gay*, 146 Cal. 237, 79 Pac. 885 (prior proceedings in the same litigation, noticed). 1906, *Southern P. R. Co. v. Lipman*, 148 Cal. 480, 83 Pac. 445 (U. S. land commissioner's letter relating to the litigation, noticed). 1913, *Sewell v. Johnson*, 165 Cal. 762, 134 Pac. 704 (the plaintiff brought an action in the nature of a creditor's bill based on a judgment in an action against P.; the trial court gave judgment for the plaintiff, and the defendant appealed; meantime the defendant had appealed from the original judgment and it was reversed; on the present appeal, the defendant suggested orally this reversal, but he had not pleaded it nor could have done so at the time of pleading; held, that the court could and would take judicial notice of the reversal; this was a manful liberalization of the doctrine; yet the serious strain apparently necessary in the opinion to meet the opposing argument shows how narrow the tradition has been).

1907, *Winn v. Coggins*, 53 Fla. 327, 42 So. 897 (decree of a court in another county and another cause, not noticed).

1907, *Waterbury Nat'l Bank v. Reed*, 231 Ill. 246, 83 N. E. 188 (*scire facias* to revive a judgment; the record noticed, without evidence thereof).

1909, *Haaren v. Mould*, 144 Ia. 296, 122 N. W. 921 (in contempt, the order disobeyed may be noticed).

1906, *Cumberland T. & T. Co. v. St. Louis, I. M. & S. R. Co.*, 117 La. 199, 41 So. 492 (that the plaintiff was a corporation duly organized under Kentucky statutes, this fact having been proved in another suit in another parish between the plaintiff and another defendant, not noticed; prior rulings repudiated).

In some of these cases, what the Court really did was to declare that the production of a record from its own files was *sufficient evidence of genuineness*, under the rule of § 2158, *ante*.

**§ 2580. Notorious Miscellaneous Facts; (1) Commerce, Industry, etc.**

[*Note 1; add:*]

1906, *Malone v. LaCroix*, 144 Ala. 648, 41 So. 724 (territorial division of the Methodist Episcopal Church in two bodies, noticed).

[*Note 1 — continued*]

1910, *Ritchie v. Wayman*, 244 Ill. 509, 91 N.E. 694 (female labor law; see the citation *ante*, § 2559, n. 8).  
 1904, *State v. Indianapolis Gas Co.*, 163 Ind. 48, 71 N. E. 139 (that natural gas no longer exists in quantities sufficient for heating purposes in Indianapolis, etc., noticed).  
 1905, *Dorr. Cattle Co. v. Chicago & G. W. R. Co.*, 128 Ia. 359, 103 N. W. 1003 (that Texas cattle fever is contagious, noticed).  
 1905, *State v. Kelly*, 71 Kan. 811, 81 Pac. 450 (economic and political history of a statute, noticed). 1905, *Sun Ins. Office v. Western W. M. Co.*, 72 Kan. 41, 82 Pac. 513 (sundry facts about the burning of wool, noticed).  
 1913, *State v. Cummings*, 248 Mo. 509, 154 S. W. 725 (that "Louisville" was a town in Kentucky, not Missouri, noticed).  
 1904, *Viemeister v. White*, 179 N. Y. 235, 72 N. E. 97 (common belief that vaccination is effective, noticed).  
 1904, *Burwell v. Brodie*, 134 N. C. 540, 47 S. E. 47 (season for planting cotton seed, noticed).  
 1906, *New Mexico v. Denver & R. G. R. Co.*, 203 U. S. 38, 27 Sup. 1 (law and custom of New Mexico as to the necessity of branding cattle, noticed). 1909, *Waters-Pierce Oil Co. v. Deselms*, 212 U. S. 159, 29 Sup. 270 (explosion of oil; a local usage to kindle a house-fire with coal-oil, held not improperly noticed).  
 1906, *Lewis, Hubbard & Co. v. Montgomery S. Co.*, 59 W. Va. 75, 52 S. E. 1017 (reasonable time for forwarding a check, etc.; customary hours of opening banks in Charleston, not before 9 A.M., noticed).

§ 2581. **Same: (2) Times and Distances.**

[*Note 1; add:*]

1905, *Com. v. Bond*, 188 Mass. 91, 74 N. E. 293 (that the date of a forged check was Sunday, not noticed).  
 1905, *Orvik v. Casselman*, 15 N. D. 34, 105 N. W. 1105 (adoption of standard time at a county-seat, noticed).

§ 2582. **Same: (3) Meaning of Words; Intoxicating Liquors.**

[*Note 2, par. 1; add:*]

1905, *Barddell v. State*, 144 Ala. 54, 39 So. 975 (nickels, noticed to be U. S. coins).  
 1913, *Hapai v. Brown*, 21 Haw. 499 (ordinary meaning of Hawaiian words is noticed in this jurisdiction).  
 1906, *State v. Nippert*, 74 Kan. 371, 86 Pac. 478 ("R. L. D." in a Federal revenue record, noticed to mean "retail liquor-dealer").

[*Note 2, par. 2; add:*]

and about the *signatures of officers* on documents (*ante*, § 2168, n. 4).

[*Note 3; add:*]

So also: 1904, *The Kawaiiani*, 128 Fed. 879, 63 C. C. A. 347 ("okolehoa," in Hawaii, noticed to be intoxicating).

[*Note 5; add:*]

1907, *Nussbaumer v. State*, 54 Fla. 87, 44 So. 712 (like *Caldwell v. State*).

[*Note 7; add:*]

1906, *Potts v. State*, 50 Tex. Cr. 368, 97 S. W. 477 (that beer means an intoxicating liquor, not noticed).  
 1911, *State v. Durr*, 69 W. Va. 251, 71 S. E. 767 ("temperance beer").

**§ 2590. Effect of Judicial Admissions; (1) Conclusive, etc.**

[Note 1; add:]

1905, *State v. Marx*, 78 Conn. 18, 60 Atl. 690 (*Oscanyan v. Arms Co.*, U. S., approved).

[Note 2, par. 1; add:]

1913, *McCarty v. Kepreta*, 24 N. D. 395, 139 N. W. 992, 1005 (affidavits of the defendant and his attorney, filed with a motion to remand after the record had gone up on appeal, held a judicial admission, but subject to the appellate court's discretion to relieve from the ordinary consequences).

**§ 2591. Same: (2) Exclusive of Evidence, etc.**[Note 1, par. 1; add, under *Contra*:]

1905, *State v. Powell*, 5 Pen. Del. 24, 61 Atl. 966 (photographs of wounds on the deceased, shown, though the defendant admitted the location and character of the wounds).

1908, *State v. Lewis*, 139 Ia. 405, 116 N. W. 606 (homicide; the accused having admitted the killing on the ground of self-defence, the State was allowed to prove the nature of the wound).

1912, *Eesley Light & P. Co. v. Commonwealth P. Co.*, 172 Mich. 78, 137 N. W. 663 (certified copy of articles of incorporation, admitted, though incorporation was conceded).

1898, *Jones v. Allen*, 85 Fed. 523, 29 C. C. A. 318.

1903, *Smith v. Seattle*, 33 Wash. 481, 74 Pac. 674.

1913, *Serdan v. Falk Co.*, 153 Wis. 169, 140 N. W. 1035 (employer's knowledge of employee's incompetence; reputation admitted).

[Text, p. 3621, l. 5; correct:]

For "*will* even be excluded," read "*may* even be excluded."

**§ 2592. Same: (3) Validity as a Waiver of Unconstitutionality, etc.**

[Note 2, par. 1; add:]

1910, *United States*, for use of *E. L. C. Co. v. U. S. Fidelity & G. Co.*, 83 Vt. 278, 75 Atl. 280.

[Note 2; add a new par. 3:]

But the present principle does not mean that a party can force the trial judge to admit illegal evidence simply because the opponent *fails to object*: 1912, *Electric Park Amusement Co. v. Psychos*, 83 N. J. L. 262, 83 Atl. 766 (cited more fully *ante*, § 2484, n. 4).

[Note 4; add:]

1910, *State v. Vanella*, 40 Mont. 326, 106 Pac. 364 (confrontation of witnesses).

[Note 5, par. 1; add, under *Contra*:]

1904, *Peckham v. People*, 32 Colo. 140, 75 Pac. 422 (like *Happel v. Brethauer*, Ill., *infra*).

1906, *Anderson v. Grand V. I. D.*, 35 Colo. 525, 85 Pac. 313.

1904, *State v. Armour Packing Co.*, — N. C. —, 47 S. E. 411 (agreed statement of facts cannot be used to overthrow an enrolled statute, if otherwise it is unimpeachable).

[Note 5, par. 2, l. 4; add:]

1905, *State v. Marx*, 78 Conn. 18, 60 Atl. 690.

**§ 2593. Same: (4) Effect on Subsequent Trials.**

[Note 1, par. 1; add:]

1906, *Moynahan v. Perkins*, 36 Colo. 481, 85 Pac. 1132 (admission at a former trial, received; but with the wholly erroneous addition that it may be left to the jury to determine its effect).

[*Note 1 — continued*]

1905, *Mugge v. Jackson*, 50 Fla. 235, 39 So. 157 (admissible, when "not limited to a particular occasion or temporary object").

1910, *Neidy v. Littlejohn*, 146 Ia. 355, 125 N. W. 198 (admission as to proposed testimony, made to avoid a continuance, is not receivable on a second trial, except to avoid a continuance).

1882, *Central Branch U. P. R. Co. v. Shoup*, 28 Kan. 394 (the former admission held binding, if so intended, for the second trial; but the jury are erroneously allowed to determine what the intention was).

1905, *Wells & M. Council v. Littleton*, 100 Md. 416, 60 Atl. 22 (an admission at a former trial is irrevocable, except for mistake, etc.; here, of by-laws).

1904, *Stemmler v. New York*, 179 N. Y. 473, 72 N. E. 581 (binding, when not expressly limited to the first trial).

1904, *Brown v. Arnold*, 131 Fed. 723, C. C. A. (stipulation held to be in force after judgment rendered).

§ 2594. **Form of the Admission; Who is Authorized.**

[*Note 1, par. 1; add:*]

*Contra*: 1911, *St. Louis I. M. & S. R. Co. v. Webster*, 99 Ark. 265, 137 S. W. 1103, 1199 (may be oral, unless a statute or rule of court requires writing; here applied to an agreement made while taking a deposition; *Wood, J., diss., in a convincing opinion*).

[*Note 2, as to counsel's statement of a case; add:*]

1913, *Cornell v. Morrison*, 87 Ohio 215, 100 N. E. 817 (counsel's opening statement is ordinarily to be treated as a judicial admission of facts not denied, and thus a nonsuit may be immediately based thereon).

*Contra*: 1910, *Pietsch v. Pietsch*, 245 Ill. 454, 92 N. E. 325 (forcible detainer; defendant's counsel's statement of the facts constituting his defence, made at the close of plaintiff's counsel's opening statement, held not sufficient to base a ruling ordering a verdict for the plaintiff; *Oscanyan v. Arms Co.* distinguished, but not successfully); see the comments on this case, in the *Illinois Law Review*, V, 319.

[*Note 5, par. 1; add:*]

1909, *Multnomah L. & B. Co. v. Weston B. & B. Co.*, 54 Or. 22, 99 Pac. 1046.

For an *infant's* guardian *ad litem* the counsel's stipulations would bind:

1911, *Byrnes v. Butte Brewing Co.*, 44 Mont. 328, 119 Pac. 788, *semble*.

§ 2595. **Avoiding a Continuance by Judicial Admission, etc.**

[*Note 1, par. 1; add:*]

Ill. St. 1907, June 3, p. 443, § 84 (Practice Act; re-enacts § 45 of c. 110 *supra*).

Kan. St. 1905, c. 338, § 2 (amending Gen. St. 1901, § 5401).

[*Note 2; add:*]

1904, *Gregory v. State*, 140 Ala. 16, 37 So. 259 (impeachment of general character, allowed).

1910, *Zobel v. Fanny Rawlings M. Co.*, 49 Colo. 134, 111 Pac. 843 (here the absent witness was himself called by the opponent and his testimony partly contradicted the affidavit).

So also the right remains to *exclude specific inadmissible parts* of the testimony: 1904, *State v. Leuhrman*, 123 Ia. 476, 99 N. W. 140.

In any event the opponent ought to be allowed to show that the applicant's sworn statements as to the *grounds for using* the absent witness' testimony are false; compare § 278, n. 3, *ante*.

[*Note 7, par. 1; add:*]

1910, *Bush v. State*, 168 Ala. 77, 53 So. 266.

1904, *Davis v. Com.*, — Ky. —, 77 S. W. 1101. 1912, *Breedon v. Com.*, 151 Ky. 217, 151 S. W. 407.

1906, *State v. Stewart*, 117 La. 476, 41 So. 798 (good opinion by Nicholls, J.). 1910, *State v. Richard*, 127 La. 413, 53 So. 669.

1914, *Maddox v. State*, — Okl. Cr. —, 139 Pac. 994 (non-resident witnesses).

1907, *State v. Pope*, 78 S. C. 264, 58 S. E. 815.

1908, *State v. Wilcox*, 21 S. D. 532, 114 N. W. 687.

#### § 2596. Admissions of the Genuineness of a Document.

[*Note 5; add:*]

*Ill.*: 1908, *Helbig v. Citizens' Ins. Co.*, 234 Ill. 251, 84 N. E. 897 (the sworn denial does not shift the general burden of proof from the party alleging execution).

*Ind. St.* 1905, p. 584, § 218 (re-enacts the foregoing statute). 1904, *Penn. Mut. L. I. Co. v. Norcross*, 163 Ind. 379, 72 N. E. 132 (insurance policy). 1904, *Fudge v. Marquell*, 164 id. 447, 72 N. E. 565 (note). 1905, *Baum v. Palmer*, 165 Ind. 513, 76 N. E. 108 (burden of proof stated).

*Ky. Civ. C.* § 128; 1912, *Beeler's Ex'r v. Cumberland T. & T. Co.*, 150 Ky. 257, 150 S. W. 335.

*Md. Pub. Gen. L.* 1888, art. 75, § 23, subsec. 108. 1906, *Fifer v. Clearfield & C. C. Co.*, 103 Md. 1, 62 Atl. 1122.

*Mich.*: 1908, *Citizens' Sav. Bank v. Globe B. Works*, 155 Mich. 3, 118 N. W. 507 (Circuit Court Rule 8 applied).

*Miss.*: 1906, *Elmslie v. Thurman*, 87 Miss. 537, 40 So. 67 (the rule applies equally where a plaintiff in a bill in chancery waives answer under oath).

*N. C. Rev.* 1905, § 1658 (similar to N. Y. C. C. P. § 735).

*Wash.*: 1904, *Beebe v. Redward*, 35 Wash. 615, 77 Pac. 1052 (statute construed).

[*Text, p. 3629, at the end; add a new § 2597:*]

§ 2597. **Future of the Doctrine of Judicial Admissions.** The doctrine of Judicial Admissions has a great future before it, if judges will but use it adequately. In the first place, the judge should apply it to all *informal*, as well as formal, admissions by counsel during trial. In the next place, the judge should freely call upon counsel to state whether a fact is in good faith disputed, *i. e.* should *require* admissions to be made, where it seems probable that the fact is not actually disputed. By this method, the presentation of evidence will be confined to those matters of fact alone which the parties do dispute.

It is easy to see how large a mass of needless evidencing would thereby be eliminated, how much time would be saved, and how much confusion of the jury would be avoided. And this would be attained by the mere application of an existing principle. Already, in England, the principle is so used, on a large scale, in the modern practice of settling issues before masters. But it can also be used by the judge at the trial.

How unappreciative are many judges of the possibility and propriety of such a use of the principle may be seen from a recent case,<sup>1</sup> in which the

<sup>1</sup> 1910, *Pietsch v. Pietsch*, 245 Ill. 454, 92 N. E. 325; and comment in the *Illinois Law Review*, V, 319.

[Text, p. 3629 — continued]

Supreme Court, refusing to give force to a counsel's admission during argument, put the following illustration as a *reductio ad absurdum*: "It would be a still more expeditious method, and equally conducive to the ends of justice, for the Court to call up the attorneys, and examine them and decide the case on what they say [*i.e.* admit], before calling a jury, whereby much time, labor, and expense would be saved." Precisely. Yet the learned Court is apparently unaware that the absurd method which they ironically describe is in truth a natural and practical method, applicable with great advantage in thousands of cases, — as practitioners, on reflection, can hardly doubt. It was the method of the common law, some centuries ago, with jury trial in the height of its prestige. It is the method of England and Canada to-day. It must become our own method in the future.

## **TABLE OF STATUTES CITED**



# TABLE OF STATUTES CITED

## ENGLAND

### *Statutes at Large.*

1836, 6-7 Wm. IV, c. 111	194, 196
1840, 3-4 Vict. c. 92	1644
1851, 14-15 Vict. c. 99, § 11	2162
1854, 17-18 Vict. c. 125, § 22	905, 1028
§ 24	1263
§ 25	986, 1270
§ 27	2016
1856, 19-20 Vict. c. 96, § 2	1644
1857, 20-21 Vict. c. 85, § 43	2252
1865, 28-29 Vict. c. 18, § 5	1262
1868, 32-33 Vict. c. 68, § 2	6, 2252
§ 34	1828
1871, 34-35 Vict. c. 112, § 19	326
1872, 35-36 Vict. c. 65, § 4	2061
1879, 41-42 Vict. c. 11, § 4	1683
1882, 45-46 Vict. c. 50, § 24	1680
1885, 48-49 Vict. c. 69	1136, 2061
§ 4	1828, 2066
§ 5	398
1888, 51-52 Vict. c. 46, § 1	1828
1889, 52-53 Vict. c. 44, § 8	1828, 2066
1894, 57-58 Vict. c. 14, § 16	1411, 2061, 2079
1898, 61-62 Vict.	58, 194, 488
c. 36, § 1	580, 2243, 2245, 2276
1904, 4 Edw. VII, c. 15, § 12	488, 2252
§ 13	1411
§ 14	1380, 1411
§ 15	1828, 2061, 2066
§ 17	1154
1905, 5 Edw. VII, c. 7, § 2	2281
c. 15, § 50	1680
§ 51	1674, 1680
§ 52	2162
1907, 7 Edw. VII, c. 29, § 68	2374
§ 78	1674

1908, 8 Edw. VII, c. 16, § 1	1684
c. 45, § 2	2061
c. 48, § 8	2152, 2153
§ 9	2152
c. 59, § 10	196, 1206
c. 67, § 27	488
§§ 28, 29	1380, 1411
§ 30	1828, 2066
§ 67	488
§ 88	1674, 1680, 1681, 1684
c. 69, § 33	1074
§ 220	1074
1909, 9 Edw. VII, c. 39, § 2	1828
1910, 10 Edw. VII, c. 11, § 8	1671
c. 45, § 2	6
1911, 1-2 Geo. V, c. 6, § 13	2042
1912, 2-3 Geo. V, c. 5, § 6	1674
c. 20, § 7	488

### *Rules of Court 1883.*

Ord. XXXI, R. 24	2124
Ord. XXXVI	986
Ord. XXXVIII	1380
Ord. L, R. 3	1862
R. 3-5	1163

## IRELAND

### *Statutes at Large.*

1879, 42 Vict. c. 11, § 7	1859
---------------------------	------

## CANADA

### DOMINION.

### *Revised Statutes 1886.*

c. 50, § 31	488
§ 111	1684
c. 158, §§ 9, 10	2281

# TABLE OF STATUTES CITED

<i>Criminal Code 1892.</i>		St. 1910, c. 3, §§ 4, 5	485
§ 454	2044, 2051	§ 6	485, 1556
§ 461	1286	§ 7	257
		§ 8	485, 2252
		§ 9	485
		§ 11	2051
<i>Criminal Code 1900.</i>		§ 12, 13	2055
§ 242 B	2055	§ 14, 15, 16	1525
§ 483	916	§ 17	1525, 2055
§ 484	1411	§ 18	780, 811
§ 485	21	§ 19	1263
		§ 21	1025
		§ 22	956, 1270
		§ 23	905
§ 4	485, 2245, 2272, 2273	§ 24	1020
§ 5	2251	§ 25	1084
§§ 5, 9	1050, 1054	§ 26	1080, 1054
§ 10	1051	§ 27	2167
§ 11	1054	§ 28	1054
§ 12	1223, 1080, 1053	§ 29	1080
§ 13	1050	§ 30	2375
§ 14	1074, 1050	§ 31	1030
§ 15	2167	§ 32	1080
§ 16	1054	§ 33	2167
§ 17	1030, 1050	§ 34	1080
§ 21	6	§ 35	1051
§ 23	1050	§§ 36, 37	1051
		§§ 38, 39	1075
		§ 40	1076
		§ 41	2162
		§ 43	1081
		§§ 44, 45, 46	1081
		§ 48	1051, 1705
		§ 49	1051
		§ 50	1192, 1223, 1830
		§ 52	1290
		§ 54	2016
		§ 55	1573, 1082
		St. 1913, c. 12, § 15	2150
		c. 24, § 5	150
		c. 27, § 4	2054
<i>Evidence Act St. 1903, c. 31.</i>			
§ 4	485, 2245, 2272, 2273		
§ 5	2251		
§§ 5, 9	1050, 1054		
§ 10	1051		
§ 11	1054		
§ 12	1223, 1080, 1053		
§ 13	1050		
§ 14	1074, 1050		
§ 15	2167		
§ 16	1054		
§ 17	1030, 1050		
§ 21	6		
§ 23	1050		
<i>Session Laws.</i>			
1890, c. 31, § 4	1076		
1903, c. 11, § 33	1074		
§ 35	1074		
c. 55, §§ 26, 27	1080, 2167		
c. 61, § 11	1084		
1904, c. 15, § 18	1080		
1906, c. 10	488		
1907, c. 29, § 79	1080		
c. 43, § 11	1084		
1909, c. 82, § 101	1270		
1913, c. 13, § 14	2085		
§ 25	803		
§ 30	1411		
1914, c. 12, § 8	1074		
<i>ALBERTA.</i>		<i>BRITISH COLUMBIA.</i>	
St. 1906, c. 3, § 7, par. 54	1084	<i>Revised Statutes 1897.</i>	
par. 55	1080, 1084	c. 52, § 134	1380, 1411
§ 9	1080	c. 67, § 102	2215
c. 24, § 17	1225, 1651	§ 228	2281
§ 38	1225	c. 71, § 20	1630, 1651, 1680, 1681, 1850
c. 28, §§ 64, 65	1080	§ 53	1154
c. 57, § 535	1080	c. 111, § 48	1225, 1651
St. 1907, c. 13, § 30	1644	§ 58	1676

# TABLE OF STATUTES CITED

<i>Revised Statutes 1911.</i>		1908, c. 18, § 1	1908
c. 78, § 150	1651	c. 63, § 16	1680
<i>Session Laws.</i>		1909, c. 14, § 3	1859
1902, c. 22, § 5	1519	c. 19, § 2	2509
§ 6	986, 1890	1910, c. 28	1225
1903-4, c. 15, § 69	1380, 1411	c. 71	803
§ 70	1380, 1411	1912, c. 29, § 6	2061
c. 17, § 99	2215	c. 97, § 6	1644
§ 160	2215	c. 101, § 10	488
§ 231	2281	<b>NEW BRUNSWICK.</b>	
§§ 292, 293	2281	<i>Consolidated Statutes 1877.</i>	
c. 18, § 2	1639, 1651, 1680, 1681,	c. 46, § 15	1680
§ 4	1859	<i>Consolidated Statutes 1903.</i>	
1905, c. 14, § 87	986, 1890	c. 94	2509
§ 89	1856, 1859	c. 127, § 38	1519
§ 95	1519	<i>Session Laws.</i>	
1906, c. 23, § 62	1380, 1411	1895, c. 16	1519
§ 118	1676	1905, c. 7, § 41	488, 2281
§ 120	1225, 1651	1910, c. 43, § 3	1644
§ 155	2281	1911, c. 11, §§ 15, 16	2281
1908, c. 2, § 51	1681, 1684	1913, c. 16, § 5	1669
c. 15, § 73	488, 2281	<b>NEWFOUNDLAND.</b>	
1909, c. 45, § 2	1573, 1662	St. 1904, c. 3, Rules of Court	
1910, c. 7, § 163	1681, 1684	28, 1856, 1859, 2218, 2219	
c. 30, § 89	2167	par. 27	2124
1911, c. 33, § 102	1680	30, par. 3	1519
1912, c. 17, § 6	2281	32, par. 22	73
§ 93	1680	par. 23	986
1914, c. 9, § 5	150	33,	1380
c. 26, § 2	1651	par. 1	1411, 1710
<b>MANITOBA.</b>		par. 3	1681
<i>Revised Statutes 1902.</i>		par. 18	1411
c. 40	916, 1856, 1890, 2124, 2218, 2220	par. 25	1387
Rule 164	1674	par. 31	1710
392	1859, 2219	34, par. 1	1710
402 A	1856, 2218	par. 6	2162
402 B	1856, 1859, 2218	par. 24	1710
407 A	2220	46, par. 4	1862
407 B	1856, 2124, 2218	par. 4-6	1163
421	1859, 2219	50, par. 29	1674
460 A	916, 1890, 2218	St. 1907, c. 19, § 27	1674
460 H	2218	<b>NORTHWEST TERRITORIES.</b>	
c. 101, § 202	2281	<i>Consolidated Ordinances 1898.</i>	
<i>Session Laws.</i>		c. 21, R. 287	1387
1894, c. 11	6		
1906, c. 17, § 1	2124		
§ 2	916, 1856, 1890, 2218, 2220		
§ 4	1859, 2192		

# TABLE OF STATUTES CITED

NOVA SCOTIA.		1904, c. 10, § 21	6, 2223, 2252, 2281
<i>Revised Statutes 1900.</i>		c. 23, § 20	2374
c. 163, § 20	1225, 1651	§ 67	1640, 1680, 2167
§ 21	1651	1905, c. 13, § 30	2212, 2374
§ 22	1859	1906, c. 11, § 55	1639, 1680
§ 23	1651	§ 78	2212, 2374
§ 24	1225, 1651	c. 30, § 59, par. 12	1680
§ 25	1651	§ 231	2212, 2374
§ 26	1225, 1676	c. 31, § 26	1680, 2167
§ 27	1651, 1681	§ 27	1680, 2162, 2167
§ 30	1236	c. 47, § 16	1674
§ 34	488	§ 18	2281
§ 35	488, 2065	1907, c. 34, § 119	1074
§ 36	488, 617	1908, c. 4, § 49	2281
§ 37	488, 2252	c. 28, § 7	1644
§ 38	488	1909, c. 43, §§ 2, 3, 4	488
§ 45a	2281	§ 7	2281
§ 48	2162	§§ 8, 9	488
		§ 10	1908
		§ 11	2061
		§§ 12, 13	2065
		§§ 14, 15	1828
		§ 17	1263
		§ 18	1028
		§ 19	986, 1270
		§ 20	905
		§ 21	1680
		§ 22	1684
		§ 23	1680, 1684
		§ 24	2167
		§ 25	1684
		§ 26	1223, 1680, 1683
		§ 27	2375
		§ 28	1639, 1680
		§ 31	2167
		§ 32	1681
		§ 33	1225, 1651, 2167
		§ 34	1225, 1651
		§§ 35, 36	1675
		§§ 37, 38	1676
		§ 39	2162
		§ 41	1681, 2167
		§ 42	1681
		§§ 46, 47	1225, 1651
		1909, c. 43, § 49	1223
		§ 51	1290
		§ 52	2016
		c. 82, § 20	196
		1910, c. 26, § 7	2220
		c. 32, § 118	1380
		§ 119	1519, 1710
		c. 45, § 2	6
		c. 58, § 2	1573, 1662
		1911, c. 36, § 2	2061

## TABLE OF STATUTES CITED

1911, c. 41, § 44	1680	1907, c. 12, § 29	1263
c. 169, §§ 2, 3	1141	§ 30	986, 1270
1913, c. 19, § 70	2220	§ 31	1828, 2066
c. 43, § 191	2281	§ 33	789, 811
		§ 35	1828
		§ 36	2016
		§ 37	1908
		§ 38	1225, 2201
		§ 39	1676, 2162
PRINCE EDWARD ISLAND.		1908, c. 14, § 116	2167
<i>Session Laws.</i>		c. 38, § 30	1684
1889, c. 9, § 10	488, 905	1909, c. 9, § 62	1680
1906, c. 6, § 25	1680	c. 16, § 15	2150
§ 30	1644, 1680	1912, c. 42, § 16	1687
c. 12	488	1913, c. 36	1674, 2161
1907, c. 3, § 25	1270, 2167	c. 64, § 123	1687
1909, c. 3, § 15	1669	§ 124	1674, 2160
c. 6, § 1	1680		
1910, c. 3, § 45	1380, 1411		
§ 46	2281		
c. 8, § 48	1380, 1411		
c. 15, § 25	1154		
		YUKON.	
		<i>Consolidated Ordinances 1908.</i>	
SASKATCHEWAN.		c. 1, § 8, par. 53	1684
<i>Revised Statutes 1906.</i>		par. 54	1680, 1684
c. 155, § 8	2573	§ 10	1680
		c. 6, § 20	1644, 1680
<i>Revised Statutes 1909.</i>		c. 17 (Judicature),	
c. 60, §§ 12a-d	1674	Ord. XX, RR. 190-199	1859, 2219
§ 16	1681	Ord. XXI, RR. 200-224	1856, 2218
§ 27	2281	R. 223	2124
		Ord. XXII, R. 234	1519
<i>Session Laws.</i>		259	986
1906, c. 10, § 21	1680	Ord. XXVI, R. 262	1380, 1411
c. 14, § 6	1684	266	1411
c. 24, § 38	1225, 1651	286	1387
c. 28, §§ 61, 62	1680	292	1380
c. 30, § 194	1683	Ord. XL, R. 498	1674
1907, c. 8, § 46	1669	c. 39, § 28	1225, 1651
c. 12, §§ 3, 4, 5, 6	1684	c. 48, §§ 38, 48	1680
§§ 7, 8	2167	c. 50, § 28	1680
§ 9	1684	c. 56, § 53	1074
§ 10	1680	c. 57, § 74	1684
§ 11	1639	c. 61, § 11	1680
§§ 12, 13	1680	c. 76, § 101	1680
§§ 14, 15	1681	§ 102	1680, 1684
§ 16	1225, 1651, 1681	§§ 110, 115	2281
§§ 17, 18, 19	1675		
§ 20	1681	<i>Session Laws 1904, 4 Edw. VII.</i>	
§ 21	1223, 1859	c. 5, § 3	1684
§§ 23, 24, 25	488	§ 4	1684
§ 26	2281	§ 5	1680, 1684
§ 27	905, 1028	§ 6	1680, 1684
§ 28	1028	§§ 7, 8	2167
		§ 9	1680

# TABLE OF STATUTES CITED

c. 5, § 10	1684	1909, No. 193, Spec. Sess., Aug. 25,	
§ 11	1223, 1651, 1680, 1683	§ 5	1620
§ 12	1674	1911, No. 52, Feb. 20, § 1	2169
§ 13	1639, 1680	§ 2	1225, 1651, 1676
§ 14	1680	No. 119, Mar. 9, § 9	1674
§ 15	1681	No. 191, Apr. 4, § 2	2143
§ 16	1681	No. 259, Apr. 6, § 32	2215, 2281,
§ 17	1680		2363
§ 18	2162	No. 479, Apr. 4, § 29	2281
§§ 19, 20	1651		
§ 21	1225, 1651	ALASKA.	
§ 22	1651, 1681, 1683	C. C. P. 1900.	
§ 23	1651, 1681, 1859	§ 669	987
§ 24	1225, 1651		
§ 25	1651	ARIZONA.	
§ 26	1225, 1651	Session Laws.	
§ 27	1676		
§§ 28, 29	1675	1905, No. 51, § 65	150, 1680
§ 30	1236	§ 70	150
§ 31	1680	1905, c. 51, §§ 66, 67	150
§ 32	1290	1907, c. 70, Mar. 21, § 18	1674
§ 33	2016	1912, c. 4	150
§ 34	488		
§ 35	488, 2065, 2218	ARKANSAS.	
§ 36	488	Statutes 1894.	
§ 37	488, 2252	§ 1900	2061
§ 38	488		
§ 39	2201	Session Laws.	
§ 40	905, 907		
§ 41	1028	1905, c. 52	923, 987, 1021
§ 42	1263	c. 326	803
§ 43	986, 1270	p. 779, May 11, § 4	1352
§ 44	1828	1907, No. 77, Mar. 12, § 5	1275
§ 46	2162	No. 260, May 6, § 1	2199
		No. 398, May 27, § 12	1674
		1909, c. 52, Mar. 5, § 2	2085
		1911, c. 1, Spec. Sess., June 29, § 94	2281
UNITED STATES		CALIFORNIA.	
ALABAMA.		Constitution.	
Code 1897.		Amend. 1911, Art. 6, § 4½	21
§ 1795	987		
§ 1797	1290, 1300	Political Code 1872.	
§ 1816	1680		
§ 5086	1680, 2375	§ 2169	2054
		§ 3083	1644, 1680
Session Laws.			
1903, No. 9, Feb. 2	488, 2239	Penal Code 1872.	
No. 32	7		
1909, No. 191, Spec. Sess., Aug. 25,			
§ 12	2281, 2363	§ 269b	1644
§ 15	2281	§§ 270, 270a	488
§ 21, par. 13	1205	§ 686	1405, 1810, 1824
§ 22½	2281	§ 869	1669, 1824
§ 29½			

# TABLE OF STATUTES CITED

§ 872	1382	1907 c. 392, § 2	912, 1387, 1389, 1411
§ 882	1382, 1387, 1411	§ 5	1382
§ 1025	2277	c. 394	1837
§ 1103a	2042	c. 395	2210
§ 1108	2061	1911, c. 14, § 55	2281
§ 1110	2044	1913, c. 157	2199
§ 1118	2495		
§ 1322	488		
§ 1333	2199		
§§ 1335-1341	1382		
		COLORADO.	
		<i>General Statutes 1883.</i>	
		§ 3642	1519
		<i>Revised Statutes 1908.</i>	
		§ 7267	488, 1409
		§ 7274	2292
		<i>Session Laws.</i>	
		1903, c. 77	1074
		c. 181, § 159	1681
		§ 160	1859
		§ 172	1681
		1905, c. 100, § 14	1640, 1680
		1907, c. 37, § 4	1684
		c. 112, § 21	1644, 1680
		c. 252	1519
		1909, c. 1	1676
		1911, c. 90, §§ 1, 7, 8	1680
		c. 109	1684
		c. 179, § 5	488
		c. 229	488, 1409
		c. 230	2292
		1913, c. 47, §§ 1, 7, 8	150, 1680
		COLUMBIA (DISTRICT).	
		<i>Compiled Statutes 1894.</i>	
		c. 30, § 33	2067
		<i>Code 1901.</i>	
		§ 964	7, 2245
		§ 1068	2245
		§ 1071	1681
		CONNECTICUT.	
		<i>General Statutes 1888.</i>	
		§§ 1060-1062	2218
		§ 1099	2218, 2219
		<i>General Statutes 1902.</i>	
		§ 710	2218, 2219
		§§ 732-737	1856, 1859, 2218, 2219
		§ 981	1519

# TABLE OF STATUTES CITED

<i>Session Laws.</i>		1905, No. 81, § 9	1672
1889, c. 22	1856, 1859, 2219	1907, c. 5888	1205, 1680, 2044
1907, c. 192	67	1909, c. 5897	1668
1909, c. 49	1818	c. 5935, § 10	1674
1911, c. 128, § 9	2281	1911, c. 6223	21
c. 175, §§ 1, 2, 3	1521	1913, c. 6482	1275
<b>DELAWARE.</b>		<b>GEORGIA.</b>	
<i>Session Laws.</i>		<i>Code 1895.</i>	
1887, c. 230	488, 2239	§ 3084	1078
1907, c. 231	1651	§ 3621	1676
c. 243	1644, 1680	§ 3630	1225
1909, c. 66, § 10	1644, 1680	§ 4250	1681
c. 218, § 4	1651	§ 5180	1778
1911, c. 69	1671, 1680	§ 5182	1519
c. 244, § 6	1644	§ 5214	1681
c. 254	1651	§ 5237	1681
1913, c. 84, § 8	1644, 1680	§ 5272	2239
c. 85, § 14	1644, 1680	§ 5285	1959
		§ 5295	1013
		§ 5314	18
		§ 5773	1404
<b>FLORIDA.</b>		<i>Code 1910.</i>	
<i>Constitution 1885.</i>		<i>Code 1910.</i>	
Art. 16, § 21	1225, 1651, 1676	Vol. II, § 379	488
<i>Revised Statutes 1892.</i>		<i>Criminal Code 1895.</i>	
§ 1087	1163	§ 629	2281
§ 1096	522	§ 989	2511
§ 1121	2016	§ 1001	1404
§ 1973	1651	§ 1011, par. 4	2239
§ 2863	2245	§ 1027	987
§§ 2867, 2875	2201		
§ 2901	1850	<i>Penal Code 1910.</i>	
§ 2905	580	§ 715	1354
§ 2918	1163	§ 1037, par. 4	2239
<i>General Statutes 1906.</i>		<i>Session Laws.</i>	
§ 1523	1668	1903, p. 90, Aug. 15	1354
§ 3148	2509	1906, c. 450, § 3	2281
§ 3558	1205, 1680, 2044	c. 451, § 1	2281
§ 3975	580	1908, No. 566	1681
<i>Session Laws.</i>		No. 568	803, 1382, 1411
1891, c. 4020	2243	1910, No. 309	1519
1893, c. 4120	2201	1911, No. 207	488
1903, c. 5132	2201		
c. 5162, p. 97	2143		
c. 5191, p. 134, § 3	1671		
1905, No. 29	2281	<b>HAWAII.</b>	
No. 33	1651	<i>Revised Laws 1905.</i>	
No. 45, § 2	2281	§§ 1159, 2214	1644

# TABLE OF STATUTES CITED

<i>Session Laws.</i>		1905, May 18 (Municipal Court),	
1905, No. 19	1671	§ 32	1856, 2218
No. 52	1073	§ 33	916, 2218
No. 64, § 3	1644	§ 54	2572
No. 67	1639, 1608	(Primary Elections),	
1907, No. 8	1680	§ 119	2572, 2577
No. 79	1644	1907, Feb. 11, p. 56	1375
No. 119, § 68	1639, 1680	May 17, p. 213	1326
1909, No. 15	1644	May 28, p. 376	1651, 1676
No. 69, §§ 3, 4, 5	1651	June 3, p. 443	1859
1911, No. 23	1644	§ 64	2595
No. 64	1681	1909, June 4, p. 145, § 2	1674
No. 96	1644		
1913, No. 42, § 6	2259, 2281	INDIANA.	
No. 83, § 6	488, 2063, 2085	<i>Revised Statutes 1897.</i>	
No. 86	1644	§ 519	987
No. 101, § 6	1141, 2281	§§ 1004, 1008	488, 2061, 2063
No. 157	1639		
IDAHO.		<i>Revised Statutes 1901.</i>	
<i>Revised Statutes 1887.</i>		§ 2779	1736
§ 1179	150	<i>Session Laws.</i>	
§ 7668	1851	1905, c. 53, p. 83 § 12	2281
§ 7871	2059	§ 19	1680
<i>Session Laws.</i>		c. 129, p. 219 § 54	2281
1899, Feb. 6, § 2, p. 125	1851	c. 158, p. 481 § 3	2281
1905, Mar. 7, p. 352	7, 150	c. 168, § 239	851, 860
p. 416	2281	c. 169, p. 584 § 76	2079
1909, Mar. 13, p. 334	916, 1890	§ 103	2360
1911, c. 15, Feb. 18, p. 30, § 10	2281	§ 112	1851
c. 191, Mar. 9, p. 631, § 21	1644, 1680	§ 119	1851
ILLINOIS.		§ 218	2596
<i>Revised Statutes 1874.</i>		§ 235	488, 2272
c. 24, § 65	1680, 1684	§§ 236, 237	2281
c. 30, § 12	2110	§ 238	1339, 2026, 2044
§ 35	1225	§ 239	831, 923, 2071
c. 38, § 279	987	§ 241	488
§ 426	987	§ 242	1382, 1398
c. 51, § 5	2336, 2341	§ 244	2061
§ 10	1684	§ 247	2039
c. 109, § 2	1225	§ 250	2281
c. 148, § 4	1382	§ 253	2281
§ 7	1349	§ 260	1873
<i>Session Laws.</i>		§ 262	1800
1897, May 21, §§ 7, 18	1705	§ 455	2085
1901, May 10	1072, 1354	1907, c. 31	2531
1903, pp. 121, 122	1705	c. 243, § 6	1856, 1859
		§ 11	2281
		c. 282, § 49	2281
		1911, c. 174	488, 2239
		1913, c. 192, § 8	2281
		c. 312	2008

# TABLE OF STATUTES CITED

<i>Burns' Annotated Statutes 1906.</i>		<i>Code of Civil Procedure 1896.</i>	
§ 530	987	§ 215	2272
<b>INDIAN TERRITORY.</b>		<i>Code of Civil Procedure 1909.</i>	
<i>Statutes 1899.</i>		§ 320	488
§ 1974	620	§ 321	620, 2245, 2338
<b>IOWA.</b>		<i>Code of Criminal Procedure.</i>	
<i>Code 1897.</i>		§ 209	1859
§ 245a (Suppl. 1902)	1387, 1388, 1413, 1415	<i>Session Laws.</i>	
§§ 3610, 3611	1856, 2218	1901, c. 233	2195
§§ 4613, 4614	923	1903, cc. 387, 388	488
§ 4623	797	1905, c. 209	2281
§ 4646	1681	c. 323	1186, 1225, 1226, 1651, 1680
§ 4651	1684	c. 324	1225, 1651
§ 4688	1382	c. 338, § 2	2595
§ 4944	1620	c. 340, § 10	2281
§ 2056	2509	c. 494, § 1	1413, 1669, 2098
§ 5227	1667	c. 526, § 1	1304, 1411
§ 5258	1669	1907, c. 168	1680
<i>Session Laws.</i>		c. 259	1856, 1859, 2281
1898, c. 9, § 1	1387, 1409, 1413, 1669	c. 373	1354
1904, c. 8, § 8	1671	1909, c. 113	1856, 1859
1906, c. 159	1239	c. 114	1570
1907, Feb. 20	1354	c. 164, § 7	2281
1910, c. 128	1354	c. 179, § 3	1206
1911, c. 3	1671	1911, c. 163, § 6	488, 2063, 2085
c. 105	1678	c. 228	488
c. 188, § 4	1851	c. 237, § 12	2281
1913, c. 15	2281	c. 238, § 17	2281
c. 21	2281	c. 248, § 17	1570
c. 272, § 5	1710	c. 296, § 15	1644
c. 296	797	1913, c. 224, § 6	1644
<b>KANSAS.</b>		c. 244	2072
<i>General Statutes 1897.</i>		<b>KENTUCKY.</b>	
c. 97, § 3	1225	<i>Statutes 1899.</i>	
c. 102, § 218	2272	§ 1638	1644
c. 136, § 4	1684	§ 1642	1684
c. 265, § 10	2281	§ 1973	2281
<i>General Statutes 1901.</i>		§ 4643	1669
§ 5401	2595	c. 81, § 17	1352, 1639, 1664, 1672, 1674
§ 5651	1859	<i>Statutes 1903.</i>	
<i>General Statutes 1909.</i>		§§ 470, 472	2433
§ 5915	620, 2245, 2338	§ 2725	1672
		§ 3760	1352, 1639, 1664, 1672, 1674
		§ 4545	1680
		§ 4643	1398

# TABLE OF STATUTES CITED

<i>Code of Criminal Procedure 1895.</i>		<b>MAINE.</b>	
§ 120	1851	<i>Revised Statutes.</i>	
§ 272	2354	c. 61, §§ 11, 12	1644
		c. 109, § 4	1411
<i>Code of Civil Procedure 1895.</i>		<i>Session Laws.</i>	
§ 128	2596		
§ 593	944		
§ 596	905	1905, c. 58	1675
§ 601	1840	1907, c. 99	1644, 1680
§ 606	617	1909, c. 159	1411
§ 4	488	c. 161	1644, 1680
<i>Session Laws.</i>		<b>MARYLAND.</b>	
1904, c. 79	1387, 1412	<i>Public General Laws 1888.</i>	
c. 127	1639, 1706		
1906, c. 27	1680	Art. 35, § 2	488
1908, c. 67, § 1	987	§ 36	1382
1910, c. 37, § 21	1644	75, § 23, subsec. 108	2596
1912, c. 103	488		
c. 135	831, 851	<i>Public General Laws 1904.</i>	
<b>LOUISIANA.</b>		Art. 27, § 440	1851
<i>Revised Statutes 1876.</i>		Art. 33, §§ 174, 175	2281
		35, § 2	488
§ 1436	1676	§ 3	1127
		§ 4	2239, 2245
		§ 36	1382
<i>Revised Civil Code 1888.</i>		<i>Session Laws.</i>	
§ 1655	2008		
§ 2402	612		
<i>Revised Laws 1897.</i>		1874, c. 386	1127
		1904, c. 56	2572
§ 611	1382	c. 661	488, 1126
		1906, c. 239	1382
<i>Session Laws.</i>		1908, c. 122	2281
1886, c. 29	488	c. 487	1665
1894, No. 49	570	1912, c. 21	1684
No. 67	1908		
1896, No. 113	20, 246	<b>MASSACHUSETTS.</b>	
1898, No. 190	612	<i>Revised Laws 1902.</i>	
1902, No. 68	612		
No. 185	488, 580	c. 159, §§ 15, 16	1859
1904, No. 41	488, 580, 2239	c. 173, § 57	1856
1906, No. 207	2065	§§ 57-67	1856, 1859
1908, No. 40	1674	§ 63	1856
No. 105	1411	c. 175, § 20	2241
No. 109	851	§ 21	488, 987
No. 126	916	§ 24	916
No. 247	1413		
1910, No. 176	1382, 1411	<i>Session Laws.</i>	
No. 234	1660		
1912, No. 105	488	1898, c. 535	1576
No. 182	1665	1905, c. 288	7
No. 242	2373	c. 330	1639

# TABLE OF STATUTES CITED

1907, c. 225	2167	<i>Session Laws.</i>	
1908, c. 269	1639		
1909, c. 206	1856	1905, c. 47	811, 1393
c. 225	1856, 1859	c. 192	2281
1911, c. 593	1856	c. 193, §§ 1, 2	1705
1912, c. 276	1856	c. 305, § 35	1225, 1651
c. 442	1639	§ 38	2167
1913, c. 81	488, 987	§ 42	1225, 1651
c. 288	1519	1907, c. 191, § 30	1680
c. 401	1640	1909, c. 127	1680
c. 716	1710	c. 251	1519
c. 815	1856, 1859	1911, c. 200	1671, 1680
1914, c. 406	987	c. 250	1644
		1913, c. 251	1644
		c. 370	1651
		c. 579	1644
<b>MICHIGAN.</b>			
<i>Compiled Laws 1897.</i>			
c. 282, § 101 (original numbering)	488		
§ 4617 (editor's numbering)	2390		
1897, § 10136-142	1415		
§ 3846	2374		
§ 10136	1411		
§§ 10144, 10145	1681		
§ 10181	2380		
§ 10188	1411		
<i>Session Laws.</i>			
1899, No. 183, § 25	2264		
No. 255, § 11	2281		
1901, No. 239	488		
1903, No. 30	488		
1905, No. 136	488, 2380		
No. 175	562, 1907, 2203		
1907, No. 144	488		
No. 182	2281		
No. 312	2281		
No. 191	1681		
No. 234	2380		
No. 307	916, 1890		
1911, No. 2	2259, 2281		
1913, No. 376	1658		
<b>MISSISSIPPI.</b>			
<i>Annotated Code 1892.</i>			
		§ 1653	1385
		§ 1808	2508
		§ 2413	1681
<i>Code 1905.</i>			
		§ 1985	2509
		§ 5018	2259, 2281
<i>Session Laws.</i>			
1912, c. 138, § 16			1674
c. 139, § 9			1674
c. 149, § 5			1644
c. 251			2259, 2281
<b>MISSOURI.</b>			
<i>Revised Statutes 1899.</i>			
		§§ 265-267	488
		§ 865	21
		§ 2635a	1432
		§ 3094	1680
		§ 3098	1680
		§ 3149	1032
		§ 4164b	1684
		§ 4635	1681
		§ 4655a	1890
		§ 4656	2336
		§ 4680	2277
		§ 8983	2281
		§ 8989	2281
<i>Revised Statutes 1909.</i>			
		§§ 5033, 5056	1404
		§ 10311	2281

## TABLE OF STATUTES CITED

<i>Session Laws.</i>			<i>Session Laws.</i>		
1895, p. 284	2277		1905, c. 157		1683
1905, Mar. 10, p. 208	1684		c. 162, §§ 21, 22		2281
Mar. 23	1705		c. 172		488
Apr. 6, p. 307	1890		1907, c. 90, § 2 (k)		2281
Apr. 15, pp. 148, 150	1705		1911, c. 177		488
1907, p. 245, Mar. 6	1432		1913, c. 43, § 2		1665
p. 245, Mar. 16	2060, 2066, 2380		c. 68		1644
p. 271, Feb. 27	1705		c. 75		1710
p. 382, Mar. 19	2281		c. 154, § 152		2281
p. 383, Mar. 19	2281		c. 179, § 19		2281
1909, p. 99, June 4, § 3	488		c. 241, § 14		1684
p. 538, May 6, § 21	1644				
1913, p. 225, Mar. 25	1818		NEVADA.		
p. 290, Apr. 7, § 24	1640		<i>General Statutes 1885.</i>		
p. 549, Mar. 29	2281				
p. 556, Mar. 17	2250, 2281		§ 3401		488
			§ 3405		2395
MONTANA.			<i>Session Laws.</i>		
<i>Penal Code 1895.</i>			1905, c. 113		2395
§ 2097	1163		1909, c. 44, § 13		1669
§§ 2480-2491	1382		§ 17		2281
			c. 77, § 1		1275
<i>Code of Civil Procedure 1895.</i>			c. 80		488
§ 1081	1164		1911, c. 179		488
			c. 199, § 20		1644
<i>Revised Codes 1907.</i>			1913, c. 272		488, 2085
§ 7887	1404				
§ 7891	488		NEW HAMPSHIRE.		
			<i>Session Laws.</i>		
<i>Session Laws.</i>			1903, c. 134		1326
1907, c. 109	1382		1905, c. 60		1326
c. 113	1163		1911, c. 133, § 24		1680
1909, c. 66	488		1913, c. 137, § 3		1275
c. 94	1674				
1913, c. 41	488		NEW JERSEY.		
c. 52	2281		<i>Revised Public Laws 1900.</i>		
c. 86	1225, 1651		p. 363, § 5		2235, 2240
NEBRASKA.			p. 375		1890
<i>Compiled Statutes 1899.</i>			<i>General Statutes 1896.</i>		
§ 5343d	2281		District Courts, Apr. 14, § 158		1828
§ 5905	488		Orphans' Courts, § 20		1681
			<i>Session Laws.</i>		
<i>Cobbey's Annotated Statutes 1903.</i>			1899, Mar. 21		1684
§§ 4817, 5008, 5025, 5026	1681		1900, c. 150, §§ 2, 5		2239
			§ 27		1680
<i>Compiled Statutes 1903.</i>			1903, c. 140		6, 1856
c. 73, § 14	2165				

# TABLE OF STATUTES CITED

1904, c. 117	1651	§ 841b	1573
1905, c. 199	1684	§ 870	6, 1856
1906, c. 206, § 6	987, 2281	§ 871	1856
c. 208, § 5	987, 2281	§ 872	1856
c. 250	1651	§ 881	1387
1909, c. 109, § 10	1644	§ 885	1387
c. 153	1681	§ 911	18
1910, c. 274, § 15	1644	§ 931a	1680
1911, c. 188, § 32	2281	§ 931b	2451
c. 201, § 33	1674	§ 931c	1678
c. 207	1828	§§ 935, 936	1651
c. 279	1856	§ 937	1676
1912, c. 199, § 15	1644	§ 941a	1684
c. 231	1859	§ 946	1651, 1676
c. 260	1680	§ 956	1680
		§ 961a	1154
		§ 961b	1290
		§ 961c	2159, 2432
		§ 961d	2016, 2024
		§ 961e	1573, 1664
		§ 961f	1639
		§ 975	1651
		§ 1339	2052
		§§ 1688f to i	1387
		§ 2513a	1818
		§ 2540	1310
		§ 2618	1185, 1310
		§ 2629	1681
<i>Rules of Court.</i>			
Practice Act Supplement	1859		
Schedule A, Rules of Court No. 66	1859		
<i>NEW MEXICO.</i>			
<i>Constitution 1910.</i>			
Art. II, § 14	811, 1397		
§ 15	2252		
§ 16	2039		
<i>Session Laws.</i>			
1901, c. 58	488		
1905, c. 38, § 3	1225, 1651		
c. 79, § 8	1680		
1907, c. 26	488		
c. 49, § 10	1680		
§ 71	1680		
c. 84, § 3	2200		
1909, c. 76, § 3	1680		
c. 83, § 29	2281		
c. 98	488		
1912, c. 28, § 4	150		
c. 78, § 6	2281		
c. 82, § 76	1680		
<i>Code of Criminal Procedure 1881.</i>			
		§ 8	1398
		§ 221f	7, 1398
		§ 222b	803
		§ 392	1828, 2066
		§ 393a	488
		§ 395	831, 841
		§ 398a	1432
		§ 482a	1681
		§ 514a	1674
<i>Penal Code 1881.</i>			
		§ 101a	2043
<i>NEW YORK.</i>			
<i>Code of Civil Procedure 1877.</i>			
§ 735	2596		
§ 803	1859		
§ 830	1387, 1389, 1413, 1669		
§ 834	2380		
§ 836	2388		
§ 841a	665, 1674		
<i>Consolidated Laws 1909.</i>			
		c. 18, St. 1909, c. 23, § 105	1676
		c. 20, St. 1909, c. 25	2281
		c. 27, St. 1909, c. 32, § 93	1413
		c. 31, St. 1909, c. 36	2281
		c. 40, St. 1909, c. 88, § 395	2281
		§ 583	2281
		§ 2177	2061
		§ 2446	2281

# TABLE OF STATUTES CITED

c. 45, St. 1909, c. 49, § 21b	1644, 1672	1913, c. 223	439
§ 240a	439	c. 236	2281
§ 296	1680	c. 395	1573
§ 391	1644	c. 412	1185, 1310
c. 50, St. 1909, c. 52, § 311	1676	c. 542	1413
c. 88, § 2444	488, 987, 1270	c. 559, § 11	1672
		c. 597, § 1	1684
		c. 619	644
<i>Greater New York Charter.</i>			
§ 685	488		
<i>Session Laws.</i>		<b>NORTH CAROLINA.</b>	
		<i>Revision 1905.</i>	
1880, c. 36	2025	§ 300	1680
1892, c. 279	1828	§§ 327-345	1660
1893, c. 595	1387, 1413, 1669	§ 329	1290
1899, c. 352	1387, 1413, 1669	§ 539	2496
1905, c. 331	2380, 2382, 2385	§ 569	1275
c. 450	1225	§ 860	1062
1906, c. 324	2043	§§ 864-872	1856
1909, c. 49, § 22	1644	§ 865	916, 2218
c. 65, Feb. 17	665, 796, 1154, 1290, 1674, 1680, 1684, 2159, 2432, 2451	§ 868	916
		§§ 870-872	488
c. 65, Feb. 19	1573, 1639, 1664, 1818, 2016	§ 1023	1225, 1651
		§ 1298	2201
c. 65, § 3	1387, 1856	§ 1351	2218
c. 66, § 1, p. 85	488, 1432, 1681	§ 1496	1828
p. 87	1674	§ 1564	488, 2067
c. 240, § 61	488, 987, 1270	§ 1592	1684
c. 425	1678	§ 1593	1680, 1684
c. 514, § 3	2281	§ 1594	1271, 1680, 1684, 1702
c. 517	1519	§ 1595	1680
c. 524	2061	§ 1596	1680
c. 578	1681	§ 1597	1239
1910, c. 394	2281	§§ 1598, 1599	1225, 1651
c. 395	2281	§ 1603	1681
c. 480, § 7	1684	§§ 1607, 1608, 1609	1681
1911, c. 105	1310	§ 1616	1215, 1680, 1681
c. 279	1644	§ 1617	1680
c. 647	2281	§ 1618	1681
§ 25	2252, 2281	§ 1619	1225, 1651, 1681
c. 764	1387, 1389, 1413, 1669	§ 1620	2281, 2292
c. 781	1856	§ 1621	2380
c. 859	1387	§§ 1622-24	1519
1912, c. 97	1680	§ 1625	1519
c. 312	2281	§ 1626	1698
c. 390	7, 803, 1398	§ 1628	488
c. 420	488	§ 1630	488
c. 444, § 4	2252, 2281	§§ 1631, 1636	488
1913, c. 71	1680	§§ 1632, 1633	488
c. 86	1859	§ 1634	488, 2272, 2276
c. 140	1387	§ 1635	488, 2252
c. 208	1676	§ 1637	2281
c. 209	1676	§ 1638	2281
		§ 1645	1411

# TABLE OF STATUTES CITED

§ 1652	803, 1382	<i>Session Laws.</i>	
§ 1654	1411	1905, c. 9, § 5	1674
§ 1655	1411	c. 10, § 12	1674
§ 1656	1859, 2219	1907, c. 2	1705
§ 1657	2219	c. 21	916
§ 1658	2596	c. 72	1665
§ 1688	2281	c. 119	488
§§ 2354, 2355, 2356	1828	c. 139	1513
§ 2360	1828	c. 270, § 21	1644
§ 2459	2281	1909, c. 72	916
§ 2645	2509	c. 109	488
§ 2661	1275	c. 128, § 17	2281
§ 2803	2203		
§ 3113	2051		
§ 3115	2051	<i>OHIO.</i>	
§ 3121	1413	<i>General Code.</i>	
§ 3127	1304, 1310, 1320, 2050, 2051	§ 11497	916
§ 3130	1681	§ 11540-1	1388
§ 3133	1658, 1681	§ 12412-1	1433, 2281
§ 3193	1326	§ 12824-1	2281
§ 3195	1837	§ 13031-11	1620
§ 3196	1326	§§ 13668, 13669	1382
§ 3201	2281		
§ 3205	1375, 1413	<i>Annotated Revised Statutes 1898.</i>	
§ 3241	1851	§ 4427-6	1354
§ 3360	2061	§ 5242a	6
§ 3950	1672	§ 7284	488
§ 3951	1672	§ 7285	2281
§ 4280	2281		
§ 4331	1640		
§ 4338	1640	<i>Session Laws.</i>	
§ 4407	987, 2215, 2281	1898, Apr. 19, § 6a	2281
§ 4684	1680	1904, Apr. 23, p. 332	2281
§ 5070	1680	1906, Apr. 2, p. 313	2281
§ 7253	488	1908, p. 20, Feb. 26	2286
		1909, p. 49, Mar. 12	488
<i>Session Laws.</i>		1910, p. 100, Apr. 14	2281
1897, c. 109	2496	p. 139, Apr. 28	916
1899, c. 131	2496	p. 210, May 13	1433, 2281
1907, c. 779	1620	1911, p. 132, May 18	21
1911, c. 175	1680	1913, p. 189, Apr. 23	1620
1913, c. 52	2016	p. 190, Apr. 23	1388
c. 69	1676	p. 443, May 8	1382
<i>NORTH DAKOTA.</i>		<i>OKLAHOMA.</i>	
<i>Revised Codes 1899.</i>		<i>Constitution.</i>	
§ 5644	1210	Bill of Rights, § 27	2252, 2281a
§ 8034	1851		
		<i>Statutes 1893.</i>	
<i>Revised Codes 1905.</i>		§ 1189	1304
§ 7252	916		
§ 9383	2282		

# TABLE OF STATUTES CITED

<i>Statutes 1903.</i>		1909, c. 3, § 52	2281
§ 68, art. 10	2034	c. 42	1676
<i>Revised &amp; Annotated Statutes 1903.</i>		c. 58	1411
§ 4574	1530	c. 199	1680
§ 4575	1225, 1239	c. 226	1239
<i>Compiled Laws 1909.</i>		1911, c. 12	1680
§ 6623	1382	c. 67	1239
§ 6644	1853	c. 128	1239
§ 6691	1851, 1853	c. 148	1382
		c. 172	1680
		c. 279, § 59	2252, 2281
		1913, c. 184, § 47	1640
<i>Revised Laws 1910.</i>		<b>PENNSYLVANIA.</b>	
§ 5876	2497	<i>Constitution 1874.</i>	
§ 5882	2239	Art. III, § 32	
<i>Session Laws.</i>		2281a, 2282	
1908, c. 75, Art. II, § 5	1275	<i>Digest of Laws 1896.</i>	
1909, c. 33, Art. I, § 5	1660	Witnesses, § 11	
§§ 12, 13	1705	2235	
c. 41, § 4	1304	<i>Session Laws.</i>	
1913, c. 68	1382	1881, May 11, Pub. L. 20	
<b>OREGON.</b>		1887, May 23, § 2	
<i>Codes and General Laws 1892.</i>		§ 7	
§ 856	1909, 1910	Pub. L. 158, § 2b	
§ 1134	2065	1893, Pub. L. 345	
<i>Codes of Civil Procedure.</i>		June 8, § 4	
§ 731	1680	1895, May 15, § 1	
<i>Lord's Oregon Laws.</i>		1905, No. 221, § 21	
§ 597	1239	1907, May 23	
§ 727	1481	No. 146	
§ 932	1669	1909, No. 90, §§ 2, 4	
§ 3733	1640	§ 3	
<i>Bellinger &amp; C.'s Annotated Codes &amp; Statutes.</i>		No. 126	
§ 755	1680	No. 128	
§ 785	41	No. 167	
§ 819	1676	1911, Mar. 15, p. 20	
§ 826	1411	Mar. 30, p. 35	
§ 835	1382	May 11, p. 259	
<i>Session Laws.</i>		p. 269	
1905, c. 51	1680	June 8, p. 709	
c. 106	1674	p. 720	
1907, c. 117	1239	1913, Mar. 27, p. 14	
c. 174	1651	No. 136	
		No. 241	
		No. 300	
		2016	
		<b>RHODE ISLAND.</b>	
		<i>Session Laws.</i>	
		1905, § 399	
		1911, c. 714	
		2008, 2016	
		2281	

# TABLE OF STATUTES CITED

SOUTH CAROLINA.		TENNESSEE.	
<i>Code 1902.</i>		<i>Session Laws.</i>	
§ 1538	1674	1897, c. 14, § 6	2281
§§ 2051, 2888	1680	1909, c. 87.	1382, 1681
		c. 160	803
		c. 384	1680
<i>Session Laws.</i>		1913, c. 30	1644
St. 1886, Dec. 20	2110	2d Extra Sess., c. 1	2281, 2056
St. 1905, Feb. 22	206, 2061		
1905, No. 457	2203		
1906, No. 97	1674		
1907, Feb. 16	1269		
1909, No. 126, § 13	1674		
No. 128	1382, 1411		
1910, No. 361	1210, 1240, 2132		
1911, No. 70, § 7	1644		
No. 88	1684		
No. 53	1219, 1269		
SOUTH DAKOTA.		TEXAS.	
<i>Statutes 1899.</i>		<i>Revised Civil Statutes 1895.</i>	
§ 533	1290	§ 2274a	1382
		§ 2282	1382
<i>Statutes 1903.</i>		§ 2284	1382
c. 154, § 3, p. 179	1620	§ 2291	1382
		§ 2312	7, 1225, 1651, 1676, 2143
		§ 7160	150
<i>Revised Code of Civil Procedure 1903.</i>		<i>Code of Civil Procedure.</i>	
§ 486	488	Art. 790	831
§ 529	1681		
§ 533	1651		
§ 924	2408		
§ 961	1239		
§§ 970-973	1676		
<i>Penal Code 1903.</i>		<i>Penal Code 1895.</i>	
§ 802	1411	§ 713	63, 246
§ 803	488	§ 6351	21
<i>Session Laws.</i>		<i>Session Laws.</i>	
1905, c. 125, § 8	1680	1903, Mar. 31, c. 94, p. 119	2281
c. 149	1239	1905, c. 59, § 1	1832
1907, c. 3	1676	c. 76	1382
c. 246	1644	1907, c. 7	2281
1909, c. 224, § 11	2281	c. 8	2281
1911, c. 148	1681	c. 62	1644, 2082
c. 249	488	c. 91	1381
c. 256, § 28	1680	c. 118	835
1913, c. 371	488	c. 165	7, 1225, 1651, 1676, 2143
		1913, c. 69	150
		Spec. Sess., c. 31	2056, 2281
		UNITED STATES.	
		<i>Constitution 1787.</i>	
		Amend. IV	2183, 2264
		V	2252, 2264
		VI	1398
		XIV	1398, 1404, 2252.
		<i>Revised Statutes 1873.</i>	
		§ 721	6
		§ 724	2200, 2219
		§ 858	6, 488

# TABLE OF STATUTES CITED

§ 859	2259	1903, Mar. 3, c. 1012	1354
§ 860	7, 852, 1040, 1066, 2264, 2276, 2281, 2281a, 2282	1904, April 19, c. 1396	1239
§ 861	6, 1411, 1856	c. 1398	1186, 1239, 1676, 2373
§ 862	6	1906, Mar. 21, J. R. 11	2281
§ 863	1381, 1856, 2200	Mar. 23, c. 1131	488, 2085
§ 866	6, 1381, 1856	June 28, c. 3585	1651
§ 867	1856	June 29, c. 3591	1680, 1684
§ 869	2195	c. 3592	516, 1672
§ 876	1856, 2207	c. 3608	6, 488
§ 882	2143	June 30, c. 3920	2259, 2281, 2281a
§ 886	1680	1907, Feb. 20, § 3	488
§ 891	1680	1909, Feb. 16, c. 130	1381, 1411
§ 892	1684	Mar. 4, c. 320	1674, 1676
§ 905	1681	Mar. 4, c. 321, No. 350, § 93	1639
§ 906	1680	1910, Mar. 26, c. 107, 61st Cong.	
§§ 913, 918	6	p. 263	488
§ 1078	488, 516	May 7, c. 216, No. 168, 61st	
§ 1079	488	Cong., p. 352	7, 852, 2281
§§ 1081, 1082	1411	1911, Mar. 3, c. 231	5, 488, 1381, 1411,
§ 1083	1381		1828
§ 1084	1828	1912, Feb. 5, c. 28	488
§ 1624	1398		
§ 3167	2375	<i>Rules of the Supreme Court.</i>	
§ 3240	1680	No. 46	6
§ 3318	1240	<i>Admiralty Rules.</i>	
§ 3330	1240	No. 6	6
§ 4597	1352	No. 46	4
§ 4915	1417	<i>Equity Rules.</i>	
§ 5209	2258	No. 46-48	1411, 1417
		No. 51	2195
		No. 53	1381
		No. 54	1381
		No. 58	1856, 1859
		No. 62	2195
		No. 78	1828
		<i>UTAH.</i>	
		<i>Revised Statutes 1898.</i>	
		§ 3467	1383
		§ 5015	2276
		<i>Compiled Laws 1907.</i>	
		§ 3414	488
		§ 3431	987
		§ 4355	2513
		§§ 4513, 4670	1669
		§ 5014	488
		<i>Session Laws.</i>	
		1905, c. 41, Mar. 7	1382, 1411
		c. 108, Mar. 9, § 17	1639, 1680
		c. 120, Mar. 16, § 20	1644, 1680

# TABLE OF STATUTES CITED

1909, c. 37	488	1910, c. 28	1644
c. 39	488	c. 334	1681
1911, c. 62	488	1912, c. 152	1651
c. 105	488	c. 235	1664, 2143
c. 106	1680	1914, c. 100	2143
c. 109	488	c. 313	562
1913, c. 66	1674		
<b>VERMONT.</b>		<b>WASHINGTON.</b>	
<i>Statutes 1894.</i>		<i>Annotated Codes and Statutes 1897.</i>	
§ 1589	488	§ 6009	1859, 2319
§ 1600	1639	§ 6047	1859, 2319
§ 2367	1681	§ 6113	1859
§ 3303	1644		
§ 3765	1680	<i>Remington &amp; Ballinger's Annotated Codes and Statutes 1909.</i>	
§§ 5523-29	2362		
<i>Session Laws.</i>		§ 2290	987, 1270
1900, No. 36	1681	§§ 2304, 2443	2061
1904, No. 24	1680	§ 6297	1678
No. 60	488, 616		
No. 67	1680	<i>Penal Code 1909.</i>	
1906, No. 75	2200	§ 38	987, 1270
No. 118	1680	§ 52	2061
1908, No. 64	488	§ 191	2061
No. 80	1644		
1910, No. 85	488	<i>Session Laws.</i>	
No. 86	1639	1905, c. 26	1387, 1413, 1669
No. 158	488	1907, c. 60	2281
No. 221	2363	c. 83	1644
1912, No. 259	1684	c. 103	488, 2085
		c. 170	2061
<b>VIRGINIA.</b>		1909, c. 249, § 38	488, 987, 1270
<i>Code 1887.</i>		§ 39	2281
§ 145a	2281	§ 54	1411
§ 1345	1674	§ 55	2191
§ 2229	1644	§ 78	2281
§ 2260	2067	§ 182	2061
§ 3334	1674, 1680, 1681, 2162	§ 228	2281
§ 3671	263	§ 316	2281
§ 2501	1651	1911, c. 117	2281
§ 3899	488	1913, c. 100	2061
<i>Session Laws.</i>		c. 120	2281
1902, Extra, c. 22	488, 2281	c. 126	1413, 1669
1903, Extra, c. 486	1651	c. 127	1620
1904, c. 18, § 3	1411		
Extra, c. 565	1674	<b>WEST VIRGINIA.</b>	
1906, c. 20	1684	<i>Code 1899.</i>	
1908, c. 59	228, 231, 263	c. 29, § 115	1974
e. 338	1674, 1680, 1681, 2162	c. 64, § 8	2067
		c. 73, §§ 2, 3	1651

## TABLE OF STATUTES CITED

<i>Code 1906.</i>		<i>Session Laws</i>	
c. 152, § 20	852	§§ 1024, 1024a	168a
§ 3075, 3076	1651	1901, c. 85	2281, 22810
		1903, c. 426	569
		1905, c. 131	488
		c. 149	2281
<i>Session Laws.</i>		c. 237	1382
1905, c. 36	150	c. 447, § 1	2259, 2281
1907, c. 39	2016	§ 2	2259, 2281
c. 76	2143	1907, c. 197	488
c. 82	150	c. 271	916
1909, c. 44	803	c. 276	1678
1911, c. 22	488	c. 369	1856
c. 23	488	1909, c. 107	1387
		c. 196	1674
		c. 219	1680
<i>WISCONSIN.</i>		c. 302	1710
<i>Statutes 1898.</i>		c. 528	2281
§ 186	1680	1911, c. 65	1413
§§ 1024, 1024a	1680	c. 123	1050
§ 1435f-22	2281	c. 180	1681
§ 1436	569	c. 231	1856
§ 2238a	1710	c. 232	1856
§ 2276a	1674	c. 291	916
§ 3959	2444	c. 322	2380, 2385
§ 4068	916	c. 576	488, 2085
§ 4069	488, 1856	1913, c. 246	1416
§ 4075	2380, 2385	c. 336	1382, 1411
§ 4078	2281	c. 486	1674
§ 4078d	2385	c. 773	2281
§ 4079m	1050		
§ 4086	1382, 1411		
§ 4096	1416, 1856	<i>WYOMING.</i>	
§ 4096, subd. 3, 6, 7	1856	<i>Statutes 1899.</i>	
§ 4097	1856	§ 3682	488
§ 4102	1382		
§ 4141	1330	<i>Compiled Statutes 1910.</i>	
§ 4141a	1387, 1413	§ 2602	150
§ 4145	1681	§ 2604	1225, 1651
§ 4163	1678		
§ 4186-9	1655	<i>Session Laws.</i>	
§ 4201	406	1907, c. 24	1680
§ 4352	2281, 2385	1909, c. 145	488
§ 4475-2	2281	c. 152	1669
§ 4583	2281, 2385	1911, c. 87	1681
§ 4736	196	1913, c. 126	150, 1225, 1651



## **TABLE OF CASES CITED**



# TABLE OF CASES CITED

A		SECTION	SECTION
Aalholm v. People	1491	Alabama G. I. School v. Reynolds	1858
Aaron v. U. S.	2311	Alabama G. S. R. Co. v. Clarke	754
Abernethy v. Yount	2013	v. Hardy	17
Abhan v. Grassie	2486	v. Norris	2432
Abbott v. Terr.	2497	Alabama & V. R. Co. v. Thornhill	923, 2509
v. Walker	1049, 1062, 1567	Albany Phosphate Co. v. Hugger	655
Abraham v. Miller,	2498	Albrecht v. Hittle	1873
Abrahams v. Woolley	2340	Alcorn v. R. Co.	283
Achilles v. Achilles	1897	Alcott v. Public Service Co.	458
Acker M. & C. Co. v. McGaw	1062	Alden v. Grande R. L. Co.	1078
Ackerman v. Crouter	2462	v. Supreme Tent	20
Acme C. P. Co. v. Westman	1722, 2509	Aldersey, re	2531
Adair v. State	2501, 2511	Aldrich v. Aldrich	112, 233, 1061, 1737
Adams v. Clark	1350	v. Island E. T. & T. Co.	1967
v. First M. E. Church	1958	Aledo v. Honeyman	682
v. Gillig	2439	Aledo Terminal R. Co. v. Butler	463
v. Herald Pub. Co.	1028	Alexander v. Blackburn	795
v. New York	1354, 2183, 2252, 2264	v. Blackman	285, 2034
v. State,		v. Mud Lake L. Co.	1984
78 Ark.	398	v. U. S.	2270
93 Ark.	133, 166, 987, 1007	v. Wade	21
129 Ga.	852	Alexis v. U. S.	968
v. Utley	1067	Alford v. State	18, 655, 660, 928, 953, 1615, 1977
v. Way	2164	Alkon v. U. S.	2276, 2282
Adamson v. Harper	1163	Allams v. State	2501
Addington v. State	1450	Allen, ex parte	1354, 1671
Addis v. Rushmore	1010	v. Boston Elev. R. Co.	19, 1700
Addison v. People	290	v. Com., 134 Ky.	1618
Adkinson v. State	949	Ky. 82 S. W.	19, 177
Aeolian Co. v. Standard M. R. Co.	1890	v. Kidd	1639
Aetna Indemnity Co. v. Waters	2556	v. Northern P. R. Co.	2509
Aetna Ins. Co. v. Bank	1205	v. St. Louis T. Co.	2509
v. Brannon	2418	v. The King	21, 105
Ætna L. Ins. Co. v. Milward	1671	v. State, 146 Ala.	276, 293
Ah Hoy v. Raymond	2437	162 Ala.	2062
Ahmi v. Waller	1890	14 Ariz.	1350
Alabama C. C. & I. Co. v. Turner	1943	Okl. Cr., 134 Pac.	398, 2061
Alabama Const. Co. v. Meador	1195	v. Travelers' Protective Ass'n	2510
Alabama C. G. & A. R. Co. v. Heald		v. U. S.	2042
	1750, 1951	Alliance Ass. Co. v. Pearce	2463

# TABLE OF CASES CITED

	SECTION		SECTION
Alling v. Weissman	1877	Anderson v. Oregon R. Co.	456, 2509
Allison v. Wall	1960	v. Pitt I. M. Co.	461
Allison's Ex'r v. Wood	1623, 2517	v. Seropian	1158
Allman v. M'Cabe	2531	v. State	
Allred v. Kirkman	1131	122 Ga.	1442
v. State	987	Tex. Cr., 95 S. W.	1128
Allwright v. Skillings	747	133 Wis.	8521
Alsterberg v. Bennett	2442	v. Terr.	2512
Alton Mfg. Co. v. Garrett B. Inst.	2451	Andrews, ex p.	2271, 2281, 2281a
Alward v. Oakes	958	v. Andrews	2046
Amazon, The	1352	v. People	855, 1350
America, The	2533	v. State	988
American Benevolent Ass'n v. Stough	1073	Andricus' Adm'r v. Pineville Coal Co.	
American Bonding Co. v. Ensey	2153	1354, 1388, 1672	
American Car & F. Co. v. Alexandria		Angell v. Reynolds	211
W. Co.	2200	Angle v. Musgrave	1681
American Graphophone Co. v. Leeds		Anglea v. Com.	523, 987
& C. Co.	1657	Anin's Petition	2210
American Ice Co. v. Pennsylvania R.		Apkins v. Com.	1644
Co.	455	App v. App	2471, 2573
American Lithographic Co. v. Werck-		Appel v. Chicago City R. Co.	1807
meister	2219, 2259	Applicants for License, re	1354
American Mfg. Co. v. Bigelow	1750, 1755	Aragon Coffee Co. v. Rogers	289
American S. F. Co. v. Gerrer's		Arbuckle v. Matthews	2143
Bakery	2465	Arcola v. Wilkinson	18
American States S. Co. v. Milwaukee		Ard v. Crittenden	1779
N. R. Co.	463, 1168	Arizona L. Ins. Co. v. Lindell	2438
American Straw B. Co. v. Smith	65	Arizona & N. M. R. Co. v. Clark	65,
American Woolen Co. v. Boston &		2382	
M. R. Co.	1021	Ark Foo v. U. S.	2256
Ames' Will	1081	Arkansas City v. Payne	1067
Amos-Richia v. Northwestern M. L.		Arkansas C. R. Co. v. Craig	784
Ins. Co.	2184, 2520	Arlington Oil & G. Co. v. Swann	1672
Amys v. Barton	1722	Armour v. Skene	283
Anadarko v. Argo	1062	Armour Packing Co. v. V. Y. Produce	
Ancient Order of United Workmen,		Co.	1884
re	2531	Armstrong v. Portland R. Co.	1856
Anderson v. Anderson, 140 Ga.	617, 2239	v. Ross	2465
37 N. Br.	1519	v. Yakima H. Co.	252, 282, 458
v. Arpin H. L. Co.	392	Arnd v. Aylesworth	2034, 2537
v. Aupperle	166	Arnold v. Hussey	1523
v. Chicago Brass Co.	1416, 1951, 2498	v. Maryville	2382, 2386
v. Chicago Burl. & Q. R. Co.	716	Arnold's Estate, 147 Cal.	396, 1081, 1738,
v. Cole	1573		2098
v. Ferguson B. S. Co.	2201	240 Pa.	2467
v. Fielding	461	Arnwine v. State	246, 1033
v. Goodwin	2408	Arrowsmith's Estate	1382, 1417
v. Grand V. I. D.	2592	Arthur v. Arthur	2475
v. Great N. R. Co.	1750	Asbury v. Hicklin	19
v. Hilker	1639	Ashley v. State	1442
v. Horlick M. M. Co.	664	Atchison T. & S. F. R. Co. v. Baker	561
v. Metropolitan Stock Exchange	1967		1404
v. Middlebrook	908, 916	v. Baumgartner	2510

# TABLE OF CASES CITED

	SECTION		SECTION
Atchison v. Coltrane	2416	Bailey v. Bee	2421
v. Geiser	2509	v. Danforth	1466, 2134
v. Holloway	571	v. Kansas City	283
v. Johns	1719	v. Kreutzmann	1691, 1693
v. Melson	2220	v. Robinson	1672
v. Palmore	2200	v. State, 168 Ala.	2511
v. Watson	1978	94 Miss.	293
Atherton v. Atlantic C. L. R. Co.	2201	Bair v. Struck	18, 457
v. Emerson	754, 1640	Baird v. Vines	2536
v. Tacoma R. & P. Co.	199	Baker v. Berry Hill M. S. Co.	2439
Atkins v. Best	87	v. Cotney	1978
v. State	689, 1938	v. Drake	1779
Atkinson v. Kirkpatrick	2440	v. Harrington	460
Atlanta & W. P. R. Co. v. Atlanta B. & A. R. Co.	2572	v. Irish	199
Atlantic C. L. R. Co. v. Crosby	1755	v. Jones	1738
v. Dexter	2415, 2432	v. State, 85 Ark.	1447
v. Partridge	1871	Fla., 40 So.	987, 1850
Atlantic & B. R. Co. v. Johnson	1841	174 Ind.	1079
Atlas Shoe Co. v. Bloom	1077, 1555	Tex. Cr., 83 S. W.	1956, 2575
Attorney-General v. Nottingham	451	120 Wis.	321, 2235, 2497
v. Toronto J. R. Club	6, 2256, 2281	v. Washington I. Co.	1078
Atwell, re	2360	Baker Co. v. Huntington	2450, 2472
Atwell v. U. S.	2363	Ball v. Boston	2498, 2502
Atwood v. Atwood	1387, 1408	v. Com.	987
	1919, 1958, 1974	v. Evening Amer. Pub. Co.	406
Augusta U. S. Co. v. Forlaw	2102	v. Loughridge	2143
Auld v. Cathro	2391	v. Phelan	2462, 2463
Aultman T. & E. Co. v. Knoll	1078	v. U. S.	15, 987, 1850, 1854
Ausmus v. People	693, 2072	Ball's Estate	2498, 2502
Austin v. Bartlett	273, 1750	Balliet v. U. S.	6, 341, 1850, 1854, 1890, 2273, 2276, 2762
v. Com.	1330, 1398, 1669	Ballmann v. Fagin	2258, 2264
v. Forbis	1078	Ballow v. Collins	693, 1290, 1299
v. Terry	1672	Baltimore B. R. Co. v. Sattler	451, 1943
Austin & N. W. R. Co. v. Cluck	2200	Baltimore C. & A. R. Co. v. Moon	1867
Avery v. Avery	2046	Baltimore Refrigerating & H. Co. v. Kreiner	2508
v. State	359, 987	Baltimore & O. R. Co. v. Fonts	1154
v. Stewart	1194, 1195	v. Morgan	2390, 2415
Axel v. Kraemer	1890	v. State	18, 65, 770, 913
Ayers v. Ratsheky	2529	v. Wilson	2509
v. Wabash R. Co.	1890, 1895, 2495, 2505	Baltimore & O. S. W. R. Co. v. Bru- baker	1225
Ayres v. Ayres	2517	v. Hollenbeck	2536
		Banco de Sonora v. Bankers' M. C. Co.	1697, 2536
<b>B</b>		Bancroft v. Bancroft	2063, 2069
Babb v. Oxford P. Co.	792	Banigan v. Banigan	2380
Bachant v. Boston & M. R. Co.	1078	Bank v. Johnson	2195
Bachinski v. Bachinski	389	v. Leland	2124
Bacon v. Conroy	738	Bank of Irwin v. American Exp. Co.	347
Baier v. Selke	1078	Banks v. Braman	1698
Bailey v. Bailey	2069	v. Com.	233, 1938, 1958
v. Beall	1911, 1958		

# TABLE OF CASES CITED

	SECTION		SECTION
Banks v. Connecticut R. & L. Co.	2219	Baum v. Palmer	2506
Barbe v. Terr.	580, 2059	Beaumgartner v. Eigenbrot	19
Barber v. State	1012	Baxter v. Gornaley	1141, 1976
Barddell v. State	2582	Bayeux v. Beryhale	1347
Barden v. Hornthal	2520	Baysinger v. Terr.	1755
Bardin v. State	1405	Beal-Doyle D. G. Co. v. Carr	1750, 1751
Barg v. Bousfield	282	Beamish v. Beamish	2421
Barham v. Bank of Delight	2153	Beard v. Com.	2354
Barker v. Citizens' M. F. Ins. Co.	2463	v. Guild	283
Barker v. Massachusetts M. L. Ins. Co.	1726	v. Royal Neighbors	1060
v. Rhode Island Co.	905	Bearden v. State	2349
v. State	20	Bearse v. Mahie	2034
v. Western U. T. Co.	104	Beattie v. Boston Elev. R. Co.	2509
Barnard v. Schuler	1635	Beaty v. Com.	1448
v. U. S.	1784	Beauvoir Club v. State	2270
Barnes v. Danville St. R. & L. Co.	2509	Beavers v. Bowen	1060
v. Rumford	1784	Beck v. Staats	1164
v. Squier	783	Becker v. Philadelphia	1075
v. U. S.	2016	Beckman v. Lincoln & N. W. R. Co.	2486
Barnett v. State	2100	Bedenbaugh v. Southern R. Co.	65
Barney v. Quaker Oats Co.	664	Becke v. Redward	1456, 2596
Barnewell v. Stephens	1966	Becker's Ex'x v. Cumberland T. & T. Co.	2596
Barnowski v. Helson	2509	Beeman v. Supreme Lodge	95, 2152
Barrett v. Magner	2155	Beer, in re	2282
v. State	398	Beggans' Will	1417, 1511
Barrie v. Quinby	2440	Beier v. St. Louis T. Co.	905
Barrington v. Missouri	1850	Beld v. Darst	2455
Bairon v. Anniston	2498	Belford v. State	133, 987, 2061
Barry v. McCollom	1729	Belknap Hardware Co. v. Sleeth	289
v. Mutual Life Ins. Co.	2416	Bell v. Bell	2046, 2067
v. Smith	2535	v. Staacke	2465
Barry's Will	1303	v. State	
Barson v. Mulligan	2531	140 Ala.	1966
Bartleman v. Moretti	2281	Miss., 38 So.	1021, 1038, 1349
Bartlett v. Nova Scotia S. Co.	1564, 1587, 1651	Belleville v. Wells	1350
v. O'Donoghue	2132	Belskis v. Dering Coal Co.	18, 1261, 1263, 1750
Barton v. Shull	1029	Bennett v. Com.	218, 1873
v. Terr.	2512	v. Lumber Co.	916
Barton P. M. Co. v. Taylor	2410	v. State, 160 Ala.	1124
Bashinski v. State	254	66 Fla.	1329, 1442
v. Swint	2433	Tex. Cr. 81 S. W.	276
Bass v. State	2513	v. Susser	15, 278
Batchelder v. Manchester R. Co.	1808	Benner v. Bailey	2408
Bates v. State	969, 1042	Benson v. Raymond	1081, 1160
Battis, in re	2475	Bensberg v. Washington University	2500
Battis v. Chicago R. I. & P. R. Co.	1719, 2382, 2383, 2384, 2389	Benson v. Superior Mfg. Co.	1951
Battle Creek v. Haak	2354	Bentler v. Com.	2252, 2281
Battles v. State	398	Bentley v. Bentley's Estate	1893
Bauer v. State	2131	v. Jun	608
Baugh v. Gesell	1958	v. McCall	1651, 2143, 2146
		Benton v. State	18, 967

# TABLE OF CASES CITED

	SECTION		SECTION
Bercher v. Gunter	1969	Birmingham So. R. Co. v. Fox	252
Berenson v. Conant	2445	Birmingham & M. M. O. Co. v. Lon-	
Berg v. Spink	717	don & N. W. R. Co.	2319
Bergan v. Central Vermont R. Co.	2491	Birney v. Haim	2132
Bergen v. People	2071	Bise v. U. S.	1270
Bergheimer v. Bergheimer	2245	Bishop v. American Preservers' Co.	1213
Bernard v. Pittsburg Coal Co.	1067, 1133	v. Bishop	488, 2239, 2245
Bernards Tp. v. Bedminster Tp.	1490	v. Brittain Inv. Co.	2505
Berry v. Berry	2067	v. Hilliard, 227 Ill.	1911, 2505
v. Doolittle	770	v. State, 194 Ill.	347
v. State, 9 Ga. App.	1821	Tex. Cr. 160 S. W.	59
4 Okl. Cr.	861	Bivings v. Gosnell	1778
Bess v. Com.		Bjork v. Glos	18
116 Ky.	390	Black v. Chicago B. & Q. R. Co.	1239
118 Ky.	852	v. State	200, 987
Bessierre v. Alabama C. G. & A. R.		Black Diamond C. & M. Co. v. Price	451
Co.	1750	Blacker v. State	2071
Best v. Berry	2471	Blackett v. Ziegler	1782, 2475
Betts v. Betts	2498	Blackford Case, The	18
Beuchert v. State	326	Blackmore v. Ellis	2498
Bevelot v. Lestrade	1738	Blackstad M. Co. v. Parker	2410
Beville, ex parte	2245	Blackwell v. Blackwell	2408
Beyerline v. State	2338	Blacquierre v. Carr	2065
Bianchi v. Del Valle	613	Blair v. State, 72 Nebr.	278, 398, 1878
Biddeford Nat'l Bank v. Hill	2416	4 Okl. Cr.	1447
Biddle v. Superior Court	1074	Blais v. Clare	2465
Bieber v. Gans	2408	Blake v. Ogden	2408
Biggers v. Catawba P. Co.	1976	Blalock v. Clark	2440, 2496
Biggs v. Com.	1440	Blanchard v. Holyoke St. R. Co.	789, 1164
Bigliben v. State	1481	Bland v. Beasley	1582, 1584, 1587
Biggs v. Langhammer	2053	Blank Estate	2065
Billing v. Semmens	2510	Blankenship v. Com.	2495
Billingsley v. State	2043	v. Hall	2520
Bilton v. Terr.	1442	Blease v. Garlington	2195
Binewicz v. Haglin	282, 1053, 1055	Bledsoe v. Jones	803
Bioren v. Nealer	1511	Bleistine v. Chelsea	252
Birch v. Somerville	1819	Blickley v. Luce	1040
Bircher v. Modern Brotherhood	2510	Blincoe v. Choctaw O. & W. R. Co.	1168
Birdseye, re	2503	Bliss v. Beck	1039
Birdwell v. U. S.	620	v. Harris	2169
Birely v. Dodson	2463	Block's Succession	1352
Birkenfeld v. State	851	Blood v. Morrin	1856
Birmingham R. & E. Co. v. Mason	944	Bloedel v. Cromwell	2421
	2354	Bloom v. Wanner	95
Birmingham R. L. & P. Co. v. Barrett	17, 20	Bloomer v. State	63, 1072
v. Bush	1263, 2124	Bloomfield v. Board	1350
v. Bynum	451	Blossi v. Chicago & N. W. R. Co.	1969, 2415
v. Martin	455, 1951	Blue v. State	2497
v. Moore	1693, 2354	Blue Ridge L. & P. Co. v. Price	1750
v. Morris	461	Board v. Provident H. & T. S. Ass'n	1442
v. Rutledge	789, 1719	v. Tollman	1350
v. Seaborn	754	v. Travelers' Ins. Co.	1350
v. Wise	507	Bobbink v. Erie R. Co.	458

# TABLE OF CASES CITED

	SECTION		SECTION
Boche v. State	1022	Bower v. Cohen	1225, 1564, 1651, 1665,
Bock v. Wall	393		2138
Bodcaw L. Co. v. Ford	283	Bowers v. Cottrell	2408
Bodenheimer v. Bodenheimer's Ex'r	2054	Bowles v. Com.	1750
Boehme v. Sovereign Camp	1671	Bowling Green G. Co. v. Dean's Ex'x	792
Boehner v. Hirtle	1573	Bowman v. Little	29, 1602, 2086, 2506,
Boerner Fry Co. v. Mucci	457		2529
Bogart v. New York	1963	v. Owens	1778
v. Pitchless L. Co.	561	Boxendone v. Haliburne	2426
Bogert v. Bateman	1511, 2411	Boyce v. Bolster	616
Boles v. People	795	Boyd v. McConnell	1510
Bollinger v. Bollinger	1043, 1378	v. State, 84 Miss.	1124, 1448, 1722,
Bolton v. State	2016		2264, 2272
Bond v. Hurd	2036	81 Ohio	398
v. State	1671	Boyer v. Chicago R. I. & P. R. Co.	1975
Bone v. Hayes	289	Boykin v. State	
Bonelli v. Burton	289	86 Miss.	1014
Bonestel v. Gardiner	2432	Miss., 42 So.	276
Boney v. Boney	1072, 2103	Boyle v. Boston Elev. R. Co.	2125
Booker v. Booker	614	v. Smithman	2257
Boonville Nat'l Bank v. Blakey	2450	Boyne C. G. & A. R. Co. v. Anderson	795
Boop v. Laurelton L. Co.	459	Boynton v. Ashabrunner	1239
Booren v. McWilliams	2181, 2383	Boys v. Charles	2426
Borck v. State	959	Brackney v. Fogle	2391
Borden v. Lynch	1086, 1890	Bradford v. Blossom	2421
Boren v. U. S.	2042	Bradley v. Basta	2415
Boring v. Ott	2498	v. Gorham	1029, 2034
Borneman v. Chicago, St. P. & M. R.		Bradley Gin Co. v. Means Co.	2442
Co.	561, 571	Bradshaw v. Butler	2106
Borstelman v. Brohan	2105	Brady v. Shirley	167, 1978
Bosnight v. Southern J. Co.	2435	Bragg v. Metropolitan St. R. Co.	18
Boston Elevated R. Co., in re	1117, 1807	Braham v. State	18, 561, 656, 689, 782,
Boston Safe D. & T. Co. v. Buffum	2421		851, 1842, 1938, 2115
Boston & M. C. C. & S. M. Co. (State		Brailey v. Rhodesia Consolidated	690
ex rel.) v. District Court	1862	Brainard v. Brainard	1938
Boston & Maine R. Co. v. Franklin	2349, 2354	Branan v. Nashville C. & St. L. R. Co.	1859
v. State	1856, 2195, 2210, 2212, 2223	Brannan v. Henry	2132
Boswell v. First National Bank	1290, 1312,	Branson v. Wirth	1662
	1320	Branstrator v. Crow	2500, 2530
Bosworth v. Union R. Co.	1662	Bray v. U. S.	205, 282, 2061
Bothwell v. Boston El. R. Co.	2495	v. Williams	1350
v. State	1938	Brazier's Case	1761
Bottomley v. Hall	2169, 2184	Breeden v. Com.	2595
Boucher v. Boston & M. R. Co.	2509	Breidenstein v. Bertram	269, 2527
Boulder & W. R. D. Co. v. Leggett		Brennan v. People	1450
D. & R. Co.	581	v. St. Louis	283
Boulton v. Houlder	1858	Brenton v. Terr.	2061
Bourassa v. Grand T. R. Co.	93, 97	Bresler's Estate	1552, 2452
Bouvier-Jaeger Coal Land Co. v.		Brett v. State	792
Sypher	1352	Brewer v. State	832
Bowe v. Gage	2498	Bridger v. Exchange Bank	1877
Bowen v. Mutual Life Ins. Co.	2442	Briggs, re	2261, 2281, 2282
v. State	141	v. People	780, 1329, 2512

# TABLE OF CASES CITED

	SECTION		SECTION
Bright v. Com.	506, 1828, 2336	Brown v. State — <i>Continued</i>	
Brinsfield v. Howeth	1614, 1971, 2354	(Tom) 88 Miss.	111, 396, 1871
Brison v. McKellop	1730	(Leora) Miss., 40 So.	1008 396
Brister v. State	2354	127 Wis.	581, 1076
British Amer. Ins. Co. v. Wilson	1456	v. U. S.	1079
British Ass'n of Glass Bottle Mfrs. v. Nettlefold	1859	v. Wisner	2446
Britton v. Chamberlain	1681	Brown's Will	928
v. Com.	987	Brown Land Co. v. Lehman	19, 2349
Bradshaw v. Butler	2106	Bruce v. Crews	702
Broadwell v. Morgan	1564	v. Wanzer	1651
Brock v. Brock	1302	Bruder v. State	763
v. Metropolitan L. Ins. Co.	2494	Bruger v. Princeton & S. M. M. F. Ins. Co.	1213
v. State	1003	Bruggeman v. Illinois C. R. Co.	1693, 1951
Brom v. People	363, 1441	Brundred v. McLaughlin	1966
Bromberger v. U. S.	1839	Brunet v. State	248
Bromley v. Atwood	2475	Brunger v. Pioneer R. P. Co.	284
Broodddus v. Monroe	2503	Bryan v. U. S.	318
Brooke v. Lowe	1876	Bryan's Appeal	2452
Brooks v. Garner	289	Bryant v. McKinney	1496
v. State	1966	Bryce v. Canadian Pac. R. Co.	562
Brooks Co. v. Wilson	2438	v. Chicago M. & St. P. R. Co.	660
Brosseau v. Lowy	2433	Buce v. Eldon	1719
Brosty v. Thompson	2442	Buchanan v. Clark	2408
Brotherhood of Painters v. Barton	1646, 2390	v. Minneapolis T. M. Co.	18
Brott v. State	177	Bucher v. Wisconsin C. R. Co.	663
Brownell v. Brownell	987	Buck v. Brady	751
Brown v. Arnold	2593	v. McKeesport	792
v. Brown	2315, 2329, 2475	Buckingham v. Angell	2215
v. Chicago B. & Q. R. Co.	655	Buckley v. U. S.	1641, 1672
v. Com.	1440	Buckner v. State	247
v. Crown G. M. Co.	2433	Budro v. Burgess	2432
v. Equitable L. Ins. Co.	1242	Buehner Chair Co. v. Feulner	2552
v. Evans	2016	Buffington v. McNally	2438, 2465
v. Feldwert	2410	Bullard v. Hollingsworth	791
v. First Nat'l Bank	1074, 1236	v. Leach	2474
v. Gillett	1028, 1031	Bullard's Estate	233, 1671
v. Harkins	1195, 1240	Bundrick v. State	1878
v. Harriot	1896	Bundy v. Sierra L. Co.	1951
v. Huey	1856	Burch v. Americus G. Co.	95
v. Kimball	2024	Burdett v. State	580
v. Milwaukee E. L. & R. Co.	664	Burdette v. Burdette	2245
v. Moosic M. C. Co.	2312	Burnaman v. State	280, 960
v. New Jersey S. L. R. Co.	463	Burk v. Reese	680, 682
v. Orde	1856	v. State	968
v. Patterson	610, 2336	Burke v. Burke	2450, 2498
v. Quinby Co.	2410	v. Glos	1225
v. Quintard	2471	v. Louisville & N. R. Co.	455
v. State		Burkhardt v. Loughridge	1869
142 Ala.	278, 600, 1007, 1013, 1108	Burkhart v. North American Co.	76
119 Ga.	2115	Burks v. State	
(Tom) 85 Miss.	396, 2072	72 Ark.	1808
		78 Ark.	1126

# TABLE OF CASES CITED

	SECTION		SECTION
Burnaby v. Baillie	2063	C	
Burnett v. State, 76 Ark.	2062	C. v. C.	2220
8 Okl. Cr.	2259	Cabaniss v. State	1230, 1244, 1959, 1960
Burnette, re	2327	Cadigan v. Crabtree	1063
Burnette v. Young	2456	Cadwalader v. Price	1564
Burns v. Del. & A. T. & T. Co.	561	Cady v. Cady	20
v. Donoghue	1141	v. Norton	18, 1819
v. State	1807	Cairnes v. Pelton	1854, 1856
Burnside v. Everett	451, 681, 1873	Cairns v. Murray	1557
Burr's Trial	2200	Caldwell v. Modern Woodmen	2531
Burrell v. Montana	852, 2281a	v. State	20, 2056, 2336, 2528
Burris v. State	278	Caldwell L. & L. Co. v. Triplett	1567
Burroughs v. U. S.	111	Calkins v. Calkins	2520
Burrow v. Idaho & W. N. R. Co.	916	v. Howard	1354
Burton v. Dangerfield	1680	Calkins' Estate	1738
v. Driggs	1404	Callender, M. & T. Co. v. Flint	2536
v. State		Calleraud v. Piot	2408
141 Ala.	2153	Calligan v. Calligan	2520
Tex. Cr., 101 S. W.	1644, 1651	Calvert v. Carter	1907
v. U. S.	2346	v. Springfield Elec. L. & P. Co.	1698
v. Wyde	1736	Cameron v. U. S.	7, 2280
Burwell v. Brodie	2580	Campbell v. Bates	2008, 2139, 2142
Busby v. State	987	Campbell v. Brown	1750
Busch v. Robinson	2097	v. Campbell, 138 Ill.	1081
Bush v. Com.	935	30 R. I.	1908
v. State	2595	v. Everhart	1671, 2494
Bush & H. Co. v. McCarty Co.	245	v. Hackfeld	2220
Busse v. State	133	v. New Haven	1951
Butcher v. Butcher	1511	v. Perth Amboy S. & E. Co.	2433
Butchers' S. & M. Ass'n v. Boston	1530, 1633, 1635	v. Railway Transfer Co.	1871
Butler, re	2195	v. Skinner	7, 2143
Butler v. Hines	1778	v. State, 123 Ga.	397
v. State	406	62 Tex. Cr.	987
v. Toronto Mutoscope Co.	2203	Campion v. Lattimer	778
Butrick, re	2139	Camsusa v. Coigdarripe	282
Butschkowski v. Bracks	2573	Canaan v. Avery	2527
Butt v. Mastin	1239	Canadian Pacific R. Co. v. Quinn	1530
v. Smith	2433	Canatsey v. Canatsey	1511
v. State	1079	Canham v. Rhode Island Co.	282
Butterfield v. Beaver City	17	Cannon v. Terr.	934, 987
v. Miller	2144	Canole v. Allen	2236
Butteris v. Mifflin & L. M. Co.	2355	Can Pon, in re	1354
Button, ex parte	1856, 2195, 2210	Cantey v. Platt	2017
Butts v. Richards	2520	Cantin v. News Pub. Co.	1856
Buzzell v. Tobin	2420	Capell v. Fagan	2105, 2448
Byers v. Baltimore & O. R. Co.	456	Capital C. Co. v. Holtzman	282, 969
Byram v. People	851	Capital Traction Co. v. Contner	1021, 1951
Byrd v. State	1938	Caples v. State	987
Byrne v. Boston W. H. & R. Co.	2509	Carbould-Ellis v. Dales	2475
v. Cambria & C. R. Co.	1943	Cardiff, The	917
Bynes v. Butte Brewing Co.	1063	Cardwell v. Breckenridge	570
	2594	Carey v. Hawaiian Lumber Mills	382
		v. Nissle	1051

# TABLE OF CASES CITED

	SECTION		SECTION
Carle v. People	2484	Cavanagh v. Iowa Beer Co.	2410
Carlin v. Kennedy	1951	v. Riverside	287
Carlisle v. Grand Trunk R. Co.	2509	Caven v. Bodwell G. Co.	782, 1896
Carman v. Montana C. R. Co.	791	Cawthon v. State	363
Carmical v. Carmical	1302	Cecil v. State	987
Carney v. Boston Elev. R. Co.	2509	v. Terr.	398, 1061
v. Hennessey	916	Cecil Paper Co. v. Nesbitt	1978
Carothers v. State	2277	Cedar Rapids Nat'l Bank v. Carlson	2410
Carp v. Queen Ins. Co.	1186	Cedartown v. Brooks	2220
Carpenter v. Ashley	1416	Central Branch U. P. R. Co. v. Shoup	2593
v. Dressler	1239	Central of Ga. R. Co. v. Bagley	2509
v. Jones	2105	v. Goodwin	1976, 2416
v. Hatch	1081	v. Keyton	451, 1943
v. Smith	1239	Central National Bank v. National	
v. Winn	1859	Met. Bank	1876
Carr v. American Locomotive Co.	252, 1403	Central Pac. R. Co. v. Feldman	1640
v. First National Bank	2572	Central Trust Co. v. Culver	1058
v. McColgan	2410	Chadister v. Baltimore & O. R. Co.	1168
v. Stern	65	Chadwick v. U. S.	1060, 2364
Carrara P. A. Co. v. Carrara P. Co.		Chaffin v. Fries M. & P. Co.	461, 2498
	1381, 1907	Chahoon's Case	392
Carrens v. State	2062	Chamberlain v. Chamberlain	2134
Carrington v. Brooks	2219	v. Iba	1058
Carroll v. Boston Elev. R. Co.	561, 682,	Chambers v. Chambers	2520
	1856, 2509	v. Jaffray	6, 2281
v. East Tenn. V. & Ga. R. Co.	2319	v. Modern Woodmen	1671
Carson v. National Life Ins. Co.	2437	v. Morris	667
Carstens v. Muggat	1519	Champion v. McCarthy	1492, 2314
Carter v. Carter	2113	Champlin v. Pawcatuck V. St. R. Co.	1750
Carter v. State, 172 Ind.	143, 238	Chan v. Slater	1779
6 Okl. Cr.	331	Chancellor v. State	2059
v. Wakeman	21, 1414	Chancey v. State	21
v. Wood	2143	Chandler v. Mutual L. & I. Ass'n	1461
Cartwright v. Toronto	1389	v. State	527, 1012
Carwile v. State	93, 821, 1966	Chantango v. Abaroa	1347
Carwille v. Franklin	785	Chandler v. State	527, 1012
Case Threshing M. Co. v. Mattingly	2415	Chany v. Hotchkiss	1031
Casey v. Chicago City R. Co.	1721	Chapline v. State	1079
Cashin v. N. Y. N. H. & H. R. Co.	228,	Chapman v. Chapman	1681
	1639, 1722	v. Kullman	2531
Casparis Stone Co. v. Boncore	2509	v. Pendleton	1777
Cassatt v. Mitchell C. & C. Co.	1859, 2200,	Chaput v. Haverhill G. & D. St. R. Co.	1576
	2219, 2257, 2259	Charles v. State	1878
Cassem v. Prindle	2106	Charlton v. St. Louis & S. F. R. Co.	458
Cassidy v. Holland	2520	Chase v. Hoosac T. & W. R. Co.	1023
Castleberry v. State	987	Chaslavka v. Mechalek	2245
Castner v. Chicago B. & O. R. Co.	451,	Chastang v. Chastang	157, 2166
	1048, 1062, 2094	Chastek v. Souba	2408
Castor v. Bernstein	1290, 2016	Chateaugay O. & I. Co. v. Blake	561
Caswell v. Glos	1705	Chatman v. Hodnett	2146
Catchings v. State	2034	Chattanooga N. B. & L. Ass'n v.	
Cather v. Damerell	1554, 1556	Vaught	1347
Catron v. Com.	1157	Chavigny v. Hava	505

# TABLE OF CASES CITED

	SECTION		SECTION
Cheek v. Oak G. L. Co.	18, 454	Chicago St. L. & N. O. R. Co. v. Rott- gering	463
Cheatham v. Union R. Co.	451	Chicago Telephone S. Co. v. Marne & E. T. Co.	1160
Cheney v. Goldy	1738	Chicago Title & T. Co. v. Sagola L. Co.	586
Cheney's Estate	18, 1958	Chicago Union T. Co. v. Ertrachter	1700, 1976
Chenoweth v. Burr	2498	v. Giese	688, 2509
v. Southern Pacific Co.	2509	v. Lawrence	233, 689, 1938
Cherry v. Slade	2477	v. O'Brien	1807, 2034
v. Sprague	2536	v. Roberts	681, 1920, 1976
Chesapeake Stone Co. v. Fossett	1389	Chicago W. & V. C. Co. v. Moran	1223
Chesapeake & O. C. Co. v. Western Md. R. Co.	2572	Chicago & Alton R. Co. v. Eaton	282
Chesapeake & O. R. Co. v. Deepwater R. Co.	1074, 2465, 2478	v. Howell	438
v. Howard	2415	v. Kelly	1012
v. Richardson	456	v. Scott	463
v. Stock	1062, 1234	v. Walker	791, 1158
v. Wiley	688	v. Wilson	65, 1684, 2510
Cheshire, <i>in re</i>	1681	Chicago & E. R. Co. v. Lawrence	1960
Chesney v. Newsholme	1760	Chicago & E. I. R. Co. v. Crose	460, 792
Chester v. Murtfeldt Co.	2510		1037, 2551
Chesterfield Mfg. Co. v. Leota Cotton Mills	377	v. Schmitz	20, 969, 1587, 1626, 2515
Chiara v. Stewart Mining Co.	2510	v. Zepp	749
Chicago v. Didier	1976	Chicago & J. El. R. Co. v. Spence	795
v. Gilsdorff	18	Chicago & N. W. R. Co. v. Andrews	664
v. Jarvis	252, 458	v. Kendall	6, 2221
v. McNally	688, 2220	Chicago & S. E. R. Co. v. Grantham	2110
v. Mandel	1219	Chicago & S. L. R. Co. v. Kline	463, 792,
v. Mines	463, 1808		1013
Chicago B. & Q. R. Co. v. Babcock	2358	Chicago & W. I. R. Co. v. Heiden- reich	679
v. Krayenbuhl	285, 1158, 1414	Childers v. Pickenpaugh	2477
v. Todd	1704	Chin Yow v. U. S.	1354
v. Weber	1223	Ching Lum v. Lam Man Ben	1810
Chicago City R. Co. v. Bundy	15, 568, 682, 1013, 1719, 1721, 1977, 2115	Chippewa Bridge Co. v. Durand	2451
v. Creech	1890	Chitwood v. U. S.	93, 346
v. Gregory	905, 1808	Chiuccariello v. Campbell	2509
v. Handy	961	Choctaw, O. & G. R. Co. v. McDade	18,
v. McCaughna	688		283
v. McDonough	1977	Chrast v. O'Connor	1651
v. Matthieson	1037, 1126, 1977	Christiansen v. Graver T. Works	2558
v. Nelson	2552	Christopherson v. Chicago M. & St. P. R. Co.	1750, 2510
v. Ryan	1013	Chybowski v. Bucyrus Co.	282, 2494
v. Shaw	1014	Cincinnati H. & D. R. Co. v. De Onzo	792
v. Smith	795	v. Frye	2507
v. Uhter	18, 987, 1626, 1750	Cincinnati N. O. & T. R. Co. v. Cox	1878
Chicago Gt. Western R. Co. v. McDonough	18, 451, 461	v. Martin	1750
Chicago M. & St. P. R. Co. v. New- some	19	v. Sadieville M. Co.	455
Chicago R. I. & P. R. Co. v. Brandon	2509	v. South F. C. Co.	2509
v. Hill	2220	Cincinnati Traction Co. v. Stevens	1126,
v. Rathneau	18, 458		1944

# TABLE OF CASES CITED

	SECTION		SECTION
Citizens' Sav. Bank v. Globe B. Works	2596	Clifton v. State	398, 2060
Citizens' State Bank v. Chambers	2464	Clinton v. Goodrich	987
City Bank v. Thorp	1201	v. State	506, 925, 1029, 1828
City Deposit Bank v. Green	2444	Close v. Chicago	20
City Electric R. Co. v. Smith	1841	Clow v. Smith	1041
City of St. Joseph, The	751	Coats v. Chicago R. I. & P. R. Co.	2415
Clagett v. Duluth	1350, 1684	Cobb v. Dunlevie	1651
Clampitt v. U. S.	347	v. Glenn B. & L. Co.	1236, 2154
Clancy v. Barker	1078	v. Oklahoma Pub. Co.	987
v. Clancy	2477	v. Simon	2296
v. St. Louis T. Co.	905	v. United E. & C. Co.	678
Clark v. Brooklyn H. R. Co.	789	Cobb, B. & Y. Co. v. Hills	916
v. Clark	1539	Coburn, in re	1958
v. Eltinge	1953, 2555	Cochburn v. Hawkeye C. M. Ass'n	907, 2311
v. Finnegan	508, 1828	Cochran v. Cochran	1730
v. Grand Trunk W. R. Co.	2509	v. Lloyd	2509
v. People	95, 359, 1726	v. Stein	697, 2008
v. State, 79 Nebr.	363	v. U. S.	1852, 1873
56 Tex. Cr.	1726	Cochrane v. National Elev. Co.	2016
v. Union Traction Co.	736	Cockerill v. Harrison	6, 2061
v. U. S.	2119	Cogswell v. Hall	1576
v. Van Vleck	1698, 1750, 2354	Cohankus Mfg. Co. v. Rogers' Gdn.	1164
Clark Co. v. Rice	1416	Cohen v. Hamblin & Russell Mfg. Co.	458
Clarke v. N. Y. N. H. & H. R. Co.	21, 282	Cohn & Goldberg L. Co. v. Robbins	1779
v. Phila. & R. C. & I. Co.	1974	v. State	2183
v. Roberts' Estate	2054	Coine v. Chicago & N. W. R. Co.	2432
Clarkson v. Bank of Hamilton	1856	Colbert v. State	2026, 2395, 2529
Claudet v. Golden G. M.	1532	Colbert's Estate	1736, 2523
Clay v. State	861, 2056, 2059, 2100	Colburn v. McDonald	1350
Clayton v. Gilmer Co. Ct.	2477	v. Marble	76, 77, 207, 213
Clemens v. Conrad	1270	Colby v. Foxworthy	2525
v. Crane	2406	v. Reams	2121
v. Royal Neighbors	1725	Cole, re	2207
Clement v. Graham	1218, 1680, 1858	Cole v. District Board	1605, 1974, 2536
Clement, re	2477	v. Ellwood Power Co.	1234
Clements v. Potomac E. P. Co.	461	v. Lee	2145
Clemmons v. State	363, 568, 2501	v. Manning	2061
Clemons v. State	1976	v. State	2237, 2336
Clendennin v. Clancy	2550	Coleman v. Coleman	2408, 2520
Cleveland v. Com.	1450	v. Jones & Pickett	1066
v. Martin	1984	Colesar v. Star Coal Co.	795
v. State	2042	Collier v. Alexander	2169
Cleveland, C. C. & St. L. R. Co. v.		v. State	398
Gossett	2465	Collins v. Capes	2477
v. Hadley	568, 2491	v. Chicago M. & St. P. R. Co.	1951
v. Loos	456	v. Clough	1567
v. Smith	463	v. Dorchester	451
Cleveland P. & E. R. Co. v. Prits-		v. German-Amer. M. L. Ass'n	1644
chan	781	Collison v. Illinois C. R. Co.	65, 2510
Clifford v. Denver & R. G. R. Co.	2390	Collister v. Ritzhaupt	64
v. Pioneer Fireproofing Co.	987, 1270, 2529	Colonial Jewelry Co. v. Brown	2410
v. Taylor	228, 2491	Colonial Park Estates v. Massart	2410

# TABLE OF CASES CITED

	SECTION		SECTION
Colorado Midland R. Co. v. McGary	2582	Commonwealth v. Kelly	660, 1129
Colorado & S. R. Co. v. Lauter	664	v. Loving	263
v. Webb	571	v. McClanahan	833, 851
Colored Knights of Pythias v. Tucker	2506	v. McGarvey	326
Colton's Estate	1244, 1272, 1678	v. Mackenzie	852
Columbia N. & L. R. Co. v. Means	2496	v. Maddocks	59
Columbian B. & L. Ass'n v. Rice	2536	v. Merrill	1680
Columbus R. Co. v. Patterson	18	v. Min Sing	280, 960
Coman v. Wunderlich	377	v. Molten	2501
Combs' Appeal	2048	v. Monongahela Bridge Co.	1058, 1066
Commissioners v. State	1951	v. O'Bryan, U. & Co.	95, 1678
v. Warfield	1350	v. Palmer	2512
Commonwealth v. Adams	2514	v. People's Ex. Co.	2272, 2273
v. Anselvich	1354	v. Phelps, 192 Mass.	2056, 2059
v. Aston	56, 851, 861, 1072	210 Mass.	1700
v. Barker	2241	v. Phillips	858
v. Barnacle	246	v. Phoenix Hotel Co.	2259, 2276
v. Bavarian B. Co.	20, 905	v. Preece	861
v. Bishop	2056	v. Racco	987, 1005, 1270
v. Bolger	2252	v. Richardson	2281a
v. Bond	291, 2581	v. Richmond	154, 2272, 2273
v. Borasky	570, 1335, 2100	v. Rivet	93
v. Brown	1067	v. Shooshanian	811, 2098
v. Cameron	2252, 2282	v. Sinclair	1722, 2511
v. Cate	21, 56	v. Snell	363
v. Clancy	321	v. Snyder	232, 855
v. Colandro	968, 2512	v. Spencer, 212 Mass.	286, 561, 1938,
v. Cronin	2340		2243, 2501
v. Davies	2042	v. Spohr	1434
v. Deitrick	905, 918, 1018, 2079, 2512	v. Stevens	2536
v. De Masi	2056	v. Stuart	1079, 1576
v. Dorr	770, 1861	v. Thomas	111
v. Dow	329	v. Thompson	1076
v. Edgerton	1351	v. Tircinaki	246
v. Elisha	1476	v. Tucker	16, 154, 392, 457, 655, 682,
v. Ensign	2264		792, 861, 1126, 1129,
v. Everson	2339		1871, 2020, 2183, 2550
v. Eyster	1974	v. Walsh	1270
v. Fielding	792	v. Webster	416
v. Furman	507, 1821, 1828	v. Williams	923, 987
v. Green	2272	v. Woelfel	617
v. Greene	2511	Commonwealth Trust Co. v. Coveney	2444
v. Hargis	1079, 1442	Compher v. Browning	1063, 1738, 1938,
v. House	364		2502, 2503
v. Howard	238, 390, 1725, 1808	Comstock v. Conn. R. & L. Co.	463
v. Hudson	832	v. Georgetown	461, 1062, 1721, 1974
v. Ieradi	1010	Comstock's Adm'r v. Jacobs	664, 1003
v. Johnson, 123 Ky.	1635	Conant v. Evans	1058
158 Ky.	1451	v. Jones	1872
188 Mass.	655, 681	Conger v. State	1135
199 Mass.	792, 1871, 2273	Conklin v. Consolidated R. Co.	75, 1725
213 Pa.	858, 2233	Conkling v. Weatherwax	1083, 1085
v. Jordan	1700, 1858		2517

# TABLE OF CASES CITED

	SECTION		SECTION
Conley v. Portland G. L. Co.	555, 561, 571	Cooper v. State, 89 Miss.	852, 1448
v. United Drug Co.	2509	94 Miss.	1021
Conly v. Nailor	2047	Tenn., 138 S. W.	1755
Connecticut Power Co. v. Dickinson	19,	v. Terr.	2059
	1808	v. Upton	287
Connella v. Terr.	2339	Copeland v. State	569, 1442
Connolly v. Brown	256	Copley v. Ball	1658
Conner v. Missouri P. R. Co.	966	Corbett v. Joannes	2465
Conover v. Neher R. Co.	208, 747, 1556	Corbin v. Benton	2509
Conrad v. Clarke	2444	v. Gleason	1738
v. Kennedy	1681	Corcoran v. Albuquerque T. Co.	437
Conrades, <i>ex p.</i>	2260	Cordiner v. Los Angeles Traction Co.	
Conrades v. Heller	1511		663
Considine v. Dubuque	792	Corkran v. Rutter	1555, 1558
Consolidated G. E. L. & P. Co. v.		v. Taylor	1555, 1558
State	283, 461, 794, 1976	Corkum v. Corkum	617
Consolidated Grocery Co. v. Ham-		Cornell v. Morrison	2594
mond	2153	Cornet v. Cornet	2503
Consolidated K. C. S. & R. Co. v.		Cornog v. Wilson	2525
Gonzales	1521	Corpus v. State	2115
Consolidated Rendering Co., <i>re</i>	2200, 2201,	Corse & Co. v. Minnesota Grain Co.	561
	2259, 2268, 2271	Corsellis, <i>re</i>	2463
v. Vermont	2195, 2200, 2203, 2252	Corser v. Paul	1056
Continental Casualty Co. v. Jasper	2433	Corsick v. Boston Elev. R. Co.	1043
v. Owen	2452	Coruth v. Jones	64
Continental F. Ins. Co. v. Whitaker	2415	Cosgrove v. Pitman	250
Continental Hose Co. v. Fargo	2446	Cotter v. Cotter	2046
Continental Ins. Co. v. Chicago & N.		Cotton v. Boston El. R. Co.	1041, 1152
W. R. Co.	2487, 2509	v. Willmar & S. F. R. Co.	664
v. Ford	1869	Coulter v. State	248
v. Hargrove	95	Council v. Mayhew	1958, 1966
Conway v. Rock	2520	Courtenay v. Hoskins	1391
Cook v. Chicago R. I. & P. R. Co.	1271	Couts v. Winston	2498
v. Doud Sons & Co.	1951	Covington v. Berry	1239
v. Enterprise Transp. Co.	20	v. O'Meara	496, 497
v. Manasquan	2451	Cowan v. State	2277
v. Newhall	2509	Cowdery v. McChesney	1558
v. Stimson Mill Co.	1078, 1977	Cowdry's Will	2502, 2511
v. State	1022, 1079	Cowles v. Lovin	1584, 1587, 1665
v. U. S.	2042	Cox v. Aberdeen & A. R. Co.	2509
Cooke v. Cain	2066	v. Brice	1502
v. People	1530, 1539	v. Mignery	1350
v. Wilson	803	v. State, 124 Ga.	1040
Cooley v. Collins	1213, 1256, 2509	162 Ala.	406
Coolidge v. Ayers	1041, 1051	v. Terr.	2513
v. Taylor	1530	Coxe v. Singleton	988
Coolman v. State	1839, 1841	Coyle v. Com.	1451
Coon v. McNelly	2463	Craddock v. Barnes	2408
Cooper v. Bower	18, 1770	Craft v. Barron	928
v. Kennedy	2442	v. Norfolk & S. R. Co.	2494
v. Payne	2434	Crago v. Cedar Rapids	2382
v. Seaboard A. L. R. Co.	13, 688	Craig v. State	1977
v. Spring V. W. Co.	2498	Cramer v. Burlington	2346

## TABLE OF CASES CITED

	SECTION		SECTION
Crane v. Fry	1951	Cummings v. Farnham	283
v. Ross	1062, 1960	v. Gourlay	1530, 1532
Craven v. State	1440	Cunard S. S. Co. v. Kelley	41
Crawford v. U. S.	581, 2120	Cunniff v. Cunniff	1081
v. Verner	2473	Cunningham v. Clay	458
Crawfordsville Trust Co. v. Ramsey	1890	v. Dody	2509
Credille v. Credille	1738, 2500	v. People	1761
Crediton v. Exeter	2325	Cunion's Will	2314, 2523
Creeping Bear v. State	950, 1022	Cupps v. State	118
Crenshaw v. State	2059	Curran v. Holland	2438
Cressey v. International Harvester Co.	2442	Curry v. State, 117 Md. 50 Tex. Cr.	367 667
Creveling v. Banta	2410	Curtice v. Dixon	261
Cribbs v. Walker	2408, 2520	Curtin v. Boston Elev. R. Co.	2509
Crigler v. Ford	252	Curtis v. Beaney	2319
Crippen, <i>in re</i>	1347	v. Lehmann	1819
Crippin v. State	1587	v. N. Y. N. H. & H. R. Co.	792
Crocker-Wheeler Co. v. Bullock	2193, 2210, 2212	Curtis & G. Co. v. Pribyl	290, 451
Croft v. Chicago R. I. & P. R. Co.	1944, 2509	Curtsinger v. McGown	1073
Cromeenes v. San Pedro L. A. & S. L. R. Co.	1755	Custer v. Fidelity M. A. Ass'n	93, 2452
Cronk v. Wabash R. Co.	283, 571, 1700	Cutler v. State	2273
Crooker v. Pacific L. & M. Co.	461	Cutter-Tower Co. v. Clements	1200
Croomes v. State	1761	Cutts v. Boston Elev. R. Co.	436
Crosby v. Potts	2194, 2199	Cuyler v. Wallace	2516
v. Portland R. Co.	556, 561, 568, 682, 1867, 2509	Cyr v. De Rosier	1210
v. State	507		D
v. Wells	321, 556, 1890, 1944	Dady v. Condit	463
Cross v. Iler	1081	Dale's Appeal	1081
v. State	1131	Dallas C. E. St. R. Co. v. McAllister	905
v. Syracuse	663	Daly v. Simonson	2416
Crossman v. Keister	1198	Danahy v. Kellogg	1862, 2221
Crotty v. Chicago G. W. R. Co.	2103	Dancel v. Goodyear S. M. Co.	2193, 2195, 2220
Crowell v. State	1072, 1079	Daniel v. Com.	1442
Crumm v. Allen	1404	v. New Era L. Co.	2477
Cryer v. McGuire	1463	Daniels v. State	851, 852, 860
Cudlip v. Journal Pub. Co.	18, 206	Dardanelle P. B. & T. Co. v. Croom	1951
Cuesta v. Goldsmith	492	Darnell v. State	19
Cuff v. Frazee S. & C. Co.	1312, 1405, 1725	Darrell v. Com. Ky., 82 S. W. Ky., 88 S. W.	282 278
Cully v. Northern Pac. R. Co.	2319	Darrow, <i>in re</i>	1618
Culpepper v. State	254	Darst v. Doom	2520
Culver v. Carroll	2408	Dashwood v. Magniac	2464
v. South H. & E. R. Co.	2115	Davenport v. Davenport	1736
v. Waters	1705	Davenport Co. v. Pennsylvania R. Co.	2319
Cumberland G. M. Co. v. Atteaux	754	Davidson v. Hurtz	2438
Cumberland Tel. & Tel. Co. v. Peacher Mill Co.	1976	v. Watts	523, 987
v. St. Louis I. M. & S. R. Co.	2579	Davidson S. S. Co. v. U. S.	18, 95, 283, 916
v. State	2259, 2281	Davie v. Lloyd	1561

# TABLE OF CASES CITED

	SECTION		SECTION
Davies, <i>re</i>	2286	Deepwater Council <i>v.</i> Renick	2169
<i>v.</i> Bierce	2442	Degg <i>v.</i> State	1669, 1842
<i>v.</i> Sovereign Bank	1856	De Graff <i>v.</i> Mans	2408
Davis <i>v.</i> Adair	1727	<i>v.</i> State	967
<i>v.</i> Adrian	792	Delahoyde <i>v.</i> People	2497
<i>v.</i> Arnold	657	Delaney <i>v.</i> Berkshire St. R. Co.	288, 1856
<i>v.</i> Coblens	1890	<i>v.</i> Framingham G. F. & P. Co.	1530, 1639
<i>v.</i> Collins	1876	<i>v.</i> Jackson	2439
<i>v.</i> Com.	2595	<i>v.</i> State	1966
<i>v.</i> Davis	1058	Delaware Indians <i>v.</i> Cherokee Nation	2415
<i>v.</i> Fidelity Fire Ins. Co.	2442	De Leon <i>v.</i> Terr.	1212, 2339
<i>v.</i> First Nat'l Bank	1810	Delger <i>v.</i> Jacobs	2297
<i>v.</i> Kornman	252, 283, 458, 461, 1951	Dell <i>v.</i> McGrath	461
<i>v.</i> Moyles	1257, 1483, 1490, 1573, 1662, 1672	De Loach <i>v.</i> Newton	1350
<i>v.</i> Oregon S. L. Co.	568	Demelman <i>v.</i> Brazier	2536
<i>v.</i> Pennsylvania R. Co.	463, 654	Deming Inv. Co. <i>v.</i> Shawnee F. Ins. Co.	2434
<i>v.</i> People	63	<i>v.</i> Wallace	2416
<i>v.</i> Pursel	2498	De Montague <i>v.</i> Bacharach	1066
<i>v.</i> Seaboard A. L. R. R. Co.	792	Denbeigh <i>v.</i> Oregon-Washington Nav. Co.	65
<i>v.</i> Seybold	2165	Denham <i>v.</i> Com.	177, 2356
<i>v.</i> State, 141 Ala.	2572	Dennison, <i>ex p.</i>	21
145 Ala.	2276, 2375	Dennison <i>v.</i> Barney	2408
168 Ala.	1326	Denton <i>v.</i> Mammoth S. E. L. & P. Co.	2509
96 Ark.	688, 2061	Denunzio's Receiver <i>v.</i> Scholtz	2310, 2311
46 Fla.	177	Denver <i>v.</i> Spencer	2451, 2509
47 Fla.	177, 749, 760	Denver City T. Co. <i>v.</i> Gawley	1696, 1700
120 Ga.	1842, 2060	<i>v.</i> Hills	15, 2509
122 Ga.	852	<i>v.</i> Lomovt	1041
85 Miss.	1021	<i>v.</i> Norton	966, 2220
8 Okl. Cr.	1476	<i>v.</i> Roberts	2220
45 Tex. Cr.	2242, 2311	Denver & R. G. R. Co. <i>v.</i> Burchard	461
<i>v.</i> Stephenson	1073	<i>v.</i> Scott	1958
<i>v.</i> Yonge	2054	Deppe <i>v.</i> Atlantic C. L. R. Co.	1976
Dawson <i>v.</i> Orange	1582	Depue, <i>re</i>	2199, 2201
<i>v.</i> Waggaman	1777	De Renzes <i>v.</i> His Wife	1382
Day <i>v.</i> State	1732	Derosia <i>v.</i> Loree	2451
Daytona Bridge Co. <i>v.</i> Bond	1073	Desha's Adm'rs <i>v.</i> Harrison Co.	2450
Dean <i>v.</i> Dean	1303	Devencenzi <i>v.</i> Cassinelli	2432, 2498
<i>v.</i> Kansas C. St. L. & C. R. Co.	437	De Yampert <i>v.</i> State	19
<i>v.</i> State	2063	De Yoe <i>v.</i> Seattle Elec. Co.	2509
<i>v.</i> Wabash R. Co.	688, 795	Diamond <i>v.</i> State	1354
Dearborn <i>v.</i> Newhall	2350	Diamond B. C. Co. <i>v.</i> Cuthbertson	2507, 2552
Dearden <i>v.</i> San Pedro L. A. & S. L. R. Co.	2509	Diamond Distilleries Co. <i>v.</i> Gott	2419
Deaton <i>v.</i> Com.	851, 2059, 2060	Diamond Glue Co. <i>v.</i> Wietzychowski	747
Decatur <i>v.</i> Barteau	1680	Diamond Rubber Co. <i>v.</i> Harryman	283, 458
<i>v.</i> Vaughan	1869	Diaz <i>v.</i> U. S.	1398, 1399
Deck <i>v.</i> Balt. & O. R. Co.	1270	Dick <i>v.</i> Albers	2503
Decker <i>v.</i> Stansberry	2472	<i>v.</i> State	18
<i>v.</i> Chicago, M. & St. P. R. Co.	681		
Deeder <i>v.</i> State	1240		

# TABLE OF CASES CITED

	SECTION		SECTION
Dick v. Supreme Body	2380	Donnelly v. Chicago City R. Co.	663
v. Zimmermann	1890	Donner v. State	749
Dickey v. State	278	Donovan v. Connecticut Co.	2494
Dickinson v. Boston	1576	v. Selinas	1072
v. Dickinson	2220	Dorlan v. Westervitch	1956, 1966, 2132
v. Kansas C. E. R. Co.	2220	Dorman v. State	1405
v. Smith	2143, 2144	Dorn & McGinty v. Cooper	1871
v. State	56	Dorr v. Atlantic S. L. R. Co.	1750
Dieterle v. Bekin	2508	v. Midelburg	2408
Dietrich v. Kettering	16	Dorr Cattle Co. v. Chicago & G. W. R.	
Dietz v. State	363	Co.	2153, 2580
Dillard v. Jones	2477	Dorrance v. Dearborn Power Co.	747
v. State	1974	Dossett v. St. Paul & T. L. Co.	208, 461,
v. U. S.	318, 1021		969
Dillman v. McDanel	229, 232, 664	Dotson v. State	988
Dillon v. State	2079	Dotterer v. State	949, 987, 1005, 1270
Dimmick v. U. S.	392	Dougherty v. White	392
Dimond v. Henderson	291	Douglas v. Bolinger	2477
Di Palma v. Weinman	1198	v. Terr.	1013
Di Prisco v. Wilmington C. R. Co.	1750	Douglas L. Co. v. Thayer	1566
Director of Pub. Pros. v. Blady	2239	Douglass v. Agne	1616, 1800, 2349, 2354
District of Columbia v. Armes	252	v. State	2513
v. Dietrich	1750	Dover v. Greenwood	1415, 1417
v. Duryee	1161	Dovey v. Lam	609
Ditto v. Slaughter	261	Dow v. Bulfinch	460
Ditton v. Hart	681	Dowagiac Mfg. Co. v. Lochren	2195, 2200,
Dixon v. Northern P. R. Co.	1750		2210
v. State	1976	Dowdell v. U. S.	1398
v. Union Ironworks	1081	Dowell v. State	18, 41
Dobbins v. Little Rock R. & E. Co.	811	Dowie v. Priddle	73, 207
Dobbs v. State	73	Dowler, in re	1521
Dodd v. Kemnitz	2410	Downing v. Buck	1971
v. State	905	v. Farmers' M. F. Ins. Co.	2570
Dodge v. The King	1908	Downs v. Blount	7
v. Rush	398	v. Swann	2265
Doe v. Edmondson	254, 1587	Doyal v. State	248
v. Marr	166, 1605	Doyle v. Burns	1014
v. Nepean	2531	v. London Guarantee & A. Co.	2270
v. Perkins	735	v. U. S.	1079
Doidge v. Mimms	2065	Dozier v. State	2183
Dolan v. Boott Cotton Mills	464	Drake v. Holbrook	1070
Dolbeer's Estate	21, 569, 676, 689, 905,	Draper v. Douglass	1778
	1081, 1416, 1415, 1115	Drefahl v. Security Sav. Bank	1461
Doll v. Equitable Life Ass. Soc'y	5	Drew v. Drew	1644
Dolph v. L. S. & M. S. R. Co.	1404, 2509	Drewson v. Hartje P. M. Co.	1684
Domenig, re	2235	Driggers v. U. S.	1126, 1128, 1129, 1405,
Dominici's Estate	2314, 2474		1605, 1664, 2060, 2061
Dominion Fish Co. v. Isbester	2509	Driver v. King	1960
Donaldson v. N. Y. N. H. & H. R.		Droncy v. Doherty	437, 2509
Co.	1018	Druhe H. L. Co. v. Fishbein	2388
Donk Bros. C. & C. Co. v. Stroetter	616	Druin v. Com.	1841
Donnan v. Donnan	2336, 2337	Dryden v. Barnes	747
Donnellan's Estate	2474	Drysdale's Succession	2452

# TABLE OF CASES CITED

	SECTION		SECTION
Dubois, <i>in re</i>	1700	East Tennessee & W. N. C. R. Co. v.	
Du Bose v. Conner	289	Lindamood	41, 2508
v. State	1977	Eastern Dynamite Co. v. Keystone	
Ducharme v. Holyoke St. R. Co.	1010	P. M. Co.	1225
Duckworth v. Duckworth	2065	Eastern Texas R. Co. v. Scurlock	1041
Dudley v. Niswander	1058	Eastman v. Boston Elev. R. Co.	1985
Duffey v. Scientific A. C. Dept.	2437	v. Dunn	561, 1206
Dugan v. Arthurs	571	v. Moulton	1544
Duhme v. Hamburg-Amer. Packet		v. Sherry	2199
Co.	2509	Eatman v. State	331, 581, 749
Dukes v. Davis	905	Eaton v. Com.	1072
Dulligan v. Barber A. P. Co.	451	v. N. Y. C. & H. R. R. Co.	2509
Dumas v. Clayton	907, 916	Ebbs, <i>in re</i>	522
Dunahugh's Will	785, 1736, 2500	Eberson v. Continental Ins. Co.	747
Duncan v. Atchison T. & S. F. R. Co.	1951	v. Investment Co.	759
v. Eagle Rock G. M. & R. Co.	2477	Ebert v. Metropolitan St. R. Co.	1031, 1263
v. Grand Rapids	252	Echols v. State	111, 716
v. State	111	Eckels & S. I. M. Co. v. Cornell E.	
Dungan v. State	987, 1808	Co.	1700, 1861, 2125
Dunham v. Cox	1725	Eckert v. Century F. Ins. Co.	2415
v. McMichael	2155	Eckhout v. Cole	784, 2304
Dunk v. State	905, 1043	Ector v. State	2239
Dunkin v. Hoquiam	1674, 2180	Edelstein v. U. S.	2281, 2282
Dunlap v. State	2506	Edgell v. Francis	1730
Dunn v. Com.	894	Edgerly's Estate	1388
v. Gibson	2061	Edinburgh Life Ass. Co. v. Y.	321
v. People	784	Edison El. L. Co. v. U. S. El. L. Co.	
v. State			2200, 2307, 2319
143 Ala.	247, 396	Edleman v. Edleman	2536
162 Ind.	20, 967	Edmonds v. Edmonds	2067
166 Ind.	2497	Edmondson v. Birch	1859
Dunn, matter of	2572	Edmonson v. State	833
Dunning v. West	612	Edwards v. Burke	969
Dunston Lithograph Co. v. Borgo	2416	v. Edwards	1382
Dupree v. State	367, 1976	v. Manufacturer's B. Co.	2509
Dupuis v. Saginaw V. T. Co.	1164, 2498	v. State	1405
Durant, <i>in re</i>	278, 1388	Eesley Light & P. Co. v. Common-	
Duren v. Thomasville	2183, 2264	wealth P. Co.	1388, 1944, 2591
Durham v. State	290	Effler v. State	347
Durkee v. Winquist	2066	Egelston v. New York C. & St. L. R.	
Duthey v. State	1938, 2501, 2519	Co.	461
Dyar v. U. S.	321	Eggleston v. Advance T. Co.	2416
Dyer v. Maine C. R. Co.	2505	Einstein v. Holladay K. L. & L. Co.	
v. Marriott	1573		1530, 1705
		El Paso & S. W. R. Co. v. Foth	1350
		Elastic Tip Co. v. Graham	2410
		Elbert v. Mitchell	321
		Eldorado Jewelry Co. v. Darnell	2416
		Eldridge v. Compton	18
		Electric Park Amusement Co. v.	
		Psychos	2484, 2592
		Electric Welding Co. v. Prince	2558, 2573
		Elgin A. & S. Traction Co. v. Wilson	681, 2509

## TABLE OF CASES CITED

	SECTION		SECTION
Elgin J. & E. R. Co. v. Lawlor	2498	Evans v. Evans	
v. Thomas	1249	N. J. Eq. 59 Atl.	2047
Elias v. Terr.	1803	93 Ky.	64
Elkhart H. Co. v. Turner	2169	v. Freeman	2444
Ellenberg v. Southern R. Co.	1876	v. State	
Elliff v. Oregon R. & N. Co.	1067	165 Ind.	2061, 2063
Ellington v. Harris	2536	5 Okl. Cr.	2304
Elliott v. Kansas City	2329, 2389	12 Tex. App.	1405
v. Murray	2408	v. Taylor	1665
v. Sheppard	1523, 2498	v. The Josephine Mills	1951
v. U. S.	2313	Everett's Will	2503
v. Western Coal & M. Co.	1777	Everett v. People	2511
Ellis v. Block	2556	Evers v. State	505
v. Republic Oil Co.	2510	Ewell v. Ewell	1497, 2528
Ellison v. Glos	1225	Ewen v. Halston	2467, 2474
Elmore v. State	605	v. Wilbor	18, 1675
Elmsley v. Miller	2319	Ewing v. Lanark Fuel Co.	1157
Elmslie v. Thurman	1201, 2596	v. Lunn	2354
Elston v. McGlaulin	1166		
v. Montgomery	1511, 1513	F	
Ely-Walker D. G. Co. v. Mansur	1032	Fabian v. Traeger	334
Elyea-Anstell Co. v. Jackson Garage		Fadden v. McKinney	41, 1960
	2441	Fadner v. Hibler	2520
Elzig v. Bales	795	Fairfield v. U. S.	2200
Emerson v. Wark	916	Fairgrieve v. State	2056
Emmet v. Perry	1567, 1778	Fall v. Fall	1257
Emmons v. Harding	2408	Fallon v. Rapid City	1722, 1750
Emory v. Eggan	75, 258	Fallon's Estate	2048
Empire Life Ins. Co. v. Einstein	2271	Fannie v. State	1440, 2243
Encyclopedia Brit. Co. v. American N.		Fannin v. State	987, 1270
Ass'n	371	Fanning v. Green	581
Engel v. Conti	1777	Farley v. Frost Johnson L. Co.	1066
v. United Traction Co.	199, 282	Farlinger v. Thompson	1329
English v. Ricks	2300, 2337	Farmer v. Storer	2199
Enid & A. R. Co. v. Wiley	18, 1225,	v. Towers	2085
	1239	Farmers' Bank v. Barbee	1778; 1779
Epstein v. Pennsylvania R. Co.	2388, 2389,	Farmers' National Bank v. Venner	2536
	2390	Farmers' & Merchants' Bank v. Wood	2103
Erdman v. State	760	Farnham v. Colman	1858
Erickson v. American S. & W. Co.	461,	Farnum v. Whitman	1971
	1951, 1976	Farquhar v. Farquhar	2433
Erie R. Co. v. Schomer	2509	Farrell v. Dubuque	252
Erler v. Erler	2408	v. Haze	754, 1158
Erwin v. Fillenwarth	1958	v. Phillips	987
Esch v. Grave	1154	Faucett v. State	2270, 2279
Escher v. Carroll Co.	1951	Faustre v. Com.	1644
Esler v. Camden & S. R. Co.	2496	Fay v. Walsh	759
Essex v. Day	2416	Fayette v. North	2465
v. Ksenky	18	Fearington v. Blackwell D. T. Co.	2509
Estes v. Chicago B. & Q. R. Co.	1976	Fearn v. Postlethwaite	582
v. Missouri P. R. Co.	1330	Feder Silberberg Co. v. McNeil	95
Etly v. Com.	142	Federal Betterment Co. v. Reeves	21, 568,
Etzkorn v. Cedar Rapids	1005		676, 688, 1719

# TABLE OF CASES CITED

	SECTION		SECTION
Federal U. Surety Co. v. Indiana L. & M. Co.	759, 1073, 1077, 1234, 1557	First Nat'l Bldg. Co. v. Vandenburg	1561
Feigleman v. Montreal St. R. Co.	2319	First State Bank v. Borchers	2415
Felix v. Caldwell	1269, 2110	Fish v. Bloodworth	616
v. Fidelity M. L. Ins. Co.	1073	v. Fish	2503
Felsch v. Babb	1158	v. Poorman	2391, 2498
Felkel v. O'Brien	2477	Fishburn v. Burlington & N. W. R. Co.	1719
Felker v. Breece	1189, 1194	Fisher v. Boston & M. R. Co.	458
Felts, <i>in re</i>	6	v. Chicago	2578
Felts v. Murphy	1393	v. Terr.	2059
Fender v. Ramsey	1708	v. Travelers' Ins. Co.	289
Fenn v. Georgia R. & E. Co.	2210	v. Weinholzer	1621
Fentum v. Pocock	2444	Fishman v. Consumers' B. Co.	451
Ferance v. Forestdale Mfg. Co.	1754	Fitch v. Martin	377
Ferguson v. State	1003, 1021	v. Traction Co.	1414, 2509
Ferrell v. Ellis	2577	Fitter v. Iowa Tel. Co.	283
Ferrick v. Eidlitz	2509	Fitzgerald v. Allen	1911
Ferry v. Henderson	18, 1944	v. Benner	1777, 1963, 2155
Ferry-Halbeck Co. v. Orange H. B. Co.	1890	v. Langley Mfg. Co.	1976
Fey v. I. O. O. F. Ins. Soc'y	1073, 1671	v. Southern R. Co.	2509
Ffolliott v. Lord	392	v. State	2062
Fidelity & D. Co. v. Aultman	1187	Flanagan v. Mathieson	2522
v. Champion I. M. & C. S. Co.	1530	v. People	153, 2512
Fields v. State	2061	Flanary v. Com.	2281
Fife v. Cate	2498	Flannery v. Central B. Co.	1415
Fifer v. Clearfield & C. C. Co.	1064, 1078, 2596	Fleming v. Morrison	2406
Fike v. Atchison T. & S. F. R. Co.	65	v. Northern T. P. Mill	252
Finch v. Com.	1072	v. Toronto R. Co.	735
v. Zenith Furnace Co.	17	Flemister v. Central Ga. R. Co.	463
Fincher v. State	951, 1022	Fletcher v. Com.	1018, 1873
Findley v. State	1451	v. Dixon	1951, 1974
Finlen v. Heinze	963	Flint v. Flint	1890
Finn v. New England T. & T. Co.	1003, 1062	v. Stockdale's Estate	784
v. Winneskiek Dist. Ct.	2210, 2212	Flint R. L. Co. v. Smith	1651
Finnegan v. S. W. S. Mfg. Co.	451	Flohr v. Terr.	987, 2115
Finnes v. Selover B. Co.	1404, 1668	Flood v. Flood	2463
Fire Ass'n of Phila. v. Farmers' Gin Co.	714	Floore v. Green	617
Firebaugh v. Seattle El. Co.	2509	Flora v. Mathwig	18
Firemen's Ins. Co. v. Seaboard A. L. Co.	1530	Floral Creamery Co. v. Dillon	18
First National Bank v. Blakeman	1106, 1108, 1109	Florman v. Dodds & C. Ex. Co.	2415
v. Burney	2444	Florscheim v. Fry	1633, 1680
v. Chandler	1984	Floto v. Floto	1738, 1873
v. Glenn	530	Flowers v. Flowers	1738
v. Miller	367	v. State, 85 Miss.	1873, 2115
v. Nordstrom	2536	Okl. Cr. 138 Pac.	398
v. State	905	Flynn v. Butler	2446
v. Tolerton	2446	v. Coolidge	1729
v. Wright	2240	v. Flynn	2408
v. Yeoman	747, 754	v. Kelly	1236
		v. People	2511
		Fodey v. Northern Pac. R. Co.	455, 2509
		Fodor v. Fuchs	209
		Fogg v. State	1442, 1451

# TABLE OF CASES CITED

	SECTION		SECTION
Folds v. State	851	Fraleay v. Fraley	228
Foley v. Northern Cal. P. Co.	1976	Franey v. Union Stockyard & T. Co.	461
v. Pioneer M. & M. Co.	437, 1976	Frank v. Berry	694, 2021
v. Ray	2572	v. Gump	2536
Fonder v. General Construction Co.	283	v. Hanly	252
Fonville v. Atlanta & C. A. L. R. Co.		v. State	59, 363, 988, 1807
	1476	Franklin v. Atlanta & C. A. L. R. Co.	
Foot v. Foote	2046		747
Forbes v. Omaha	1168	v. Com.	1850
Ford v. Ford	68, 1352	v. Engel	252, 458
v. Kansas City	235	v. Killilea	2420
v. Providence C. Co.	1158	v. State, 145 Ala.	276, 1254
v. State	2100	53 Tex. Cr.	2060
Foreman v. Archer	2408	v. U. S.	18
Forney v. Ferrell	1081	Frauenthal v. State	963
Forrester v. Hurtt	1339	Frazier v. State	2239
v. Southern Pac. R. Co.	1078	Freasier v. State	507, 1821, 1828, 1832
Fort Smith & W. R. Co. v. Winston	1960	Freda v. Tischbein	1779
Fort Wayne & W. V. T. Co. v. Rondebush		Frederickson v. Iowa C. R. Co.	93
	1750	Free v. Southern R. Co.	1271
Fort Worth Belt R. Co. v. Cabell	1112	v. Western Union Tel. Co.	1856
Fort Worth & D. C. R. Co. v. Roberts		Freehart v. Stanford	1548
	2450	Freeman v. Blount	2511
Fosha v. Prosser	2442	v. Freeman	608, 1938
Foss v. McRae	2525	v. Grashel	1976
v. Portsmouth D. & Y. R. Co.	461	v. State	18
v. Smith	792	Freeport v. Isbell	2220
v. Van Wagenen	20	French v. Millville Mfg. Co.	1074
Foster v. Atlanta R. T. Co.	290	v. State	398
v. East Jordan L. Co.	1976	Freund v. Becker	1738
v. Hobson	1072	Friday v. Pennsylvania R. Co.	654
v. Shepherd	1671, 1726, 2115	Friend v. Yahr	2530
v. U. S.	1557	Frierson v. Frazier	283
Foster-Milburn Co. v. Chinn	1944	Fritz v. Chicago G. & E. Co.	1960
Fothergill v. Fothergill	1081	Frohs v. Dubuque	283
Foulke v. Bray	1190, 1226	Frontier Steam Laundry Co. v.	
Fountain v. Connecticut F. Ins. Co.	451	Connolly	461
v. Wabash R. Co.	719, 1704	Frost v. Barber	1856
Fountain's Adm'r v. Ware	912, 2103	Fry's Will	1512
Fountaine, in re	1521	Frye v. Gullion	2498
Fountaine v. Wampanoag Mills	451	Fudge v. Marquell	1064, 1640, 2596
Fourth National Bank v. Commonwealth	463	Fuhry v. Chicago City R. Co.	1719
Fowler, re	2235	Fuller v. New York L. Ins. Co.	2531
v. Delaplain	1960	v. Rapid Transit Co.	2220
v. Iowa Land Co.	21	v. Robinson	19, 1730, 2242
v. Stebbins	2529	v. Saxton	1605
Fowler's Will	1081, 1738	v. State	987
Fowles v. Joslyn	2102	v. Stevens	715
Fowlkes v. Lea	2433	Fuller Co. v. Darragh	969
Fox v. Manchester	266	Fulsom-Morris C. & M. Co. v.	
v. Spears	2297	Mitchell	288
v. State	1387	Fulton v. Andrew	2503
		Funderburk v. State	357, 949, 1034

# TABLE OF CASES CITED

	SECTION		SECTION
Fuqua v. Com.	944, 1398, 1413, 1669	General Conference Ass'n v. Michigan S. & B. Ass'n	1678, 1681
Furlong & Meloy v. American C. F. Ins. Co.	1058	General Hospital Soc'y v. New Haven R. Co.	2155
v. North B. & M. Ins. Co.	751	Genest v. Odell Mfg. Co.	949, 987
Fussell v. State	1126	Georgia F. & A. R. Co. v. Sasser	285, 1415
		Georgia Iron & C. Co. v. Ocean Acc. & G. Co.	2465
G		Georgia N. R. Co. v. Hutchins	20
Gage v. Cameron	2465	Georgia R. Co. v. Oaks	1126
v. Chicago	2525	Georgia R. & B. Co. v. Andrews	1013
Gaines v. State	1138	Georgia R. & E. Co. v. Dougherty	2570
Galbraith v. Starks	1539	v. Gilleland	1974
Gale v. State	1390	v. Harris	2494
Gallagher v. People	1116	v. Wallace	1062
Galvin v. Beals	377	Georgia S. F. R. Co. v. Cartledge	283
Gamble v. Riley	2410	Gerhardt v. Tucker	2434
Gang Gong, in re	1354	German-American Ins. Co. v. Brown	15
Gannon v. Moles	2437	v. Paul	2341
Gano v. Gano	2477	German Ins. Co. v. Chicago & N. W. R. Co.	1951
Ganow v. Ashton	772, 1681	Gesell v. Baugher	233, 2500
Gardam & Son v. Batterson	95	Getty v. Getty	2067
Gardiner v. McDonough	2434, 2463	Geveke v. G. R. & I. R. Co.	1976
Gardner v. Porter	2496	Gfeller, ex p.	2210, 2261, 2268, 2309, 2329
v. State	1447, 1449	v. Lappe	2523
v. Welch	2437	Gharst v. St. Louis T. Co.	2165
Garfield v. Peerless M. C. Co.	2440	Gibbins v. Metcalfe	1856
Garland v. Clarkson	1856	Gibbons v. Gibbons C. M. & M. Co.	2433, 2437
Garlich v. Northern P. R. Co.	1890	v. Terr.	451, 1005, 1071, 2115
Garner v. Stamford	1750	Gibbs v. Potter	1198
v. State	821, 1880	Gibson v. Anderson	1350
Garnier's Estate	2477	v. Boston	1048, 1076
Garran v. Michigan C. R. Co.	571	v. Holmes	2450
Garrett v. St. Louis Transit Co.	2273	v. Maine C. R. Co.	2510
v. Weinberg	529	v. Seney	321, 1029
Garrison v. Case T. M. Co.	2435	v. Snow	2307
v. Com.	905	v. State	2100
v. Glass	1254, 2124	Gick v. Stumpf	1738
Garrus v. Davis	1958	Giffin v. Martel	437
Garske v. Ridgeville	458, 2034	Gifford v. People	1614
Garvik v. Burlington C. R. & N. R. Co.		Gila Valley G. N. R. Co. v. Hall	1072, 2549
124 Ia.	1150	v. Lyon	1951
131 Ia.	1135	Gilbert v. State	56
Gaston v. State	1807, 2060	v. The King	1730, 1750
Gater v. State	290	Giles v. Giles	1576, 1736, 2495
Gauss, ex parte	2271	Gillam v. State	2056
Gay v. Gay	2579	Gillespie v. Ashford	2355
Gazelle, The	562	v. State, 49 Tex. Cr.	398
Gearty v. City of N. Y.	1777	Tex. Cr., 166 S. W.	2059, 2264, 2273
Gebus v. Minneapolis St. P. & S. S. M. R. Co.	1750	Gilliland v. Board	728, 1605
Gee Cue Beng v. U. S.	1354		
Geiger v. State	1072		

# TABLE OF CASES CITED

	SECTION		SECTION
Gillispie's Ex'r v. Gillispie	1738	Good v. Williams	2408
Gillman v. Media M. A. & C. E. R. Co.	682	Good & Co. v. Central C. & C. Co.	2446
Gillotti v. State	1130	Goodman v. Saperstein	1234
Gilmore v. Jenkins	2471	v. State	1750
v. Lee	2503	Goodpaster v. Voris	2199
v. State	247	Goodrich's Estate	1644, 1646
Ginn v. Dolan	2489	Goodwin v. Blanchard	4, 2354
v. Pennsylvania R. Co.	2509	Gordon v. Conley	2203
Gipe v. State	1442	v. Knott	2536
Gird's Estate	133, 987	v. Munn	1033, 1133
Glanton v. Griggs	803	v. State	
Glanz v. Ziabek	1664, 1911	140 Ala.	396, 987, 1618
Glaser v. Glaser	20	147 Ala.	1821
Glasgow v. Metropolitan St. R. Co.	1040, 1976	Gordon Bros. v. Wageman	1681
Glass v. State	276, 949	Gore v. People	2100
Glass' Estate	233, 1738, 1958	Gorgas v. Philadelphia H. & P. R. Co.	463
Glassington, re	2463	Gorham v. Moor	1081, 1938
Gleason's Estate	1738	v. Settegast	1483, 1761
Gleason v. Daly	1041	Goslin v. Com.	1249, 2042
Gleeson v. Virginia M. R. Co.	2509	Gosnell v. Webster	2120
Glenn v. Augusta R. & E. Co.	1013	Goss v. Goss	18, 953, 1051
Glickstein v. U. S.	2281	Gossage v. Phila. B. & W. R. Co.	716, 1640
Glidden v. U. S. Fidelity & G. Co.	1576	Gosselin v. King	488, 2245, 2337
Glos v. Ault	2515	Gossett v. State	390, 1808
v. Cessna	1705	Gossler v. Wood	2124
v. Dyche	1678	Gould, ex parte	2200, 2287
v. Holberg	1705	Gould v. Bebee	64
v. Holmes	1289	v. Day	18
v. Patterson	1705	v. Hartley	1530
v. Talcott	1705	v. Hurley	2408
v. Wheeler	1705	v. Magnolia Metal Co.	80
Glover v. State, 129 Ga.	562	v. Seminary	1302
137 Ga.	1442	v. U. S.	1732
v. U. S.	987	Gove v. Tacoma	2451
Godair v. Ham. Nat'l Bank	1013, 2155	Gowdy v. Gowdy	1085
Goddard v. Enzler	1921	Goyette v. Keenan	1567, 1777
Godfrey v. Dixon P. & L. Co.	378	Grabill v. State	1270
v. Faust	21	Grabowski v. State	398, 617
v. Phillips	1349	Gracz v. Anderson	282, 969
v. Rowland	1521, 1644, 2063, 2527	Graden v. Mais	2450
v. Smith	2050	Graff v. People	1079, 2236
Godwin v. State	1063	Graham v. Deuterman	1938
Goforth v. State	276	v. Dillon	1549, 1560
Goldborough v. Orem	1971	v. Grand Trunk R. Co.	2570
Goldenberg v. Law	2354	v. Middleby	2466, 2525
Goldschmidt v. Ins. Co.	1073	v. Rimmel	2408, 2409
Goldsmith v. Marcus	2429	v. State	396
v. State	1819	Grand Lodge v. Banister	1671, 2510
Goltra v. Pentland	1890, 2065	v. Bartes	1486, 1490
Gomes v. New Bedford Co.	1976	Grand Trunk R. Co. v. Griffith	2510
Gonzales v. Williams	1354	Grand Trunk Western R. Co. v.	
Gonzalus v. State	861	Poole	461
		v. Reynolds	664, 2510

# TABLE OF CASES CITED

	SECTION		SECTION
Grant v. State		Gregory v. State	
141 Ala.	406	140 Ala.	247, 1033, 1034,
122 Ga.	276, 784		1440, 1966, 2595
v. U. S.	1750	Tex. Cr., 94 S. W.	63
Grant's Will	1511	v. Wabash R. Co.	571
Graves v. Broughton	2465	v. Woodbery	1671
v. Rivers	488	Greinke v. Chicago City R. Co.	21, 688,
v. Rose	2477		2509
Gray v. Chicago R. I. & P. R. Co.	377,	Gremley v. Stubbs	2508
	1976, 2510	Gress Lumber Co. v. Georgia P. S.	
v. James	2416	Co.	704
v. Kelley	770, 1576	Grey v. Callan	1624
v. State, 4 Okl. Cr.	967	Griesa v. Mutual L. Ins. Co.	1856, 1862
55 Tex. Cr.	2221	Griffin v. Boston & M. R. Co.	1521, 1530
Grayson v. State	950	v. State	200
Graziani v. Burton	1684	v. Working Woman's H. Ass'n	2008,
Grebenstein v. Stone & Webster			2015, 2016
Eng. Co.	208, 1062, 1856, 2115	Griffiths v. State	2071, 2273
Green, re	2268	Grill v. O'Dell	682, 689
v. Brooks	285	Grilley v. Atkins	2408
v. Com.	855, 2100	Grimm v. Omaha El. L. & P. Co.	2510
v. Dodge	392, 1042	Grimsley v. Singletary	2416
v. Miller	1971	Griner v. State	855, 861, 866
v. State		Griswold v. Griswold	258, 2408
143 Ala.	246	v. Nichols	1779
168 Ala.	860	Groff v. Groff	797, 2004, 2015, 2016
124 Ga.	852, 1329	Grogan v. Dooley	283
125 Ga.	396, 568, 1329, 1842,	Gronvold v. Federal U. S. Co.	1419
	2085	Groot v. Oregon Short Line	18
89 Miss., 42 So.	1452	Gross v. State	2339
49 Tex. Cr., 90 S. W.	1128	Grotjan v. Rice	2094, 2498
v. Terminal R. Ass'n	2383	Grout v. Moulton	2465
v. Western Amer. Co.	208	v. Stewart	581
Green's Adm'r v. Maysville & B. S. R.		Grove, in re	2212, 2375
Co.	1164	Groves & S. R. R. Co. v. Herman	1168, 2354
Greene, in re	2195	Grubb v. Milan	2434
Greene v. Hitchcock	1302, 1303, 1304	Grueber Eng. Co. v. Waldron	2442
v. Messick G. Co.	1195	Grunberg v. U. S.	285, 747, 754, 1530, 2273
v. Murdock	21	Guardian F. & L. Ass. Co. v. Quebec	2509
v. U. S.	1530	Guild v. Pringle	1750
Greene's Estate	2329	Guillaume v. Flannery	608
Greener v. General Elec. Co.	1750	Guimond v. Fidelity P. F. Ins. Co.	1062
Greenlee v. Mosnat	1409, 1669	Guinasso v. Arata	1278, 2052
Greenwald v. Ford	2018	Guinasso's Estate	1278, 2052
Greenway v. Taylor Co.	1974	Guinn v. Warbutton	2450
Greenwood v. Boston & M. R. Co.		Guiou v. Thibau	2442
	65, 2510	Gulf C. & S. F. R. Co. v. Johnson	1270
v. State	851, 2071	v. Matthews	261, 1005
Greer v. Com.	1841	Gulliford v. McQuillen	19
v. Union St. R. Co.	944	Gump v. Gowans	582, 1292
Gregory v. American Thread Co.	451	Gunn v. Turner	1573
v. Detroit U. R. Co.	252, 458,	v. Union R. Co.	2495
	949		

# TABLE OF CASES CITED

	SECTION		SECTION
Gunter v. State	2513	Hamilton Coal Co. v. New York & P. C. & C. Co.	2465
Guse v. Power & M. & M. Co.	451, 1890	Hamlett v. McCreary	1350
Gussner v. Hawks	1893, 2103	Hamlin v. Hamlin	2408
Guthrie v. Carey	944	Hammer v. Janowitz	969, 1951
v. Field	2419	Hammock v. State	2183, 2204
v. Harkness	1858	Hammond, <i>ex parte</i>	1856, 2195, 2210
Gutmann v. Klimek	1404	Hammond v. Glos	1705
Guy v. Lanark Fuel Co.	250	v. Jacksonville El. Co.	2500
Gynther v. Brown & McCabe Co.	199	v. McCullough	2408
Gzowski v. Forst	2155	v. State, 147 Ala.	218, 1037
		78 Oh.	1354
		v. Wolf	2004
		Hammond Lumber Co. v. Sailors' Union	2257, 2281a
		Hammond Packing Co. v. Arkansas	1859, 2218
		Hammons v. State	2339
		Hampton v. Hampton	2069
		v. State	
		50 Fla.	1042, 1890, 1975
		7 Okl. Cr.	2340
		Hanchett v. Haas	966, 2520
		Hand v. Catawba Power Co.	1976
		Handy v. Smith	1415, 1519
		Hanks Dental Ass'n v. Tooth Crown Co.	6, 1381, 1856
		Hanlon v. Ehrich	1261, 2115
		Hanna v. Connecticut M. L. Ins. Co.	1073
		v. Orient Ins. Co.	21, 1947
		Hannaford v. Dowdle	2336
		Hannah v. Anderson	68
		Hannay v. New Orleans Cotton Exch.	291, 2054
		Hanners v. State	950
		Hannon v. State	1761
		Hansell-Elcock F. Co. v. Clark	461
		Hansen v. Owens	2520, 2531, 2534
		v. Seattle L. Co.	252, 458
		Hanson v. Lindstrom	1210, 1213
		Hapai v. Brown	2582
		Harbour v. State	19, 106, 1750
		Hardesty v. People	1853
		Hardie v. Boland Co.	2509
		Hardin v. Cook	451
		v. Hardin	2088
		Harding v. Missouri Pacific R. Co.	20
		Hardwick v. Hardwick	75, 1730, 2336
		Hardy v. Com.	106, 107
		v. Martin	2315
		v. State	1072
		Hargis v. Com.	21
		Hargrove v. State	177, 2059, 2060

# TABLE OF CASES CITED

	SECTION		SECTION
Harman v. Fisher	2433	Hathaway v. Com.	851
v. Illinois & E. Coal Co.	762	v. Goslant	958, 1566, 1567
v. People	2473	Hatheway v. Smith	2452
Harmening v. Howard	1186	Hauger v. U. S.	1072, 2130
Harmon v. Terr.	357, 1168, 1330	Haughton v. Aetna L. Ins. Co.	266, 1073, 2384, 2494
Harms v. Proehl	1111, 1971	Hauser v. Goodstein	1072
Harnett v. Holdrege	2445	v. People	460, 946, 1852, 1876, 2034, 2118
Harper v. U. S.	59	Havenor v. State	1669, 1850, 2363
v. Weikel	1700	Havens v. R. I. Suburban R. Co.	1078
Harper F. Co. v. Southern Exp. Co.	2508	v. Sea Shore L. Co.	1573, 2141
Harriman v. Interstate Commerce Com.	2195	Hawken v. Daley	1558, 1560
Harrington v. Boston Elev. R. Co.	289	Hawkins v. State, 98 Md.	1440, 1442, 1460
Harris v. Basden	20	6 Okl. Cr.	1853
v. Brown	20, 620, 2245	v. U. S.	520, 1398, 1404, 1407, 1410, 1442, 1750
v. Consolidation Coal Co.	571	v. Windhorst	377
v. Delaware L. & W. R. Co.	341	Hawkinson v. Otway	1511
v. Missouri K. & T. R. Co.	2552	Hawks v. Baker	1819
v. Neal	62	Hawley v. Bond	1960
v. Ogden S. L. Co.	252	v. Sumpter Valley R. Co.	455
v. People	861	Hawthorne v. Jenkins	2503
v. Quincy O. & K. C. R. Co.	720, 1893	Hay v. State	1770, 2062
v. State		Hayes' Estate	797
80 Nebr.	2239	Hayes v. Adams Exp. Co.	2415
Okl. Cr., 137 Pac.	2497	v. Burkam	1081
64 Tex.	2071	v. State	390, 967
Harris, George, matter of	2282	v. Wagner	1233, 2570
Harrison v. Ayrshire	252	Haynes v. Com.	343
v. Green	792	v. Waterville & O. St. R. Co.	223
v. Harrison	290	Hays v. Claypool	1605
v. Remington P. Co.	1074	v. State	2276
v. Southern R. Co.	460	Hazard P. Co. v. Somerville M. Co.	461
v. State	988	Heald v. W. U. Tel. Co.	2498
v. Thackaberry	1969	Healey v. Bartlett	460
Harrison G. Co. v. Pennsylvania R. Co.	2155	Hearn v. Purnell	2408
Harrold v. Terr.	821, 861, 1890, 2277	Heaston v. Krieg	1938, 2391
Harshaw v. State	2071	Heath v. Deane	1586
Hart v. Brierly	1086	v. State	133, 963, 987
v. Com.	111	Hebb v. Welch	2465
v. Godkin	747	Hebbe v. Maple Creek	794
v. Murdock	2477	Heckman v. Heckman	2240
v. State	1821	Hedden, <i>ex parte</i>	2259
v. Taylor	664	Heddendorf v. State	861
Harten v. Loffler	2465	Hedderich v. Hedderich	2475
Hartford v. Maslen	1586, 2442	Hedderly v. U. S.	581
Hartley v. Hartley	2237	Hedger v. State	1671
Hartwell v. Parks	2534	Hedlun v. Holy Terror M. Co.	969
Harvey v. Terr.	1878	Hedrick v. Southern R. Co.	2122
Haskins v. Lumsden	74	Heflin v. Eastern R. Co.	728
Hassam v. Safford	794, 1778, 2132	Hehir v. Rhode Island Co.	2494
Hast v. Terr.	205, 1620	Heike v. U. S.	1398, 1530, 2281
Hatch v. Brown	914, 1416		

# TABLE OF CASES CITED

	SECTION		SECTION
Heinmiller v. Winston Bros.	458, 461	Hiatt v. McColley	582
Heinze (State ex rel.) v. District Court	1862	Hibbard v. Baker	1938
Heitmann v. Commercial Bank	2408,	Hicks v. Davis	1951
	2410, 2413, 2435	v. Hicks	18
Helbig v. Citizens' Ins. Co.	966, 2596	v. Jenkins	2415
v. Grays' Harbor E. Co.	2220	v. Naomi F. M. Co.	1063
Helling v. Schindler	283	v. State	18, 1126, 1671
Helm v. Anchor F. Ins. Co.	581	Higgins v. Com.	1029, 1079, 2071
v. Com.	851, 923	Higgs v. Minneapolis St. P. & S. S. M. R. Co.	791
Helms v. State	106	High's Ex'rs v. Pancake	1257
Helwig v. Aulabaugh	2153	Higham v. Vanosdol	1730
Hemphill v. Hemphill	1564, 1566, 1587	Hight v. Klingensmith	2336
Hemstreet, re	2207	Hightower v. Henry	2442
Henard v. State	398	Hildebrand v. United Artisans	18
Hendelman v. Kahan	1842	Hildreth v. Aldrich	1302
Hendersen, ex parte	2195	Hiles v. State	106
Henderson v. Coleman	18, 1078	Hill v. Adams Express Co., 74 N. J. L.	759
v. Com.	987, 2277		
v. Henderson	89, 2473	78 N. J. L.	2415
v. State	1136, 2062	v. Atlanta	2572
Henderson M. & M. Co. v. Nicholson	1680	v. Clifford	1671
Henderson & C. G. R. Co. v. Cosby	1164	v. Dalton	1564, 2477, 2540
Hendricks v. St. Louis Transit Co.	785	v. Glenwood	1876
Hendrix v. State	2060	v. Hall	2444, 2503
Heneky v. Smith	282	v. Maxwell	987, 1270
Heningburg v. State	851	v. Pomelear	2068, 2235
Hennessy v. Kennedy	2432	v. State	1732
Henning v. Stevenson	609, 615, 2500	v. Terr.	987, 2059
Henrietta Coal Co. v. Campbell	1808, 1951	v. Winston	1725
Henry v. Brown	254, 1587, 1778	Hill's Guardian v. Hill	1777
v. Henry	2520	Hillel Lodge v. Rose	1072, 1354
v. Phillips	2408	Hillers v. Taylor	1730
v. Seattle Elec. Co.	1750	Hillier v. Farrell	20
v. State	949, 1010	Hilt v. Heimberger	1347
Henry Investment Co. v. Semonian	1681	Hilton v. Hayes	1042, 1053
Hensan v. Cooksey	2503	Hinners v. Edgewater & F. L. R. Co.	1168
Henson v. Lehigh V. R. Co.	2509	Hindley v. Manhattan R. Co.	21, 463, 1062
Herman, in re	291	Hinkle v. Smith	1538
Herman v. Schlesinger	2319	Hinson v. State	1614
Herndon v. State	351	Hintz v. State	832, 851, 861, 862, 1157, 1977
Herrell v. State	1852	v. Wagner	688
Herreshoff v. Knietzsch	2212	Hirdes v. Ottawa Circuit Judge	617
Herrick v. Holland	437, 728	Hirsch & S. I. & R. Co. v. Coleman	1036, 1404
Herring v. Watson	2500	Hiskett v. Bozarth	608
Herrington v. State	1750	Hisler v. State	457, 791
Hess, re	2271, 2282	Hitchcock v. Board of Home Missions	2472
Hewett v. Chapman	2351	Hite v. Keene	2558
Hews v. Equitable L. A. Soc'y	1081	Hix v. Gulley	772, 1871
Hewson v. Cleeve	207		
Heyman v. Heyman	21, 2081, 2498		
Heynbrock v. Hormann	1778		

# TABLE OF CASES CITED

	SECTION		SECTION
Hobbs v. Rowland	2437	Hoogee v. Cline	2433
v. State	1398	Hoon v. Hoon	2526
Hobson v. Moorman	1738	Hooper v. State	987
Hoch v. People	851, 2081, 2231, 2506, 2550	Hoover v. Bouffleur	2437, 2498
Hocking v. Windsor S. Co.	569	Hope v. Phila. & W. R. Co.	714, 720
Hockman v. McClanahan	530	v. Valente	2098
Hodd v. Tacoma	1825	Hopkins, in re	2025
Hodge v. Smith	2409	Hopkins v. Fachant	1354
v. State	177	v. State	1126
Hodgens v. Sullivan	2465	Horlick's Malted Milk Co. v. Spiegel	
Hodges v. Hill	97	Co.	1856, 1862, 2319
Hofacre v. Monticello	1111, 1951, 2450	Horres v. Chemical Co.	18
Hoffbauer v. Morgan	2500	Horst v. Lewis	1698, 1976
Hofnauer v. White Co.	2509	Horstman v. Kaufman	2257
Hogen v. Klabo	949, 1890	Horton v. Chadbourne	1261
Hoggan v. Cahoon	1044	v. State,	
Hoggson & P. Mfg. Co. v. Sears	2120	123 Ga.	785
Hoisting Machinery Co. v. Goeller I.		84 Miss.	59
Works	702	120 Tenn.	2183
Holbrook v. Quinlan & Co.	1064	v. Stone	2408
Holden v. McGillicuddy	2536	Hosch Lumber Co. v. Weeks	1371
v. Prudential Life Ins. Co.	747, 754, 2452	Hotchkiss M. M. & R. Co. v. Bruner	252
Holder v. State	363, 1041	Hot Springs L. & M. Co. v. Revercomb	561, 1928, 1951
Holford v. James	2450	Houlton v. Houlton	2408
Holland v. Southern P. Co.	208	Houston & T. C. R. Co. v. Anglin	2220
v. Williams	1808	Hovey v. Tripp	2472
Holloway v. Kansas City	688, 2389	Howard v. Adkins	2465
v. State	21, 988, 2079	v. Beldenville L. Co.	969
Hollywood v. State	774, 1447	v. Carter	1938
Holman v. Boston & M. R. Co.	21	v. Com.	861, 1850, 1899, 2334
v. Clark	1779	v. Creech	2016
v. Edison	21	v. Illinois Central R. Co.	1051, 1668
Holmes v. Clisby	770	v. Perrin	1680
Holmgren v. U. S.	2056	v. State, 72 Ark.	341
Holt v. Guergin	1415	139 Wis.	196
v. U. S.	2183, 2252, 2265, 2511	v. Strode	1074, 1409, 2237
Holt's Estate	2471	v. Terr.	784
Holtan v. Beck	2530	Howatson v. Webb	2416
Holway v. Sanborn	2517	Howe v. Howe	289
Holyoke v. Holyoke's Estate	1784, 2329, 2341	Howell v. Mandelbaum	150
Holzauer v. Sheeny	2155	Howell's Lessee v. Tilden	1587
Home Ins. Co. v. Continental Ins. Co.	2464	Howson v. State	2100
Home Nat'l Bank v. Hill	2416	Hoxie v. Walker	293, 398
Homnyack v. Prudential Ins. Co.	2382	Hoyle v. Mann	1213, 1779
Hong Quon v. Chea Sam	1190	Hoyt v. Independent Pav. Co.	282
Honor Co. v. Stevedores' & L. B. Ass'n	1382	v. Lightbody	1490
Hoodless v. Jernigan	18, 20	Hronek v. People	969
Hoogewerff v. Flack	747	Huachuca W. Co. v. Swain	1951
		Hub Construction Co. v. New Eng. B. Club	1858
		Hubatka v. Maierhoffer	1491
		v. Alexander	2421

# TABLE OF CASES CITED

	SECTION		SECTION
Hubbard v. Allyn	1729	Hutchings v. Cobble	1960
v. State	2071	Hutchins v. Hutchins	1382
Hubbuck's Estate	2472, 2473	Hutchinson v. Bambas	18
Hubenthal v. Spokane & I. R. Co.	2442	v. Plant	764
Hudgins v. State	2034	v. Richmond S. G. Co.	789
Hudkins v. Crim	1257, 2498	Hutchinson L. Co. v. Dickerson	462
Hudson v. Hudson	2500, 2503	Hutson v. Hartley	2523
v. Williams	1062	Hyde v. U. S.	2349
Huebner v. Childs	1576	Hyland v. Southern B. T. & T. Co.	1698
Huey v. State	1136, 2071	Hyndman v. Stephens	282
Huff v. Gulick	2066	Hyvonen v. Hector I. Co.	1754
Hufnagle v. Delaware & H. Co.	1639		
Huggard v. Glucose S. R. Co.	451, 581, 2509		
		I	
Hughes v. Chicago St. P. M. & O. R. Co.	1168, 1415, 1416, 1856, 2346	Iberia Cypress Co. v. Thorgeson	2531
v. Pritchard	1273	Ickes v. Ickes	1730
v. State, 2 Ga. App.	2183, 2264	Ide v. Boston & M. R. Co.	455, 664
Miss., 38 So.	366	Igo v. Boston Elev. R. Co.	250
126 Tenn.	451, 791, 794, 987, 1841	Illinois Central Ins. Co. v. Wolf	2433
Hulett v. Marine S. Bank	2416	Illinois Central R. Co. v. Bailey	19, 456
Huling v. Huling	1730	v. Beeler	2220
Hull v. Berkshire R. Co.	2509	v. Hicklin	455
v. Douglas	289	v. Houchins	1076, 1698
v. Larson	2354	v. McManus' Adm'r	524
Humphrey v. Pope	18, 1730	v. Prickett	18, 65, 461, 1974
v. Timken C. Co.	2406	v. Smith	1976
Hundley v. State	56	v. Stanley	2509
Hunneman v. Phelps	1985	v. Swift	2509
Hunt v. Hunt	2046	v. Taylor	716
v. Phillips	2500	v. Wade	18, 1036, 1037
v. Waterloo C. F. & N. R. Co.	923	v. Warriner	1684
Hunt's Goods	2421	Illinois I. & M. R. Co. v. Humiston	463, 1168
Hunt's Will	2391	Illinois Match Co. v. Chicago R. I. & P. R. Co.	2415
Hunter v. District Court	1388	Illinois Steel Co. v. Jeka	1023
v. First National Bank	2409	v. Pacyocka	2415
v. Ithaca	258	Imboden's Estate	923
v. State, 133 Ga.	982	Ince v. State	682
Okl. Cr. App., 134 Pac.	2239, 2242	Indiana U. T. Co. v. Jacobs	1722
59 Tex. Cr.	1450	v. Maher	2509
Huntington v. U. S.	1732	Indianapolis St. R. Co. v. Johnson	2034
Huntley v. Hutchinson	2516	v. Schmidt	2509
Huntt v. McNamee	249, 250	v. Taylor	1755
Hunziker v. Supreme Lodge	2452	Indianapolis & M. R. T. Co. v. Hall	16, 2389
Hupfer v. National Dist. Co.	792, 1045	Ingram v. Coleman	2416
Hurley v. Caldwell	1738	v. Dailey	2442
v. Y. M. C. A.	2435	v. Wish Rah Boom Co.	1943
Hursey v. Hursey	2437	Inklebarger v. State	2497
Hurst v. State	1789	Inland & S. C. Co. v. Tolson	561
v. Terr.	150, 2089	Inlow v. Hughes	1736, 2052, 2315
Husbands v. Polivick	1352, 1354, 1664	Inman v. Dudley & D. L. Co.	1127
Huston v. Smith	1347		
Hutcheis v. Cedar R. & M. C. R. Co.	1750		

# TABLE OF CASES CITED

	SECTION		SECTION
Inman Mfg. Co. v. American Cereal Co.	2465, 2466	James v. James	1680
Insurance Co. v. Schmidt	1073	v. Oakland Traction Co.	7
International Coal M. Co. v. Pennsylvania R. Co.	1412, 1856, 2259	v. State	2383
International Harv. Co. v. Campbell	2148, 2426	Jamison v. U. S.	286
International Mahogany Co., re	1953	Jangraw v. Perkins	1077
Interstate Commerce Commission v. Baird	2264, 2281	J'Anson v. Stuart	207
Interstate Inv. Co. v. Bailey	1195, 1196, 2408	Japanese Immigrant Case	1354
Interurban C. Co. v. Hayes	2432	Jaquith v. Davidson	610
Iowa Cent. R. Co. v. Hampton E. L. & P. Co.	2509	v. Morrill	2098
Iowa L. & T. Co. v. Schnose	2536	Jarchow v. Grosse	1481, 1491
Iowa-Minn. Land Co. v. Conner	1943	Jarvis v. Willson	2419
Irvine v. Gibson	689	Jaynes v. People	367, 1028
Isaac's Estate	1938	Jeffries, ex parte	26
Isaac v. U. S.	1891	v. State	280
Isbell v. Anderson C. Co.	581	Jenkins v. Andover Theol. Sem.	2517
Isbister v. Dominion Fish Co.	2509	v. Commercial Nat'l Bank	1944
Iverson v. McDonnell	969	58 Fla.	1873
Ivey v. Bessemer C. C. Mills	1379, 2105, 2429	119 Ga.	860
v. Cowart	1640	60 Tex. Cr.	851
Ivy v. State	987, 2269	Wyo., 134 Pac.	748
		v. Weston	233, 1938
		Jenks v. Thompson	461
		Jennett v. Patten	907
		Jenney Electric Co. v. Branham	2570
		Jennings v. Moore	2444
		v. Puffer	2465
		Jensen v. Deep Creek F. & L. S. Co.	2358
		v. Palatine Ins. Co.	716
		Jericho v. Huntington	1784
		Jespersen v. Mech	1063
		Jessie v. Com.	1129
		Jewell v. Excelsior P. M. Co.	1750
		Johansen v. Pioneer Min. Co.	208
		John Hancock Ice Co. v. Perkiomen R. Co.	456, 2491
		Johns v. State	1839, 2089
		Johnson v. Atlantic C. L. R. Co.	38, 514
		v. Birket	1389
		v. Carlin	1247
		v. Caughren	1984
		v. Chicago R. I. & P. R. Co.	460, 571, 2552
		v. Com.	
		102 Va.	797, 2016
		111 Va.	507, 1976
		v. Detroit & M. R. R. Co.	1951
		v. Johnson	1051
		v. McClure	2433
		v. People	19, 1079
		v. Rhodes	1873
		v. Schoch	1460
		v. Seaboard A. L. R. Co.	949
		v. Seel	2354

## J

Jack v. Kansas	2258, 2281		
Jackson, in re	2531		
v. American T. & T. Co.	1078		
v. Drake	2435		
v. Hewlett	1736		
v. Jackson	2408		
v. Lamar	2408		
v. Moore	1554		
v. State, Ala., 41 So.	246		
50 Tex. Cr.	833		
v. Tribble	783		
v. Ward	2531		
v. Weis & L. M. Co.	1350		
Jackson L. Co. v. Cunningham	283		
Jacksonville El. Co. v. Sloan	1081, 1951		
Jacobs v. Boston El. R. Co.	1041, 2015		
v. Disharoon	1960		
v. Morgenthaler	1541		
v. State	21		
v. U. S.	2276, 2282		
v. Van Sickle	916, 2047		
Jacobson v. Massachusetts	1700		
James v. Jackson	20		

## TABLE OF CASES CITED

	SECTION		SECTION
Johnson v. St. Paul & W. C. Co.	1416	Jones' Estate	
v. State		130 Ia.	233, 1639
142 Ala.	2072	166 Cal.	1738
75 Ark.	321, 1111, 1117	Jones Stackser Co. v. Green	2416
55 Fla.	451, 1036, 1977	Jordan v. Austin	288, 1203
120 Ga.	276	v. Carberry	1639
125 Ga.	18	v. State	
85 Miss.	105	50 Fla.	728, 1977
Miss., 40 So.	1614	120 Ga.	1410
89 Miss., 42 So.	835	Joseph v. Com.	1840
90 Miss.	1072	Joseph Bros. Co. v. Schonthal	21
129 Wis.	1750	Joseph Taylor Coal Co. v. Dawes	208, 367
v. Tacoma	714, 1943	Judd v. N. Y. & T. S. S. Co.	1081
v. Union P. C. Co.	252, 1951	Judy v. Judy	1911
v. U. S.	2264	Julian v. Kansas City S. Co.	1971
v. Walker	1141, 1154	Jungworth v. Chicago M. & St. P. R. Co.	1750
Johnson Lumber Co. v. Leonard	1347, 2498	Junior v. State	2158
Johnston v. Cedar Rapids & M. C. R. Co.	1721	Jurelich v. People	2056
v. Linder	2498	Just v. Idaho C. & I. Co.	2451
v. Marriage	913		
v. Southern P. Co.	2220	K	
v. Spoonheim	1777, 1779	Kao v. Ozaki	1290
Joiner v. State	2071, 2232	Kaeppler v. Red R. V. N. Bank	1890
Joliff v. State	1620	Kah's Estate	1738
Jones v. Abbott	2421	Kahaley v. Frye	664
v. Allen	2591	Kahn v. State	354, 2016
v. Atlantic C. L. R. Co.	1530	Kalberg v. Bon Marche	507
v. Bradford	1884	Kaleikini v. Waterhouse	1460
v. Caldwell	2390	Kambour v. Boston & Maine R. Co.	1807
v. Great Central R. Co.	2319	Kamm v. Rees	1540, 1550
v. Griesler	582	Kamp v. Coxie Bros. & Co.	1078
v. Herrick	2053	Kann v. Bennett	1263
v. Kansas C. F. S. & M. R. Co.	2508	Kannow & Sons v. Farmers' C. S. Ass'n	1230
v. Knauss	291	Kansas C. L. R. Co. v. Gallagher	2510
v. Nantahala M. & T. Co.	2325, 2327	Kansas City M. & B. R. Co. v. Butler v. Matthews	1719
v. People	2089	Kansas City S. Co. v. Standard W. Co.	2155
v. Peterson	1871	Kansas C. S. R. Co. v. Belknap	961
v. Reynolds T. Co.	461	v. Henrie	1976
v. Royster Guano Co.	1164	v. Morris	792, 1750
v. State		Kapigian v. Der Minassian	581
145 Ala.	1821	Kapiolani Estate v. Thurston	1644
147 Ala.	747	Karel v. Conlan	2252, 2257
174 Ala.	1669	Karlen v. Hadinger	616
Ala., 61 So.	689	Kasenberg v. Hartshorn	1558
130 Ga.	1398, 1451	Kastor Advertising Co. v. Coleman	664
12 Ga. App.	579	Kath v. Wisconsin C. R. Co.	687, 1721
50 Tex. Cr.	1878	Kaufman v. Barbour	5, 2444
51 Tex. Cr.	263, 2242	v. Boismier	1013
v. Stevens	70		
v. Thomas	1738		
v. Warren	2416, 2496		
v. U. S.	6, 341, 1079, 1263, 1851, 1854		

# TABLE OF CASES CITED

	SECTION		SECTION
Kaufman v. State	328	Kern v. Des Moines C. R. Co.	1750
v. Tredway	334	Kerr v. De Lancy	2477
Kaulbach's Estate	2065	Kerry Co. C. v. Liverpool S. Ass'n	2319
Kavanaugh v. Wausau	225	Kershner v. Henderson	2408
Kawailani, The	2582	Kesselring v. Hummer	133, 1129, 1974, 1976
Kean v. Landrum	463	Kettenbach v. U. S.	341
v. New York C. & H. R. R. Co.	2416	Kettles v. People	2486
Kearner v. Tanner Co.	672, 682	Kevern v. People	41, 168, 1072
Kearney v. Mayor	1195, 1213	Keys v. U. S.	987
Keaton v. State	2062	Kidwell v. Ketler	1076
Keefe v. Armour Co.	1951	v. U. S.	133, 168, 2061
v. Sullivan Co. R. Co.	1566, 1567, 1568, 1956	Kiely v. Corbett	2416
Keely v. Moore	1292, 1671	Killam v. Wellesley & B. St. R. Co.	2509
Keena v. American Box Toe Co.	916	Kimball v. Fernandez	73
Keene v. Behan	2034	v. Friend's Adm'r	1168
Keeney v. Fargo	720	v. Northern El. Co.	795
Kein v. Ft. Dodge	461	Kimic v. San Jose L. G. I. R. Co.	570, 2349, 2354
Keith v. State	2354	Kincaide v. Cavanaugh	2200, 2219
Keliher v. U. S.	520, 1079, 2056, 2059, 2511	Kindberg's Will	2502
Kellan v. Kellan	1738	King v. Ashley	2317
Keller & B. Co. v. Berry	2220	v. Bellamy	2516
Kelley v. Laconia L. Dist.	1678	v. Bynum	657, 1770
v. People's Nat'l F. Ins. Co.	1640	v. Com.	1620
Kellogg v. Finn	2576	v. Cox	2110
Kelly v. re	1138, 2071	v. Gilson	
v. Chicago R. I. & P. R. Co.	2415	191 Mo.	1081, 1671
v. Colhoun	2271	206 Mo.	2500
v. Cummins	2327	v. Green	18
v. Kelly	1081, 1958	v. Hanson	1841, 2550
v. Moore	1292, 1512	v. Phoenix Ins. Co.	2184
v. People	63	Kingfisher v. Altizer	252, 438, 458, 2220
v. State	821	Kinkade v. Howard	2165
Kellyville Coal Co. v. Strine	1951	Kinkead v. U. S.	1662
Kemp v. Central of Ga. R. Co.	1750	Kinnane v. Conroy	1890
Kemper v. State	1398	Kinner v. Boyd	1963
Kempf v. Koppa	228, 689	Kinney v. Brotherhood	1671
Kenneally, in re	1491	Kipp v. Clinger	4
Kennedy v. Borah	1269	Kirby v. Kirby	2408
v. Com.	1442, 1755	v. State	18
v. Dickie	1347	Kircher v. Imperial L. & I. Co.	1856
v. McCann	2503	Kirk v. State	1041
v. Modern Woodmen	887, 928, 2531	Kirkland v. State	1182, 1404, 2152
v. State		Kitchell v. Hodgen	1082
140 Ala.	246	Kitchen v. Smith	2066
71 Nebr.	276	Kitchings v. Brown	1955
Kenney v. State	1751, 1761	Kittle, in re	2281a
Kennington v. Catoe	68, 987, 2527	Kittoe v. Willey	2408
Kentucky, The	1641	Klein v. East River E. L. Co.	1073
Kentucky Ref. Co. v. Conner	1704	Klenke v. Noonan	2505, 2536
Kenway v. Kidd	1644	Kline v. Kline	2046
Kenworthy v. Slooman	1196	Klingaman v. Fish & H. Co.	1719, 1976

## TABLE OF CASES CITED

	SECTION		SECTION
Klueter v. Schlitz Brewing Co.	2485	Kuhl v. Chamberlain	1077
Knapp v. St. Louis T. Co.	1465	Kuhlman v. Wieben	1974
v. State	263	Kuhns v. Wisconsin I. & N. R. Co.	283
Knauf v. Dover L. Co.	1951	Kultz v. Jaeger	1738
Kneeder, ex parte	2264	Kunkel v. Minneapolis St. P. & S. S. M. R. Co.	2510
Knickerbocker Ice Co. v. Gardiner D. Co.	2155	Kurtz v. Brown	1856
v. Gray, 165 Ind.	803	Kurz v. Doerr	2498
171 Ind.	461, 770, 1626	L	
Knickerbocker Steamboat Co., re	2268	Lacy v. Meador	1278
Knight v. Peabody	581	Ladwig v. Heyer	1971
v. State		Lake v. Com.	62, 1669
114 Ga.	1126	Lake Erie & W. R. Co. v. Holland v. Huffman	2432 1389
64 Tex.	290, 1869, 2528	Lalakea v. Hilo Sugar Co.	1635, 1679
Knights Templar & M. L. I. Co. v. Crayton	1053, 1073, 1076, 1374, 1671	Lally v. Central V. R. Co.	714
Knott v. Cape Fear & N. R. Co.	456	Lamb v. Philadelphia & R. R. Co.	438
v. Peterson	1077, 1698	Lambeck v. Stiefel	1056
Knox v. Montville	1784	Lambert v. Hamlin	288
v. State	1073, 1079	v. La Conner T. & T. Co.	1951
Koch v. State	987, 2356	L'Amie v. Wilson	1859
v. Streuter	2144	Lamkin v. Johnson	2494
Koeber v. Somers	2319	Lam Yee v. State	2273
Koehler v. Abey	747, 754	Lamar v. Micoux	2572
v. Schilling	1194, 1195	Lambert v. Armentrout	914, 916
Koepke v. Delfs	133, 987	v. Hemler	2498
Koester v. Northwestern P. H. Co.	2408	Lanasa v. State	1129, 2304
Kolodrianski v. American L. Co.	1404	Lancaster v. Lee	2143
Koloff v. Chicago M. & P. S. R. Co.	1676	Lancaster & J. E. L. Co. v. Jones	2459
Koltermann v. Chilvers	1681	Lander v. Sheehan	451
Komp v. State	784, 1676	Landis & Schick v. Watts	392, 682
Koon v. Southern Ry.	770, 794, 1951, 2496	Landon v. Morehead	21, 1201
Kops v. Reg.	2272	Landt v. McCullough	1201, 1208, 2525
Korah v. Chicago R. I. & P. R. Co.	2510	Landthrift v. State	1821
Kornegay v. Atlantic C. L. R. Co.	2509	Lane v. Bailey	2215
Kornig v. Western L. Ind. Co.	2510	v. Bauserman	770
Koskoff v. Goldman	283	v. Com.	2059
Kosturska v. Bartkiewicz	1352	v. Watts	2141
Kovacs v. Mayoras	1106	Lang v. Lang	228, 679
Kramer v. Gardner	2433	v. Metzger	1081, 1085
v. Weigand	1135	v. U. S.	6
Krapp v. Metrop. L. Ins. Co.	568, 1073, 1644, 1646, 2390	Langdeau v. John Hancock M. L. Ins. Co.	2452
Krebs v. Lauser	2437	Langford v. State	318
Kreens v. State	2265	Lanham v. Lanham	2336
Kreiling v. Northrup	21	v. Louisville & N. R. Co.	2432
Kroell v. State	396, 1976	Lanier v. Hebard	1490, 1573
Kroetch v. Empire M. Co.	1062, 1884	v. State	1781
Kroger v. Cumberland F. P. Co.	2494	Lanning v. Gay	582, 607
Krogg v. Modern Woodmen	1073, 1671	Lansing v. Michigan C. R. Co.	. 987
Kroll v. Close	2553	Lanza v. Le Grand Quarry Co.	1415, 1669
Krouse v. Detroit U. R. Co.	1405		
Kruse v. Koelzer	2415		

# TABLE OF CASES CITED

	SECTION		SECTION
Lapointe v. Berlin Mills Co.	1158, 1898	Lee v. Angus	2200
Lappe v. Gfeller	1736	v. Com.	2071
Laprade v. Fitchburg & L. St. R. Co.	2410	v. Kansas C. S. R. Co.	688
Larkin v. Nassau Elec. Co.	1261	v. Missouri P. R. Co.	2495
Larrance v. People	1042	v. Salt Lake	1951
Larson v. Glos	2034	v. State	
v. Salt Lake City	2220	72 Ark.	111, 247, 1013
v. State	689, 2389	8 Ga. App.	367
v. Thoma	581	45 Tex. Cr.	987
La Rue v. Kansas M. L. Ins. Co.	2573,	Leech v. Karthaus	2168
	2574	Leedom v. State	63, 64, 398, 2061
Lasater v. State	2062	Leesville Mfg. Co. v. Morgan W. & I.	
Lasher v. Colton	898	Works	1194, 2153
Lassas v. McCarty	1938	Leftridge v. U. S.	1852, 2071, 2081
Lassiter v. Norfolk & C. R. Co.	2536	Leftwich v. Early	2408
v. State	1821	Legere v. State	1128, 2512
Latham, ex p.	2536	Lehigh Valley R. Co. v. Clark	2494
Lathrop v. Humble	2433	Lehmann v. Minneapolis & St. L. R. Co.	451
Latour's Estate	2500	Leifheit v. Neylon	2103
Latourette v. Miller	681	Leistikow v. Zuelsdorf	1067, 1890
Lauchheimer v. Jacobs	773	Lemke v. Hage	2498
Lauer v. Banning	401	Lemmert v. Lemmert	20
Launikitas v. Wilkesbarre & W. V. T.		Lenahan v. Pittston C. M. Co.	969
Co.	1003	Lenfest v. Robbins	396, 952
Laurie Co. v. McCullough	458, 461, 2382,	Lenoir v. People's Bank	1385
	2386	v. Lenoir	2046, 2067, 2245
Lauth v. Chicago U. T. Co.	1719, 1721,	Leon v. Kerrison	1246
	1974	Leonard v. Fleming	1085, 2520
Lavalleur v. Hahn	2406	v. Leonard	2408
La Vie v. Tooze	2473	Lepley v. Anderson	2414, 2498
Lawless v. Lawless	1081	Le Prohon's Appeal	2329
Lawlor v. Loewe	1729	Lerum v. Georing	1032
Lawn v. Prager	751	Lese v. Lanprecht	2430, 2442
Lawrence v. Doe	1966	Leslie v. McMurty	1736
v. Methuen	715	Letourneau v. Carbonneau	2415
v. State	1079, 2183, 2264, 2277	Letts v. Letts	2056, 2060
Lawson v. Black Diamond C. M. Co.		Leucht v. Leucht	1730, 2336
	1859, 2218	Levels v. St. Louis & H. R. Co.	1639
v. Rowley	2195	Levendusky v. Empire R. M. Co.	2509
v. State	390, 1938	Leverett v. Bullard	2477
Lea, re	1354	v. Tift	1651, 2141, 2146
Leach v. Com.	987	Levi v. Levi	1539
v. Oregon S. L. Co.	1750	v. State	1404
v. Rex	2245	Levine v. Mitchell & S. Co.	2446
Leadbetter v. Crow's Nest	2319	Levy v. Rust	2024
Leaptrot v. State	1938	Lewis v. England	1539, 1555, 1558
Leary v. Webber Co.	208, 250, 1938	v. Englewood Elev. R. Co.	714, 1640
Leathe v. Thomas	2536	v. Glass	1300
Leatherman v. State	1978	v. Lewis	2252, 2452
Leavitt v. Fiberloid Co.	2434, 2509	v. Rio Grande W. R. Co.	2510
v. Shook	2132	v. State	1350
Leckie v. Scott	2199	Lewis, Hubbard & Co. v. Montgomery	
Lederer v. Saake	1674	S. Co.	2580

# TABLE OF CASES CITED

	SECTION		SECTION
Lexington v. Fleharty	1750	Lombard v. Chaplin	2113, 2115
Lexington R. Co. v. Herring	199	London Guarantee & A. Co. American	
Lexington St. R. Co. v. Strader	1750	Cereal Co.	1388
Leyner v. Leyner	2328	Long v. Athol	461
Liberty v. Haines	1063, 1067	v. Garey Inv. Co.	2391
Light v. Reed	1681	v. Hawken	2195
Liles v. Liles	1194	v. Powell	1676
v. May	1040	v. State	
Lilley v. Parkinson	1693	72 Ark.	246, 968
Lillie v. Modern Woodmen	1347	10 Tex. App.	1751
v. State	457	Long Bell L. Co. v. Nyman	95
Limerick v. Lee	1067	Longan v. Weltmer	18
Lindahl v. Supreme Court I. O. F.	2510	Longer v. Beakley	1736
Lindenbaum v. N. Y. N. H. & H. R.		Longmire v. State	396
Co.	2034	Loofbourow v. Utah L. & R. Co.	19
Lindquist v. Dickson	905	Loomis v. Connecticut F. Ins. Co.	451
Lindsay v. Allen	2281	Looney v. Saltonstall	1856, 1859
v. Bates	928	Loose v. State	667, 762, 1839, 1842
v. State	579, 1876	Lord v. Moore	2100
Lindsey v. State, Fla., 63 So.	2270	v. State	2239
69 Oh.	499	Lord's Will, in re	2106
v. Stephens	1738	Loree's Estate	1738, 2314
Lindsley v. Natural Carbonic Gas Co.	1354	Lorenz v. U. S.	1079
Line v. Grand Rapids & I. R. Co.	571	Loring v. Boston Elev. R. Co.	795
v. Line	2568	Lossing v. Cushman	2442
Linebarger v. Linebarger	1081, 1738	Lo Toon v. Terr.	1819, 1873
Linkeman v. Knepper	614	Loughead v. Collingwood S. Co.	282
Linton v. Moorhead	2536	Loughlin v. Brassil	283
v. Sutherland	1779	Louisiana R. & N. Co. v. Morere	714
Lipham v. State	398	Louisville v. Caron	1164
Lipphard v. Humphrey	1740, 2421	Louisville B. & I. Co. v. Hart	461
Lipsey v. People	326, 2273	Louisville & N. R. Co. v. Bowen	283
List's Ex'r v. List	1062, 2312	v. Brown	792
Little v. Liggett	2435	v. Daniel	1530
v. Rogers	693	v. Fort	455, 456
v. State	177, 2012	v. Guttman	455
Little Rock R. & E. Co. v. Green	2510	v. Jacobs	1587
Little Rock V. & I. Co. v. Robinson	987	v. Mayes	935
Little & H. I. Co. v. Pigg	1073	v. Molloy's Adm'x	1750
Liu Hop Fong v. U. S.	1354	v. Morton	283
Livinghouse v. State	2061	v. Payne	1808
Livingston v. State	364	v. Perkins	1966
Livingstone Mfg. Co. v. Rizzi	1078	v. Quinn	15, 1007
Lockard v. Van Alstyne	367	v. Scalf	923, 1719, 1722
Locke v. Lyon M. Co.	2556	v. Short	456
Lockhart v. State	1445, 1477	v. Simpson	2200
Lockridge v. Brown	18	v. Smith	1719, 1722
Logan v. Freerks	763	v. U. S.	1557
v. Lee	2573	v. Varnier	284, 1133
Logan's Heirs v. Ward	2522	v. Willbanks	2433
Logia Suprema v. Aguirre	1081	v. Wilson	1164
Logsdan v. Stern	616	Loveland, re	2463
Lomax v. Lomax	2477	Loverin & B. Co. v. Bumgarner	289, 2153

# TABLE OF CASES CITED

	SECTION		SECTION
Low v. Hanson	2572	McBride v. McBride	1938
Low Chin Woon v. U. S.	2256	v. Georgia R. & E. Co. 1062, 1133, 1750	
Low Foon Yin v. U. S.	2256	McCabe v. State	1384
Lowdon v. U. S.	290	McCaffrey v. Burkhardt	2445
Lowe v. Bliss	2132	McCall v. Toxaway T. Co.	2416
v. State	1328	McCalman v. State	166
Lowman v. State	276, 987, 988	McCandless v. State	2079
Lowrie v. Taylor	762	McCann v. People	2100
Lowry Nat'l Bank v. Fickett	1074, 2159	McCants v. Thompson	1560
Lowsit v. Seattle L. Co.	969	McCarthy v. Meany	748
Loxley v. Studebaker	2442	v. Peach	669
Lucas v. Com.	1434	McCarty v. Kepreta	1075, 2590
v. McDonald	1938	McClary v. State	1181
Luce v. Parsons	1576	McCleary v. State	499, 851
Luck v. State	1842	McCleery v. Lewis	2143
Luckenbach v. Sciple	18, 770	McClellan's Estate	
Luckey v. Western U. Tel. Co.	1730	20 S. D.	797, 2008
Lueders v. U. S.	341	21 S. D.	1129
Luick v. Arends	1730, 1890, 2340, 2341	McClelland v. Bullis	21, 2498
Luman v. Golden A. C. M. Co.	1078, 1951	McClintock v. Frohlich	20
Lumm v. Howells	1086	McClung v. McPherson	2132, 2520
Lumpkin v. State	1072	McClure v. State Banking Co.	64
Lunde v. Cudahy Packing Co.	2509	McClurg v. Brenton	177
v. Detroit United R. Co.	987	McCollum v. Southern P. R. Co.	1213, 2432
Lundstrom v. State	2071	v. State	667
Luscombe v. Peterson	2408	McConnell v. Brown	1911
Luttrell v. Whitehead	1502	v. Keir	1417, 2500
Lyke v. Lehigh V. R. Co.	1129	v. State	2062
Lyles v. Brannon C. Co. 1502		v. Wildes	1081
v. State		McConnell's Ex'r v. McConnell	1081
130 Ga.	1732, 1750	McCook v. McAdams	21, 1943
48 Tex. Cr.	1435	McCord v. McCord	2340
Lyman v. State	2575	v. Masonic Casualty Co.	1056
Lynch v. Ninemire P. Co.	2509	McCord-Collins M. Co. v. Dodson	1213
v. Troxell	718	McCormick v. Detroit G. H. & M. R.	
Lynch's Adm'r v. Murray	1387	Co.	1721, 1974
Lynes v. Northern Pac. R. Co.	1698, 2556	v. State	153
Lynn v. Hockaday	2336	McCorquodale v. State	1033
Lyon v. Grand Rapids	252, 770, 1976	McCoy v. Jordan	233, 1938, 2355
v. United Moderns	2434, 2496	v. U. S.	987, 2277, 2356
Lyons v. Chicago City R. Co.	1976	McCraney v. Glos	1652, 1684
Lytton Mfg. Co. v. House Lumber Co.	2435	McCrary v. Pritchard	1944, 2439
		McCray v. State	967, 1339, 2196
		McCready v. Crane	21
		McCrear v. State	2079
Mac, Mc		McCreary v. Coggeshall	2017, 2145
McAdams v. McAdams	2415, 2503	McCreary v. Com.	988
Macafee v. Higgins	1958	McCrohan v. Davison	1963
McAlister v. Henkel	2200, 2259, 2270	McCue v. Com.	905
v. State	987	McCullars v. Jacksonville O. M. Co.	1104
McAllin v. McAllin	1873	McCulloch v. Needham	2510
McAllister v. Rowland	233, 1671	M'Cullough v. Munn	797
McAnany v. Henrici	1976	v. R. Co.	1976
McBrayer v. Walker	1297, 2116		

# TABLE OF CASES CITED

	SECTION		SECTION
McCullough Bros. v. Sawtell	1076	McIntosh v. Wales	258
McCune v. Goodwillie	586	McInturf v. Insurance Co.	1387
McDaniel v. State	106	M'Intyre v. Modern Woodmen	681, 1978
McDaniels v. State	2059	McIntyre v. McIntyre	2408
McDermott v. Mahoney	1063	v. People	2195
McDermott's Estate	995	McKane v. Howard	64, 77, 207
McDevitt v. Deacon	1681	McKarren v. Boston & N. St. R. Co.	794
MacDonald v. Metropolitan St. R. Co.	1700	McKay v. Lasher	797
v. Bayha	1778	McKee v. Higbee	2097, 2498
McDonald v. Brown	1389	McKenna v. McMichael	2048
v. City El. R. Co.	1975	McKenna's Estate	689, 1738, 2500
v. Duluth	1951	McKenzie v. Banks	1003, 2385
v. McDonald	1651	v. Beaumont	1676
33 Can. Sup.	2065	McKergow v. Comstock	1856
38 N. Sc.	1651	McKevitt v. People	276, 987, 1270
v. Erbes	1213	McKinney v. Carmack	111, 1329
v. N. Y. C. & H. R. R. Co.	664, 1018	McKinnon v. Lively	987
v. Pless	2354	v. Collins	7, 1028, 1117, 1646, 2534
v. Rhode Island Co.	682	McKinstry v. Tuscaloosa	492
v. Smith	289, 290, 1389, 1893	McKnight v. Detroit & M. R. R. Co.	2194
v. State		v. Newell	1549
165 Ala.	141, 177	v. Oregon S. L. R. Co.	2536
56 Fla.	2513	v. Parsons	2420
McDonough v. Boston El. R. Co.	1078, 2053	v. U. S.	1779, 2272
McDowell v. McDowell's Est.	610, 1466	McLain v. Allen	1490
v. Edward's Adm'r	2503	McLaughlin v. Joy	1417
McDuffee v. State	290, 2511, 2512	McLean Co. Coal Co. v. Bloomington	2465
McDuffee's Adm'r v. Boston & M. R. Co.	290	McLeod v. Atlantic C. L. R. Co.	2509
McDuffie v. State	951	MacMahon v. Railway P. Ass. Co.	1859
McElroy v. State	140	McMahon v. Chicago City R. Co.	949, 1778
McElwain v. Com.	2273	v. Rowley	1705
McEwen v. State	1442, 2512	McManus v. Nichols-Chisholm L. Co.	1048
McFarland v. People	2061	McMichael v. State	2243
MacFeat v. Phila. W. & B. R. Co.	18, 792	McMillen v. Ferrum M. Co.	1163
McGarry v. Healey	2026	McNamara v. Boston Elev. R. Co.	2416, 2509
McGary v. McDermott	2047, 2433	McNaughton v. Smith	19
McGeary v. Brown	1859	McNeil v. Cullen	2444
McGeehan v. Hughes	461	McNeill v. Stitt	2498
McGehee v. State	142, 821	McNish v. State	851
McGivern v. Steele	1387, 1576, 2098	McPhelemy v. McPhelemy	1244
McGorray v. Sutter	2271	McQuiggan v. Ladd	198, 248
McGowan v. Davenport	1077	McRae v. Erickson	2382, 2383
McGregor v. Montgomery	1213	McReynolds v. Smith	228
McGuire v. Blount	2139, 2145	McRorie v. Monroe	1330, 1976
v. Clark	2408	McSein v. State	2086
v. Norfolk & W. R. Co.	914	McSwane v. Foreman	2204
McHenry v. Parkersburg	1640	McWilliams v. Dickson Co.	1856
M'Hugh v. M'Hugh	2463, 2477		
McHugh v. St. Louis T. Co.	1719		
v. Terr.	248, 396		
McInerney v. U. S.	1633, 1641, 1672, 2529		

# TABLE OF CASES CITED

	SECTION		SECTION
Mackey v. Irwin	1061	Mansbach's Estate	2384, 2391, 2500
Mackin v. People	2270	Mansfield v. Johnson	1275, 1681
Macon v. Humphries	20, 2219	Maples v. Haggard	1665
Macon R. & L. Co. v. Mason	290, 560, 2337	Machant's Estate	2534
Maddox v. State	1732, 2595	Marcus v. Gimbel Bros.	1078
Madison v. Guilford	1784	Marcy v. Parker	2349
Madre v. Gaskins	2503	Marinette v. Goodrich T. Co.	664
Madsen v. Utah L. & R. Co.	2383	Marinoni v. State	18
Madson v. Rutter	17	Mark, re	2271, 2276
Madunkeunk D. & I. Co. v. Allen C. Co.	1530	Markey v. State	18, 1352, 1676
Mageau v. Great Northern R. Co.	2391	Marks v. Hardy's Adm'r	21, 1624, 1706
Magee v. State	2265	v. Harriet Cotton Mills	1951
Magness v. Modern Woodmen	2531	v. Madsen	614, 2340
Magnolia M. Co. v. Gale	18	v. Marks	2463
Maguire v. People	1013	Marley v. State	150
v. Seaboard A. L. R. Co.	2509	Marmer v. State	2060
Mahan v. Daggett	461	Marron v. Great Northern R. Co.	747
Mahar v. Montello G. Co.	916	Marsh v. Sanders	1858
Mahon v. Rankin	1058, 2115	Marshall v. Marshall, 252 Ill.	1698
v. State	2016	71 Kan.	17, 2334
Mahoney v. Hartford Inv. Co.	1555, 1558	v. Terr.	205
v. Salisbury	2410	v. U. S.	341
Maier v. Brock	2506	v. Wabash R. Co.	1974
Main v. Radney	18, 2415	Martin v. Beatty	232, 689
Maitland v. Zanga	1909	v. Boston & N. St. R. Co.	561, 2509
Makainai v. Goo Wan Hoy	2184	v. Brand	2529
Makekau v. Kane	1481, 1778	v. Com.	1442
Maki v. State	852	v. Corscaddon	258
Malcom Sav. Bank v. Cronin	5, 803	v. Derenbecker	612
Malley Co. v. Button	321	v. Des Moines E. L. Co.	1976
Malone v. Alderdice	1352	v. Hoffman	1263
v. La Croix	2580	v. Knight	2016
v. State	247, 1079	v. Martin	1681
v. Stephenson	987	v. Moore	792
Maloney v. King	1164, 1873	v. Ragsdale	1388
v. Winston Bros. Co.	2536	v. State, 144 Ala.	247
Maloy v. State	923, 1985	2 Ala. App.	203
Mance v. Hossington	377	v. Terr.	524
Manchester Assur. Co. v. Oregon R. & N. Co.	749, 1530, 1532	Martorana, in re	2066
Manda v. Orange	463	Marx v. Ontario B. H. & A. Co.	1976
Mandel v. Swan	1223	Maryland Casualty Co. v. Seattle El. Co.	2354
Mandery v. Mississippi & R. R. B. Co.	1943	Maryland El. R. Co. v. Beasley	252, 792
Mandler v. Starks	2442	Maryland Steel Co. v. Engleman	1127
Manhattan L. Ins. Co. v. Albro	6, 2452	Marzulli v. Metropolitan L. Ins. Co.	2034
Mankato Mills Co. v. Willard	21	Mash v. Darley	1347
Mann v. Balfour	582, 1736	v. People	15, 18, 2243
v. Com.	2059	Mason v. State	1781, 2081, 2513
Manning v. Mercantile S. Co.	2259, 2264, 2271	Masourides v. State	905
v. School District	736, 754	Masee v. Williams	78, 406
v. State	1186	Massee-Felton L. Co. v. Sirmans	1460, 1464
		Masseth's Estate	2421

# TABLE OF CASES CITED

	SECTION		SECTION
Massey-Harris Co. v. Horning	1058	Meisner v. Meisner	2442
v. De Laval S. Co.	6185	Mellor v. Walmsley	1524, 1563, 1665
Massuco v. Tomassi	690, 2088	Melton v. State	63, 1157
Masterson v. St. Louis Transit Co.	2273	Menasha W. W. Co. v. Harmon	1212, 1234
Maston v. State	56, 59, 592	Mendel v. Boyd	1230
Math v. Chicago City R. Co.	782, 785	Mendenhall (State ex rel.) v. District Court	1862
Matheson v. Matheson	2408	v. Ulrich	2409
v. U. S.	561, 2501	Menefee v. State	580
Mathie v. Hancock	1854	Meno v. State	133, 390, 2060
Mathison v. State	934	Mercantile Guaranty Co. v. Hilton	2558
Matko v. Daley	1456, 1530	Mercer v. Denne	1524, 1563, 1584, 1588, 1591, 1634, 1665, 2375
Matterhorn, The	2536	Mercer Co. v. Wolff	1168
Matthews v. Farrell	18, 1062	Merchant v. Com.	507
Matthews & Son v. Richards	1249	Merchants' Exch. Co. v. Sanders	95
Mattingly v. Shortell	64	Merchants' L. & T. Co. v. Egan	2104, 2113
Mattison v. Mattison	763	Merchants' S. & G. Co. v. Board of Trade	1398, 2252
Mattson v. Minn. & N. W. R. Co.	1182	Merchants' & F. State Bank v. Dawdy	18
Mause v. Hossington	377	Merck v. Merck	529, 1302, 2420
Maves v. Grand Trunk P. R. Co.	778	Merrell, ex p.	2260
Mawelo v. Hamm-Young Co.	1750	v. Dudley	1732
Maxey v. U. S.	6, 520	Merriam Co. v. Syndicate Pub. Co.	1699
Maxson v. Case Threshing M. Co.	1951	Merrill v. Leisenring	398, 1416, 1974
Maxwell v. State	835	Merriman v. Schmitt	2437
May v. Com.	218	Merritt v. Copper Crown Co.	1271, 1858, 2536
v. May	488, 2067	v. Dewey	2525
v. Northern P. R. Co.	2220, 2389	Merriweather v. Com.	1072
Mayberry v. Beck	2465	Messel v. State	2071, 2072, 2081
Mayfield Lumber Co. v. Lewis' Adm'r	201, 1984	Messenger v. Messenger	1705
Mayhew v. Eugene	2572	Metropolitan Life Ins. Co. v. O'Grady	2336
Maynard v. Oregon R. & N. Co.	792	v. Wagner	1976
v. People	133	Metropolitan R. Co. v. Blick	571
Mayo v. Hughes	2123	Metropolitan Stock Exchange v. Lyndonville N. Bank	2573
Mayor of Baltimore v. Hurlock	463, 655	Mette & K. D. Co. v. Lowrey	1404
Mayrand v. Dussault	2503	Metteer v. Smith	2572
Mays v. New Amsterdam C. Co.	2390	Metz v. Willitts	18
v. State	1476	Metzger v. Royal Neighbors	2341
Mead v. Presbyterian Church	1302, 1512	Metzradt v. Modern Brotherhood	1671
Means v. Carolina C. R. Co.	2496	Meurer's Will	1302
v. State	2056	Mexborough, Earl of, v. Whitwood	
Mease v. United T. Co.	18	U. D. Council	2256, 2268, 2281
Medical College Laboratory v. N. Y. University	2433	Meyer v. Home Ins. Co.	2375
Medley v. German A. Ins. Co.	2416	v. Foster	1330
Meehan v. Great Northern R. Co.	1976	v. Supreme Lodge	2382, 2388
v. Holyoke St. R. Co.	1951	Meyers v. Highland B. G. M. Co.	437, 1951
v. State	987, 2497	Michael v. Matson	2374
Meeker v. Fairfield	252, 1951	Michaels v. People	821
v. Post P. & P. Co.	74	Michalowicz v. Michalowicz	2067, 2069
Meekins v. Norfolk & S. R. Co.	18		
Meier v. Buchter	229, 1081		
v. Paulus	1416, 1856		
Meily v. St. Louis & S. F. R. Co.	1951		

# TABLE OF CASES CITED

	SECTION		SECTION
Michell v. Low	2048, 2106	Mills v. Biscoe L. Co.	1859
Middleworth v. Ordway	2471	v. Flynn	74
Midland V. R. Co. v. Adkins	719	v. State	2273, 2511
v. Hamilton	770	Milwaukee G. E. Co. v. Gordon	20
v. Le Moyne	908	Minden v. Vedene	1158
Mier v. Phillips F. Co.	347, 1164, 1168	Minihan v. Boston Elev. R. Co.	278, 2509
Miera v. Terr.	397, 1976, 1977	Minnesota Deb. Co. v. Johnson	1246, 1256
Miles v. Armour	2218	Minor v. State	2272
v. Carnes	1884	Mise v. Com.	1164
Miller v. Carr	2502	Misenheimer v. State	2071
v. Com'rs	2256	Misner v. Strong	1062
v. Gillispie	1388	Mississippi Glass Co. v. Franzen	907
v. Hamilton B. S. Co.	1974	Mississippi L. & C. Co. v. Kelly	1290, 2016
v. John	1079	Missouri K. & T. R. Co. v. Davis	1530
v. Leib	682, 2155	v. McGlamory	1350
v. Luckey	1943	v. Simons	1350
v. Mandel	2498	Missouri S. L. Ins. Co. v. Lovelace	1684
v. Minturn	795	Missouri Pac. R. Co. v. Castle	17, 2383,
v. Mullan	252, 438		2552
v. Northern P. R. Co.	1633	Missouri & N. A. R. Co. v. Daniels	682,
v. Pearce	655, 944		2390
v. People		Mitau v. Roddan	2465
216 Ill.	235, 933, 1051, 1330,	Mitchell v. Altus State Bank	2409
	2115, 2272	v. Leech	1700
229 Ill.	56, 2513	v. State	
v. Shumway	254	140 Ala.	354
v. Sovereign Camp	2531	148 Ala.	987, 1985
v. Spring Garden Ins. Co.	2465	82 Ark.	1450
v. Springfield W. Co.	1890	7 Okl. Cr.	21
v. State		9 Okl. Cr.	1620
146 Ala.	2276	Mitchell & Brady v. Mitchel's Adm'r	617
94 Ark.	1976, 1978	Mithen v. Jeffery	201, 282, 1911
165 Ind.	526, 1476	Mitsunaga v. People	840, 1021
174 Ind.	106, 1022	Mittelstadt v. Modern Woodmen	2510
78 Neb.	2239	Mittlesteadt v. Johnson	2498
9 Okl. Cr. 255	390	Mixon v. State	1450
46 Tex. Cr.	523	Mobile J. & K. C. R. Co. v. Hawkins	1254,
Tex. Cr., 91 S. W.	852		1960
139 Wis.	1012, 1079	v. Kea	2509
v. Stebbins	616	Mobile & O. R. Co. v. Vallowe	252, 458
v. Steele	6	Mobley v. Lyon	1034
v. Terr.		Modern Woodmen v. Gerdorn	2531
9 Ariz.	177	Moering v. Falk Co.	1616
149 Fed.	987	Moffatt v. Hardin	2312
v. U. S.	1066	Moffit v. Canadian Pac. R. Co.	1456
Miller's Estate		v. Connecticut Co.	93, 792
31 Utah	1081	Mohawk Overall Co., in re	2200
36 Utah	1974	Molyneux v. Willcockson	2239
Miller's Will	1736	Monaghan v. State	2511
Millner v. State	1404	Monarch Mfg. Co. v. Omaha	1530, 1639
Milner v. State		Monongahela R. C. C. & C. Co. v.	
124 Ga.	855	Schinnerer	2573
7 Ga. App.	2071	Monroe Cattle Co. v. Becker	2047

# TABLE OF CASES CITED

	SECTION		SECTION
Montgomery v. Seaboard A. L. R. Co.	1680	Mott v. State	2062
Montgomery St. R. Co. v. Shanks	1719, 1977	Motton v. Smith	716
Montreal St. R. Co. v. Feigleman	2319	Moultrie Repair Co. v. Hill	907
Moon v. Pere Marquette R. Co.	283	Mount Vernon B. Co. v. Teachner	1704
Moore v. Adams	2498	Mountford v. Cunard S. S. Co.	457
v. Dozier	657, 691, 1984	Mower v. McCarthy	1086
v. Fryman	1959	Mower-Harwood C. & D. S. Co. v. Hill	2415
v. Pywell	2573	Moy Suey v. U. S.	1354
v. R. Co.	1160, 1168	Moyers v. Fogarty	2311
v. State, 130 Ga.	770, 1207	Moynahan v. Perkins	2593
96 Tenn.	1819	Moynihan v. Holyoke	461
Tex. Cr., 144 S. W.	987	Mueller v. Batcheler	2297
Moore Lime Co. v. Johnston's Adm'r	2509	v. Cook	2433
Moorhead v. Arnold	1151, 1168, 1351	v. Pew	1738
v. Kaulbach	2065	Mugge v. Jackson	2593
Moran v. O'Regan	1971	Mulhall v. Fallon	1576
v. State	1976	Mulkey v. State	1354
Moran B. Co. v. Pacific C. C. Co.	2430	Mullen v. U. S.	1398
Mordecai v. Canty	1302	Mullin v. Boston Elev. R. Co.	461
More v. More	1512	Mullins v. Com.	
Morehead's Trustee v. Anderson	1944, 2570	Ky., 79 S. W.	987
Morey's Estate	2494, 2503	113 Va.	389, 851, 1726, 2550
Morgan v. Lehigh V. C. Co.	20	v. Lyles	1081
v. Lexington H. Co.	74	v. Shrewsbury	1058
v. Morgan	2408	Mulroy v. Jacobson	2120
v. State		Multnomah L. & B. Co. v. Weston	
120 Ga.	2071	B. & B. Co.	2594
124 Ga.	289	Muncy, <i>ex parte</i>	2280
v. Terr.	19	Mundy v. Jacques	2110
v. Thompson	2444	Munn, <i>ex p.</i>	2252
v. U. S.	1058	Munro v. Henderson	2421
Morgenroth v. Spencer	2239	Munroe v. Hartford St. R. Co.	21, 191, 1066
Morrell v. Preiskel	714	Munster v. Ashworth	1371, 1378
Morris v. Davies	166	Murchison v. Green	2506
v. Minneapolis St. P. & S. S. M. R. Co.	2491	Murdock v. Adamson	1053, 1461
v. Pratt	2054	v. Gould	2465
v. State		Murmurt v. State	1066
144 Ala.	933, 1005	Murphy v. Atlanta & C. A. L. R. Co.	261
146 Ala.	396	v. Black	2432
6 Okl. Cr.	1153, 1450	v. Board	1750, 2381
9 Okl. Cr.	398	v. Cady	1680, 2143
v. Terr.	247, 794	v. Chicago M. & S. P. R. Co.	1168
v. U. S.	762	v. Chicago, R. I. & P. R. Co.	1350
Morrison v. Hazzard	2465	v. Com.	157, 1967
v. Holder	1567	v. Dafoe	1778
Morrow v. National Mas. Acc. Ass'n	1922	v. Murphy	694, 695, 697, 2004
Morse v. Com.	331	v. People	1644
Mortgage T. Co. v. Elliott	1195	v. Southern Pac. R. Co.	2220
Moseley v. Johnson	1704	v. State	
Moser, <i>re</i>	2259, 2271	122 Ga.	2086, 2231
Moss v. Hunt	1351	Tex. Cr., 143 S. W.	2062
v. State	716, 2265	124 Wis.	2056, 2281, 2363

# TABLE OF CASES CITED

	SECTION		SECTION
Murray v. Dickens	745, 751	Nelms v. State	56
v. Moore	341	Nelson v. Georgia C. & N. R. Co.	1750
v. Supreme Hive	1644, 1671	v. Grondahl	93
Musgrave v. Anglin	1651, 1681	v. Nat'l Drill Mfg. Co.	1198
Muskeget Island Club v. Nantucket	561, 714	v. Union R. Co.	252
		v. U. S.	1859, 2200, 2210
Muskogee Electric T. Co. v. McIntire	2509	Nelson Theatre Co. v. Nelson	463, 1944
Musselman G. Co. v. Casler	1062	Nelson & Sons v. Nelson Line	1859
Mutual Industrial I. Co. v. Perkins	288	Ness v. Escanaba	792
Mutual Life Ins. Co. v. Griess	1862, 2194, 2221	Neubert v. Armstrong W. Co.	95, 1203
v. Owen	2381	Neville v. State	821, 1958
Myer's Will	232, 1081, 1938, 2384, 2386	Nevins v. Nevins	1730
Myers v. Manlove	18	New Bell J. C. Co. v. Oxendine	2410
v. Myers	1081	New England M. S. Co. v. Anderson	1213
Myhra v. Chicago M. & P. S. R. Co.	688	New Jersey I. & I. R. Co. v. Tutt	1651
		New Mexico v. Denver & R. G. R. Co.	2580
		New Orleans & N. E. R. Co. v. Mobly	505, 507
		New York C. & H. R. R. Co. v. U. S.	291
		New York Life Ins. Co. v. Rankin	1062, 1808
		New York, N. H. & H. R. Co. v. Hor-	
		gan	1275
		v. Offield	2572
		New York & B. F. Co. v. Moore	154
		New York & L. I. B. Co. v. Smith	1350
		Newby, in re	2498
		Newcomb v. Burbank	1859
		v. State	18, 792
		Newcomb's Estate, re	2383
		Newell v. Cleveland C. C. & St. L. R. Co.	65, 2510
		v. New Holstein C. Co.	2465
		v. White	1302
		Newman v. Com.	923, 2273
		v. People	2060
		Newport N. P. Co. v. Beaumeister	2510
		Newport R. M. Co. v. Mason	1951
		Newton v. Foot	803
		Newton Centre Trust Co. v. Stuart	2020
		Nichols v. New Britain	1072
		v. State	2062
		v. Wentz	1890, 1938, 1974
		Nichols-Shepard Co. v. Ringler	702
		Nichols & S. Co. v. Skedanuk	1290, 1856
		Nicholson v. Eureka L. Co.	704, 2006, 2141, 2165
		v. State	1976
		v. Tarpey	2448
		Nickey v. Leader	2578
		Nickles v. Seaboard A. L. R. Co.	1062, 1976
		v. State	1976

# TABLE OF CASES CITED

	SECTION		SECTION
Nickolizack v. State	1808, 2277	Noyes v. Meharry	462
Nielson v. Cedar Co.	1013	v. Thorpe	1856, 2260
Nilson v. Chicago B. & Q. R. Co.	2510	Nugent v. Cudahy P. Co.	2390
Nix v. Thackaberry	1911	Nussbaumer v. State	2562
Nixon v. Omaha & C. B. St. R. Co.	1719	Nussbar v. Arnold	1081
v. Snellbaker	1736	Nutting v. Watson	2034
v. State	1398	Nye v. Foreman	2478
Noble v. Fickes	2408		
Nobles v. State	398		O
Noelle v. Hoquiam L. & S. Co.	2389	Oakes v. State	581, 2557
Nolan v. Garrison	1411	O'Barr v. U. S.	1807
v. Newton St. R. Co.	683	Obermeyer v. Lageman C. M. Co.	2382
v. Otney	2408	O'Berry v. State	1163, 1802
Nolen v. State	200	O'Brien v. Bonfield	1303, 1510
Noonan v. Luther	64, 581	v. Boston Elev. R. Co.	2510
Nophsker v. Supreme Council	225, 266	v. Cheney	2099
Norbeck v. Davis	2235	v. Knotts	18, 1081
Norcum v. Savage	1067, 1256	v. O'Brien	2408
Nordan v. State	1387, 1725, 1750	v. Paterson B. & M. Co.	2444
Nordgren v. People	951, 1438, 1446,	v. St. Louis Transit Co.	1414
	1726	v. U. S.	749, 1207
Norfolk R. & L. Co. v. Spratley	1976, 2509	v. Woburn	2572
Norfolk & W. R. Co. v. Bell	461	O'Brien Lumber Co. v. Wilkinson	2464
v. Briggs	456	Ocala F. & M. W. v. Lester	2123
v. Denny's Adm'r	2536	O'Callaghan v. Dellwood Park Co.	2509
Norman v. McCarthy	2409	v. Murphy	1390
v. State	2239	O'Carroll v. Hastings	2452
Norman P. S. Co. v. Ford	654, 1074, 2463	Ochsner v. Com.	987
Norris v. Billingsley	1233, 1651	O'Connell v. King	1067
v. Cargill	1067	O'Connor v. Lighthizer	2410
v. Cudahy P. Co.	461	v. Madison	1081
v. St. Louis I. M. & S. R. Co.	568	O'Connor Co. v. Gillaspay	1750
North Jersey St. R. Co. v. Purdy	2509	O'Day v. Meyers	916, 1890
North Texas C. Co. v. Bostick	1821	O'Dea v. Michigan C. R. Co.	1721
Northeastern R. Co. v. Hastings	2463	Odegard v. North Wis. L. Co.	283
Northern Ala. R. Co. v. Mansell	461	O'Dell v. Goff	228, 1738
v. Shea	1951	v. State	770, 2272
Northern C. R. Co. v. State	664	Odom v. State	233, 569, 689
Northern Pacific R. Co. v. Alderson	790	O'Donnell v. People	18, 1270
v. Dixon	2509	Offutt v. Doyle	2432
Northern Supply Co. v. Wangard	1951	Ofner, in re	2467, 2474
Northwest E. I. Co. v. Campbell	2047	O'Grady v. People	2060
Northwestern Elev. Co. v. Great Nor-		O'Hare v. Chicago M. & N. R. Co.	463
thern R. Co.	1557	O'Hearn v. State	1072
Northwestern M. F. Ass'n v. North-		Ohio Copper M. Co. v. Hutchings	1383
ern P. R. Co.	2509	Ohio Nat'l B'k v. Berlin	1635
Northrup v. Columbian L. Co.	1082, 2143,	O'Laughlin v. Poll	2441
	2470	Old Wayne N. L. Ass'n v. Mc-	
Norton v. Clark	1738, 2119, 2314, 2500	Donough	2168
v. Kramer	437	Oldstadt v. Linehan	254
Norwich Ins. Co. v. Oregon R. Co.	2451	Oliver v. Henderson	2474, 2477
Nova Scotia Steel Co. v. Bartlett	1225	Olmstead v. Oregon S. L. R. Co.	2487
Noyes v. Boston & Maine R. Co.	199	Olmsted v. Edson	1856, 2195, 2232

## TABLE OF CASES CITED

	SECTION		SECTION
Olson v. Aubolee	1884	Owner v. Bee Hive Spinning Co.	1200, 1219
v. Court of Honor	2391	Oxford (Bishop of) v. Henly	1209
v. Pike	2509	Oxier v. U. S.	987
Omaha v. Yancey	95	Ozark v. State	1043
Omaha St. R. Co. v. Boesen	1032, 2509		
v. Larson	571		P
O'Mara v. Lamb	2199		
O'Meara v. McDermott	1388, 1404	Pace v. Louisville & N. R. Co.	763
Omlie v. O'Toole	578	Pacific Export L. Co. v. North P. L.	
Ong Chair Co. v. Cook	1389	Co.	1073
O'Neal v. Sovereign Woodman	2408	Pacific L. S. Co. v. Murray	1943
v. State	967	Pacific Mill Co. v. Enterprise Mill Co.	716
v. Tennessee C. D. & R. Co.	1311, 2145	Packham v. Glendmeyer	341
Onstott v. Edel	1911	Padgett v. State	1890
Ontario & W. C. F. Co. v. Hamilton	1856	Page v. Geiser Mfg. Co.	1067
Orange v. State	63	v. Hazleton	284, 1549, 2116
Orange R. M. Co. v. McIlhenny	1067	v. McClure	2577
Order of U. C. Travellers v. Barnes	1770	Palatine Ins. Co. v. Northern P. R.	
O'Regan v. Canadian P. R. Co.	2556	Co.	1350
v. Trench	1041	v. Santa Fé M. Co.	354
Oregon & Cal. R. Co. v. Grubissich	1066,	Palmer v. Coyle	201, 251
	1074, 2130, 2522	v. Goldberg	716
Orendorff v. Suit	1352	v. Owen	2452
Orient Ins. Co. v. Northern P. R. Co.	461	v. Schurz	1974
Orion K. Mills v. U. S. F. & G. Co.	2442	v. State	1141
Ormerod v. St. George's Ironworks	1857, 1859	Palmer T. Co. v. Eaves	1064
Ormsby v. Webb	1081	Panhandle Lumber Co. v. Rancour	2498
Oro W. L. & P. Co. v. Oroville	1859	Pannell v. State	2062
Orvik v. Casselman	2581	Pape v. Wright	2165
Osborne v. Grand Trunk R. Co.	1530	Pa Pelekane's Title	2573
v. Ramsay	1487, 2527	Paquette v. Prudential Ins. Co.	1770, 2452
Osburn v. Oregon R. & N. Co.	455, 2509	Pardee v. Schanzlin	2165
v. State	63, 1157, 1807, 1890	Park v. Schneider	1406
Osby v. Reynolds	2419, 2420	v. State	1445, 1448
Osgood v. Skinner	2442	Parke & L. Co. v. S. F. Bridge Co.	1770
O'Shea v. People	784	Parken v. Safford	18, 2047
Ossenkop v. State	1853, 2382	Parker, ex p.	2195
Ostendorf v. State	2282	v. Farmers' F. Ins. Co.	1073
Ostenson v. Severson	2437	v. Parker	2329, 2391
Oswald v. Caldwell	2408	v. Ricks	1879
Otis Elevator Co. v. Luck	451	v. State	
O'Toole v. Ohio G. F. Ins. Co.	2285, 2339	165 Ala.	1442
Ott v. Murphy	74, 1725	46 Tex. Cr.	177, 851, 1041, 1977
v. Press Pub. Co.	406	Parker's Adm'r v. Cumberland T. &	
Ottawa v. Green	792	T. Co.	1078
Overbeck's Will	1958	Parks v. Baker	2474
Overton v. White	1067	v. Com.	1398, 1404
Owen v. McDermott	1960	v. State	
v. State	2071	113 Md.	1042
Owens v. National Hatchet Co.	2450	46 Tex. Cr.	821
v. State		Parlett v. Dunn	461
120 Ga.	821	Parrish v. High Point R. A. & S. R.	
32 Nebr.	2239	Co.	683

# TABLE OF CASES CITED

	SECTION		SECTION
Parish v. State	18, 677, 961, 1621, 1839, 1938, 2501, 2550	Pelham & H. R. Co. v. Elliott	1011, 1807
Parrott v. Atlantic & N. C. R. Co.	93, 376	Pelican Lumber Co. v. Johnson	1530
v. Chicago G. W. R. Co.	1943	Pelkey v. Hodgdon	282, 581
v. State	1072, 2272	Pelletier v. O'Connell	2478
Parsons v. People	397	Pelton v. Spider Lake S. & L. Co.	2498
Partin v. Com.	2042	Pence v. California M. Co.	461
Partridge v. U. S.	321	Pendleton v. U. S.	2270, 2272
Parulo v. Philadelphia & R. R. Co.	1072	Penland v. Ingle	2053, 2498
Passaic Co. v. Stevenson	1350	Penn Mut. L. I. Co. v. Norcross	2596
Pastrel v. Amory	2426	Pennsylvania R. Co. v. Durkee	2386
Patch Mfg. Co. v. Protection Lodge	291	v. Naive	21
Pate v. State	246	Penny v. State	507
Paterson v. Chicago, M. & St. P. R. Co.	561	Pensacola Elec. Co. v. Bissett	684
Patrick v. Smith	1976	Pentico v. Hays	2520
Pattee v. Whitcomb	21, 1938, 1958	People v. Adams	2086, 2148
Patten-W. D. Co. v. Planters' M. Co.	2439	v. Albers	18, 925, 1983
Patterson v. Com	1434, 1442	v. Aldorfer	1209
v. Drake	1225, 1664, 1681, 2110	v. Alexander	1434
v. Hochster	1746	v. Ambach	2511
v. First N. Bank	377	v. Argo	2281
v. Ocean A. & G. Co.	1750	v. Arnold	968, 1908
v. Patterson	2498	v. Auerbach	389, 451, 1163, 1164, 1802
v. State		v. Austin	2382
Ala. 41 So.	396	v. Balkwell	2059
Okl. Cr., 132 Pac.	1620, 1966	v. Barker	1405, 1725
v. Wyoming Valley District Council	2257	v. Becker	918, 2056, 2079
Patterson's Estate	7, 2052, 2106	v. Bennett	2072
Patton v. Bank	18, 2008	v. Bernstein	2484
v. Fox	1207, 1225	v. Bissett	967
v. Sanborn	283, 1719	v. Bladok	2254
Patty v. Salem F. Co.	1075	v. Blake	1878
Pauksztis v. Raeder B. L. & P. Co.	461	v. Blerding	2556
Paulson v. Boyd	2409	v. Board of Police Com'rs	1819
Paxton v. State	925, 1405	v. Bolik	2497
Payne v. Staunton	1858, 2375	v. Bollinger	150
v. Waterloo C. F. & N. R. Co.	571	v. Bollman	2382
Peak v. Taubman	1971	v. Bond	1263
Peaks v. Cobb	1233	v. Bonier	21, 56
Peano v. Brennan	2573	v. Borello	833
Pearce, in re	2463	v. Bowen	
v. Fisher	1681	165 Mich.	231, 2338, 2341
v. Hooper	1297	170 Mich.	2100, 2339
Pearsall v. Com.	861	v. Brown	
Pearson v. Dancer	2442	3 Cal App.	748
v. Yoder	2307, 2309	142 Mich.	168, 398
Peasley, re	2259	72 N. Y.	2270
Peck v. State	852	203 N. Y.	821, 2276
Peckham v. People	2061, 2577, 2592	v. Browne	
Peebles v. O'Gara Coal Co.	770, 772	197 N. Y.	987
Peet v. Peet	5, 2475	v. Buckley	
		143 Cal.	866, 1330, 1398, 1405, 1635, 1669, 1890, 2056, 2094

# TABLE OF CASES CITED

	SECTION		SECTION
People v. Burke		People v. Easton	276
18 Cal. App.	988, 1154, 1908	v. Emmons	142
157 Mich.	351, 2497	v. Enright	492, 497, 932
v. Butler St. F. & I. Co.	2258	v. Etter	398
v. Cahill		v. Evans	527, 2042
147 Mich.	2272	v. Everham	398, 1209
193 N. Y.	2100, 2270	v. Faber	664
v. Campbell	2520	v. Falletto	1438
v. Cardillo	1270	v. Farmer	2298, 2327
v. Cascone	21, 987, 1072	v. Farrell	198, 248
v. Case	2527	v. Farrington	273
v. Casey	2501	v. Feinberg	2056
v. Cassesse	1441	v. Ferrara	1129
v. Chadwick	2042, 2233, 2242	v. Ferrone	1880
v. Chin Non	2349, 2354	v. Fiorentino	276, 1976
v. Christian	1269	v. Fish	1398
v. Clark		v. Fleming	21
151 Cal.	689, 1398	v. Fong Chung	987
v. Cleminson	2484	v. Frankenburg	2056
v. Coffey	21, 2159, 2060	v. Freeman	2061
v. Colbath	667	v. Frey	2071
v. Collins	363	v. Fritch	1725, 2276
v. Connelly	1005	v. Furlong	841, 2265, 2382
v. Conrow	56	v. Gaffey	154
v. Cook	216, 390, 905, 1043	v. Gardt	969
v. Cotton	905, 1269	v. Garfalo	231, 851
v. Covitz	2056	v. Gibson	398
v. Cowan	949	v. Giddings	367
v. Creeks	21, 905, 1043	v. Gillette	21
v. Crowley	218	v. Giro	1349, 2097, 2100
v. Cummins	18, 118	v. Glass	343
v. Davey	21, 1157, 1808	v. Glover	1044
v. Davidson		v. Goldenson	1693
2 Cal. App.	1351	v. Gonzalez	1135
240 Ill.	222, 1974	v. Goodrich	949
v. Davis		v. Goodwin	2081
97 Cal.	2089	v. Gordon	988
147 Cal.	290, 2513	v. Gould	1067
175 Mich.	398	v. Governale	363
v. De Camp	987, 2277	v. Gray	
v. De Garmo	363, 987	148 Cal.	987, 1977
v. Deluce	2513	251 Ill.	62, 398
v. Del Vermo	149, 791, 1442, 1746, 1750	135 Mich.	2276
v. Dickerson	562, 1907, 2484	v. Griffith	2385
v. Dolan	318, 1201, 2550	v. Grill	792, 1010
v. Donaldson	2273	v. Grutz	354
v. Donnolly	1079, 1635	v. Hagenow	359, 1976
v. Dowell	987	v. Harper	1873
v. Droste	1398	v. Harris	
v. Duffy	343	144 Mich.	1761
v. Duncan	273, 987	209 N. Y.	263, 397
v. Dunnigan	841, 2339	v. Harrison	218, 398, 496, 1072, 2071
		v. Helm	1977

# TABLE OF CASES CITED

	SECTION		SECTION
People v. Henwood	2264	People v. McAdoo	1819
v. Hill		v. McBride	1354
194 N. Y.	688	v. McClure	218
195 N. Y.	1938	v. McCullough	
198 N. Y.	150, 218, 851	210 Ill.	1350
v. Hinksman	58, 925	81 Mich.	841
v. Hodge	359	v. McGarry	290, 1842
v. Hoffman	278, 321, 1040, 1060, 1064, 1075	v. McGee	1761
v. Hogan	18	v. McGinnis	274
v. Hosler	1899, 2079, 2232	v. McMahon	390, 1671, 1807, 2272, 2273
v. Hotz	1451, 1452, 2100	v. Macgregor	363, 1976
v. Hurtado	263	v. Madas	1445
v. Huff	988, 1618	v. Makatch	792, 794
v. Hutchings	1476	v. Manasse	218
v. Jackson	153	v. Manoogian	689, 1938
v. Jacobs	901	v. Marrin	341
v. Jan John	821, 1810	v. Marrs	1761
v. Jennings	413, 1977	v. Maughs	791, 792
v. Johnson	7, 106, 1828	v. Maxfield	861
v. Jones		v. Mayhew	2059
160 Cal.	276	v. Michigan C. R. Co.	1672
191 N. Y.	194	v. Mills	923
v. Kaminsky	222	v. Miner	1018
v. Katz	347, 1128, 1129	v. Mingey	1960
v. Keith	2061	v. Minney	367
v. Kelly		v. Mix	928
146 Cal.	821, 987	v. Moran	1669, 2056, 2094, 2511
17 Cal. App.	1824	v. Morris	
v. Kemmis	290	3 Cal. App.	398
v. Klise	363	254 Ill.	1157
v. Koller	398	v. Morrison	967
v. Labra	580	v. Muhly	2130
v. Lamar	111, 246, 247, 1616	v. Murphy	2272, 2354
v. Lang	2513	v. Nall	2364
v. Lapidus	2071	v. Neumann	21, 2495
v. Laudiero	988, 1013	v. Newberry	580
v. Leddy	1350	v. Newman	15, 21, 987
v. Le Doux	681, 1645, 2085, 2264	v. Nichols	1807
v. Lee	290	v. Nunley	928
v. Lee Nam Chin	276	v. O'Bryan	21, 852
v. Leonardo	1003	v. Oliver	2277
v. Lewandowski	1330, 1405, 1669, 1810	v. Owen	851, 852
v. Lewis	507, 1135	v. Patrick	2015, 2059, 2081, 2327
v. Lingley	290	v. Peck	
v. Loeder	1890	139 Mich.	318
v. Loomis	351, 2100	147 Mich.	1032
v. Loper	689, 833, 2337	v. Pekarz	290, 991, 1938
v. Luis	830, 1327, 1332, 2100	v. Perry	988, 1808, 2497
v. Lukoszus	905, 1130	v. Pettanza	349
v. Lustig	782, 953	v. Pezutto	141
v. Lutzow	1852	v. Pfanschmidt	177, 363, 1022, 1072
		v. Piner	830

# TABLE OF CASES CITED

	SECTION		SECTION
People v. Plyler	1405	People v. Stratton	200, 398, 2060
v. Podilla	1890	v. Strauch	406, 951
v. Provost	2272	v. Storrs	1079, 1083, 1458, 2024
v. Qualey	7, 1398	v. Strollo	2155, 2265
v. Quider	2572	v. Suesser	106, 689, 2501
v. Randazzio	851, 861, 1810	v. Sullivan	
v. Ranney	2071, 2072	218 Ill.	1983
v. Rardin	811, 918, 2079	247 Ill.	2478
v. Razezicz	41	v. Swaile	2339
v. Reardon	2264	v. Swift	360
v. Remus	2495	v. Teshara	1890
v. Rice	950	v. Terrell	247
v. Richardson	166, 1154, 2062, 2063	v. Thaw	263
v. Rimieri	21, 1157	v. Thomson	1438, 1451
v. Robinson	2264	v. Tibbs	168, 1154, 1770, 1983
v. Rodawald	63, 198, 246, 1116	v. Tollefson	1867, 2016
v. Rogers	218, 831, 851, 860, 861, 2100	v. Tomalty	341, 961
v. Rollins	1072	v. Turner	398
v. Rose	1072, 1354	v. Tyler	579
v. Rosenheimer	2265a	v. Tyree	932
v. Row	1021, 1022	v. Upton	2235
v. Ruef	343	v. Van Gaasbeck	59, 928, 1614, 1983, 1986
v. Ruiz	2056, 2094	v. Vaughn	689
v. Ryan	968	v. Viskniakki	367
v. Ryno	62	v. Walker	
v. Salas	811	15 Cal. App.	1530, 2277
v. Salladay	933	198 N. Y.	2495
v. Scalamiero	18, 1136	v. Ward	2073
v. Scattura	18, 1135	v. Wardrip	2056, 2094
v. Schlessel	2113, 2120	v. Warfield	987
v. Schmitz	1890, 2576	v. Washor	1822
v. Schultz	1976	v. Weaver	318
v. Scott	841	v. Weber	21, 821, 988, 1072
v. See	2081	v. Weil	321
v. Sexton	774, 898, 1828, 2364	v. Wells	968
v. Sharp	2281, 2281a	v. Weston	811, 1136, 1824
v. Siemsen	851, 2534	v. White	
v. Singh	1037	142 Cal.	987
v. Smith		251 Ill.	1451
143 Cal.	196	v. Wiemers	1225, 1877, 2464
9 Cal. App.	2276	v. Wilkins	821, 2073
254 Ill.	1876	v. Willard	2276
v. Soeder	216, 987, 1890	v. Williams	1852
v. Solani	19	v. Wilson	
v. Soto	168, 398	136 Mich.	68, 923
v. Spencer	1938	170 Mich.	963
v. Steinhauer	1852	v. Wing	166
v. Sternberg	2281, 2281a	v. Wintermute	1351
v. Stevens	1010	v. Wolf	1384, 1808
v. Steward	2220	v. Wong Loung	1072, 1974
v. Stison	168, 1141, 1432	v. Wong Sang Lung	2529
v. Stouter	507	v. Wood	1168

# TABLE OF CASES CITED

	SECTION		SECTION
People v. Wright	390, 1808	Phillips v. Laughlin	1257
v. Zito	377	v. Rhode Island Co.	2354
People's Bank v. Reid	321	v. State	
People's Gas Co. v. Fletcher	1352	162 Ala.	149
People's National Bank v. Hazard	912	121 Ga.	1842
v. Schopflin	2444	50 Tex. Cr.	1450
Peoples v. Devault	150	Phinazee v. Bunn	770
Pepper v. Martin	2500	Phoenix Assur. Co. v. Boyette	2418, 2465
Percy v. First Nat'l Bank	2498	Pickett v. Atlantic C. L. R. Co.	792
Perdue v. State	949, 1018, 1476	Pickrell v. State	2066
Perkins v. Rice	282, 283	Piedmont Sav. Bk. v. Levy	1779
Perkins v. Roswell	1587	Piepke v. Philadelphia & R. Co.	507
v. State	2183	Pier v. Speer	207, 209
v. Stevens	523	Pierce, <i>in re</i>	2206
v. Sunset Tel. & T. Co.	682, 1960, 1976	v. United Gas & E. Co.	969
v. Terr.	2273	Piercy v. Piercy	1738, 2312
v. Trinity R. Co.	2433	v. Boston El. R. Co.	1729
Perovich v. Perry	2576	v. Fisher	2520
Perrin v. U. S.	2120	Pierson v. Illinois C. R. Co.	2337, 2341
Perry v. Rubber T. W. Co.	2210	Pietsch v. Pietsch	2594
Persons v. Smith	1388	Pigeon, Case of	1576
Peters v. Berkemeier	2520	Pineland Club v. Robert	1275, 2110
v. McPhadden	1704	Pinney's Will	1671
v. Tilghman	1566, 1587	Pioso v. Bitzer	2054
Petersburg School Dist. v. Peterson	1873	Piper, <i>re</i>	2472
Peterson, <i>re</i>	1958	Pirie, <i>in re</i>	2132, 2520
v. Brackey	680, 1698	Pitman v. State	1036
v. Chaix	2465	Pittman v. State	318, 1871, 2201, 2276
v. Lott	1163	Pitts v. State	105, 106, 396, 1440, 1750
v. Mineral K. F. Co.	747	Pittsburg C. C. & St. L. R. Co. v.	
v. Pittsburg S. P. G. M. Co.	1056	Austin's Adm'r	2513
v. State	398	v. Banfill	2494
Peterson's Estate	1271, 1496, 1680	v. Brown	1233
Petty v. Benoit	751	v. Chicago	1530
Pettis v. Green Riv. A. Co.	2115	v. O'Conner	933, 1005, 2390
Petty v. State	1330, 1404, 2098	v. Haislup	1013, 1750
Peyton v. Old Woolen M. Co.	1078	v. Lightheiser	1158, 1168, 1698
Pfister v. Milwaukee F. P. Co.	406	v. State	2556
Phelan v. State	1072	Pittsburg F. W. & C. R. Co. v. Cal-	
Phelps v. Chicago R. I. & P. R. Co.	64	laghan	150
v. Hartwell	1081	Pittsburgh R. Co. v. Thomas	250, 1616
v. McGloan	1778	Pittsburgh S. & N. R. Co. v. Lam-	
v. Nazworthy	158	phere	461
v. Pratt	2408	Place v. Grand Trunk R. Co.	283
v. Root	2047	Plant v. State	396
Philadelphia B. & W. R. Co. v. Gatta	664	Planters' Mut. I. Ass'n v. Green	95
Philip Carey Mfg. Co. v. Watson	2525	Platter v. Minneapolis & St. Louis R.	
Philler v. Waukesha Co.	2203	Co.	2510
Phillips v. Chase	1576, 2272, 2314, 2322,	Plumer v. Board	2358
	2329	Plummer v. Newdigate	150
v. Gannon	2408	Plunkett v. Clearwater B. & M. Co.	283
v. Hazen	2184	v. Hamilton	2195, 2286
v. Hudson	1665	v. State	200, 789, 987

# TABLE OF CASES CITED

	SECTION		SECTION
Plymouth M. C. & I. Soc'y v. Traders' P. Ass'n	1856	Powers v. State	
Pocahontas C. Co. v. Williams	1876	75 Nebr.	2272, 2273
Poe v. State	1404	117 Tenn.	56, 923, 1618
Poindexter & O. L. S. Co. v. Oregon S. L. R. Co.	1078	v. U. S.	852, 2276
Polhemus v. Prudential R. Co.	2494	Powers' Estate	2500
Polk v. State	278	Powers' Executor v. Powers	1081, 1738
Pollitz v. Wickersham	1067	Prairie du Rocher v. Schoening K. M. Co.	1680
Pollock v. State	235, 457	Pratt v. State	1398
Polsey v. Newton	2421, 2477	v. Waddington	2508
Polson v. Com.	2071, 2100	Preferred Acc. Ins. Co. v. Fielding	2510
Pomfret v. Lancashire & Y. R. Co.	2510	Prentice v. Crane	2486
Pool v. Warren Co.	1750	Prescott & N. W. R. Co. v. Franks	795
Poole v. Buston & M. R. Co.	2509	Preston v. Bowers	1730
Pooley v. Harradine	2444	Prestwood v. Carlton	2416
Pope v. State		Prewett v. Coopwood	1081
174 Ala.	1755, 1929, 1977	Prewitt v. Martin	2115
Ala., 63 So. 71	1405	v. State	232, 681
Pope's Estate	2474	Pribbeno v. Chicago B. & O. R. Co.	283
Porch v. State	141, 1398, 1977	Price v. Clapp	367
Porter v. Buckley	571, 792	v. State	987, 1750, 2963
v. Com.	2076	Pride v. State	1976
v. People	944, 2060	Priddy v. Boice	1671
v. State		Prince v. Edwards	2505
140 Ala.	1938	v. U. S.	2512
173 Ind.	106, 118, 390	Pringey v. Guss	1213
Portis v. Hill	2054	Pringle v. Burroughs	232
Portland v. Tigard	1943	Prior v. Davis	2498
v. Yick	1350, 2572, 2577	Prisel v. Coney	2432
Portland F. M. Co. v. British & F. M. Ins. Co.	2440	Pritchard v. Fowler	2500
Portsmouth St. R. Co. v. Peed's Adm'r	761, 905	Prize Cases	2574
Posey v. State	1136	Proctor v. Cable Co.	2120
Post v. Leland	19	v. Proctor's Adm'r	1539
v. U. S.	662	Proctor Gamble Co. v. Blakeley O. & T. Co.	2131
Postal Tel. C. Co. v. Likes	1076	Produce Exchange T. Co. v. Bieberbach	1541, 1779
Potlatch Lumber Co. v. Anderson	382, 437	Prouskevitch v. Chicago & A. R. Co.	2220
Potter v. Barringer	2520	Prout v. Bernards L. & S. Co.	1890
v. Browne	987	Provencher v. Moore	377
v. Cave	252	Providence Jewelry Co. v. Fessler	2416
v. Grand Trunk W. R. Co.	1976	Provident S. L. Assur. Soc'y v. Wayne's Adm'r	1947
Potts v. State	2582	Prudential Ins. Co. v. Hummer	2434
Powell v. Fowler	2527	Prudential F. Ins. Co. v. Alley	1947
v. Hayes	1350	Pruett v. State	2235
v. Nevada C. & O. R. Co.	461	Prussing v. Jackson	1195, 1237, 1256
v. State		Pryor v. State	1442
122 Ga.	1013	Public Clearing House v. Coyne	1354
50 Tex. Cr.	2265	Puckett v. Guenther	2450
v. Strickland	289, 2235	Pulley v. State	18, 1136
Powers v. Rude	2408	Pulliam v. Sells	2008
		Pullman Co. v. Finley	2354



# TABLE OF CASES CITED

	SECTION		SECTION
R. v. Gaskell	2040	R. v. Merry	1760
v. Gavin	847	v. Miller	847
v. Gay	2059	v. Moore	1828
v. Girvin	2073	v. Morgan	194
v. Godinho	829, 2097	v. Morrison	194, 1869
v. Golden	850	v. Mudge	2272
v. Graham	1760, 2061	v. Muma	200
v. Graves	196, 1270, 2525	v. Murray	2061
v. Gray	2100	v. Murtrie	1072
v. Grinder	2276	v. Naoum	564, 2086
v. Grout	194	v. Nicholas	1761
v. Guerin	2273	v. Noel	15, 1896
v. Guttridges	1761	v. Norton	1072
v. Hale	1411	v. Osborne	1135, 1136, 1760
v. Hampton	2272	v. Paul	398
v. Hedges	1760, 2061	v. Payne	2059, 2060
v. Heuser	2060	v. Percy	2061
v. Hickey	1072	v. Penfold & Edwards	196
v. Higgins	284, 1042, 1781, 1873	v. Perry	1440
v. Hill	2243	v. Pitts	2061
v. Histen	847	v. Pollard and Tinsley	359
v. Hone	461	v. Powell	326
v. Hoo Sam	847	v. Prasiloski	1349
v. Hudson	194	v. Preston	194
v. Hurd	821, 2276	v. Rappolt	194
v. Hutchins	1644, 1680	v. Ray	2086
v. Hutchinson	907, 1079	v. Reynolds	2056
v. Iman Din	2061	v. Rodley	357
v. James	847	v. Rouse	194
v. Jerrett	580	v. Rowland	2276
v. Jones		v. Ryan	825, 829
3 Cr. App. 67	194	v. Savage	2086
6 C. & P. 391	196	v. Seigley	194
v. Kams	2059	v. Shellaker	398
v. Kay	847	v. Shrimpton	194
v. Kennedy	983	v. Skeen	2281, 2281a
v. Kiddle	1135, 1136, 1760	v. Smith	
v. Kirkham	2272	20 Cox Cr.	321
v. Knight & Thayre	847	2 Cr. App.	905
v. Lai Ping	499, 855, 1818	v. Snelgrove	1418
v. Law	396, 2024	v. Solomon	194
v. Lee Tuck	1818	v. Spuzzum	1760
v. Lillyman	1760	v. Stafford	278
v. Lucy	2059	v. Stanton	832, 836
v. Macdonnell	580	v. Steffoff	847
v. McNulty	133	v. Stewart	1406
v. Maguire	2273	v. Stone	2061, 2100
v. Male & Cooper	847	v. Stratton	194
v. Martin		v. Stroud	1072
5 Cr. App.	2059	v. Sunfield	396, 1442
9 Ont.	2100	v. Sykes	2070
v. Mason	1976, 2059	v. Sylvester	1393
v. Matheson	196	v. Tate	2056, 2060

# TABLE OF CASES CITED

	SECTION		SECTION
R. v. Theadorns	2272	Read v. Gould	2433
v. Theriault	2513	Reagan v. Manchester St. R. Co.	376
v. Thistlewood	2059	v. People	832, 852
v. Thompson	1072	v. U. S.	968
v. Thomson	359, 1726, 1750	Reager's Adm'r v. Chappelcar	2122
v. Todd	830, 841	Real Estate T. Co. v. Union T. Co.	1378
v. Trapnell	2056	v. Wilmington & N. C. E. R.	
v. Turner	196, 702, 1206, 2167	Co.	1911, 2312
v. Unsworth	847	Reavely v. Harris	1126, 1911, 2496
v. Wakelyn	2496	Reaves v. Reaves	2082
v. Walker	1442	Reck's Ex'r v. Reck	2503
v. Waller	2550	Reclamation Dist. No. 70 v. Sher-	
v. Warren	2059	man	2491
v. Watson	2059	Redding's Lessee v. McCubbin	1587
v. Watt	278	Redhouse v. Graham	1404
v. Westfall	194	Redmon v. Metropolitan St. R. Co.	21,
v. Whistnaut	2061		1078, 1976, 2509
v. White	841	Redus v. Milner C. & R. Co.	437
v. Williams	905	Reed v. Fleming	2438
v. Wilson		v. McCready	2516
8 Cr. App.	2059	v. Mattapan D. & T. Co.	916
4 Alta.	354	v. Pittsburg C. & W. R. Co.	714
v. Wong On	1873	v. Reed	2245
v. Wright	194	v. Rex Fuel Co.	2399
v. Wyatt	321	v. State	1621, 1853, 1959
v. Young	855	v. Terr.	1157
		Reeder v. Huffman	1966
		v. Wilber	1225
		Reem's Succession	2421
		Reeves v. Chicago M. & St. P. R. Co.	1951
		v. Martin	1232
		v. Southern R. Co.	65
		v. State	1443
		v. Terr.	2060, 2061
		Regnier v. Terr.	1750
		Reichers v. Dammeier	1404
		Reid, in re	2374
		Reifschneider v. Reifschneider	2505
		Reilly v. State	1476
		Reinhardt v. Marks' Adm'r	289
		Reinke v. Sanitary District	791, 1230
		Reitler v. Harris	1354
		Rensberg v. Iola P. C. Co.	665
		Renn v. State	914
		Renshaw v. Dignan	1777, 1960
		Republic Iron & S. Co. v. Passafume	1976
		Republic Iron & S. Works v. Gregg	283
		Republic of France v. Peugnet	2573
		Resurrection G. M. Co. v. Fortune	
		G. M. Co.	1800, 2477
		Reyburn v. Queen City S. B. & T.	
		Co.	1530, 1549
		Reyes v. State	770

## R

Raapke & K. Co. v. Schmoeller & M.	
P. Co.	1067
Rabinowitz v. Sullivan	1062
Radcliffe v. Chavez	1538, 1552, 2065
Ragland v. State	988
Raleigh & G. R. Co. v. Pullman Co.	2438
Ralls v. Sharp's Adm'r	2450
Ralph v. State	1393
Ralton v. Sherwood L. Co.	2349
Rampton v. Dobson	2446
Ramsey v. Flowers	1681
Ranck v. Brackbill	1124
Randall v. Peerless Motor C. Co.	1576, 2355
Ranney v. Byers	2465
Rapp v. Sarpy	2507
Rash v. Allen	1350
Ratliff v. Ratliff	2496
Rausch v. Michel	2408
Rawlins v. State	106, 815, 949, 1079, 2059
Ray v. Baker	2415
Raymond v. Com.	354
v. State	1071, 1072
Razee v. State	987
Rea v. Pittsburg & C. R. Co.	463
v. State	1012, 2575

# TABLE OF CASES CITED

	SECTION		SECTION
Reynolds v. Narragansett E. L. Co.	1698	Rix v. Smith	1257
Rhea v. State	660, 1447	Roach v. Cox	2517
v. Terr.	286, 2243	Robards v. Robards	398, 2067
Rhoads' Estate	2048	Robb v. Washington & J. College	2536
Rhodes v. State		Robbins v. State	1807
141 Ala.	18	Roberson v. State	2501
122 Ga.	1819	v. Woodfork	523
Rhodus v. Heffernan	1195	Roberts v. Philadelphia	1168
Rice v. Lockett	1908	v. Bidwell	1081, 1738, 1938
v. People	363	v. Francis	1210
v. State		v. Ringemann	2515
49 Tex. Cr.	569	v. State	
50 Tex. Cr.	521, 1037	25 Del.	41, 1022, 1051, 1491,
Rich v. Naffziger	1778		1873
Richards v. Com.	451, 1666	123 Ga.	397, 1157, 1878, 1974
v. Hugh	1819	Robertson v. Thawick	1081
v. State	1079	v. Heath	1709
v. U. S.	1263	v. State	1398
Richardson v. Gage	951, 987	Robertson's Estate	1511
v. McMillan	1389	Robinson v. Baltimore & O. R. Co.	2572
v. Mellish	1633, 1641	t. Consol. Gas Co.	2509
v. Nelson	2220	v. Duvall	1081
v. Spokane	1698	v. Gregory	1680
v. State		v. Old Colony St. R. Co.	20, 1021
145 Ala.	177, 1966	v. Singlerly P. & P. Co.	1194, 1268, 2105
103 Md.	987, 2068, 2239, 2245	v. Springfield St. R. Co.	1951
v. Webster City	18	v. State	
Richardson Fueling Co. v. Seymour	1530	155 Ala.	396
Richmond v. Caruthers	2408	50 Fla.	522, 1878
v. Jones	1956, 2515	128 Ga.	1405
Richmond & P. E. R. Co. v. Rubin	20,	6 Ga. App.	360
	461	71 Nebr.	118
Rickeman v. Williamsburg C. F. Ins.		8 Okl. Cr.	276, 1142
Co.	89	143 Wis.	398
Riddle v. Gibson	20	v. Vasey	2120
Rieck v. Griffin	233, 1680	v. Western Union T. Co.	1963
Rietveld v. Wabash R. Co.	1976, 2510	Rocap v. Bell Telephone Co.	2509
Riggs v. Metropolitan St. R. Co.	792	Roche v. Llewellyn I. Co.	18, 252, 282
Riley v. Camden T. R. Co.	714	v. Nason	2388
v. Carter	1658	Rochester German Ins. Co. v. Peaslee	
v. Fletcher	759, 763	G. Co.	2463
v. Yost	1859	Rockford v. Mower	1168, 2578
Rinker v. U. S.	696, 2026	Rock Island Plow Co. v. Schoening	1378
Rio Grande S. Co. v. Catlin	1350	Rockwell v. Capital T. Co.	2423
Rio Grande So. R. Co. v. Campbell	1407	Rodgers v. State	246
Ripley v. Sage L. & I. Co.	1073	Rogers v. Clark Iron Co.	93, 1267, 1347,
Ripton v. Brandon	1640		2105
Risdon v. Yates	2100, 2115	v. Crain	1751
Riser v. Southern R. Co.	1976	v. Hawken	847
Risler v. Ins. Co.	1558	v. Krumrei	1073
Ritchie v. Weyman	2555, 2580	v. Portland Lumber Co.	2509
Rittenborg v. Smith	987	v. State	
Rittenhofer v. Cutter	64	72 Ark.	1350

## TABLE OF CASES CITED

	SECTION		SECTION
Rogers v. State — Continued		Rumble v. U. S.	1073
88 Miss.	2286, 2374	Runnels v. State	1108
8 Okl. Cr.	235, 247, 248	Runo v. Williams	581
Tex. Cr. 159 S. W.	2349	Ruos, <i>in re</i>	2317
v. Superior Court	2210	Ruskin v. Armn	406
v. Troop	1404	Rusling v. Rusling	1738
v. Wilson	2513	Russel v. Close's Est.	2408
Rohloff v. Aid Ass'n	1680	Russell v. Broadus C. Mills	2438
Rollings v. State	390, 1157	v. Carman	18
Rollins v. Atlantic C. R. Co.	1573	v. Sharp	2498
v. Wicker	1483	v. State	
Romero v. N. I. M. & D. Co.	1209	Ala. 38 So.	792
Rooney v. Southern B. & L. Ass'n	2536	97 Ark.	1269, 1273
Root v. Cudahy P. Co.	1951, 2509	Ark. 166 S. W.	2071
v. Kansas C. S. R. Co.	1871	77 Nebr.	205, 2062, 2273
Roquemore v. Vulcan I. W. Co.	2441	19 Wyo.	1873
Rosco v. Jefferson	1960	v. Washington S. Bank	1078
Rose v. Bouck	1738	Rust v. Oltmer	2240
v. Harlee	1168	Ruth v. State	1230
v. Indept. C. Kadisho	2451	Rutherford v. Rutherford	1676
Rosenberg v. Sheahan	18	Ryan v. U. S.	347
Rosenstiel v. Pittsburg R. Co.	208, 249,	Ryder v. Ryder	2498
	250	Rylander v. Laursen	461
Rosenthal v. McGraw	747	Ryle v. Manchester B. & L. Ass'n	1078
Rosenwald v. Middlebrook	2094		
Ross v. Allmond	1350	S	
v. Double S. C. Mills	2509		
v. Ross	1911, 2421, 2500	S. v. S.	2252
v. State		Sabin v. Sabin	2046
139 Ala.	20, 923, 987	Sacks v. U. S.	133
169 Ind.	1871	Salas v. People	1033, 1750
Rossenback v. Supreme Court	1040	Salem News P. Co. v. Caliga	266
Roszczyniala v. State	823, 851, 861, 862, 1157, 1977	Salmon v. Rathjens	655
Roth's Succession	2008	Salo v. Duluth & I. R. Co.	738, 747, 1066, 1067
Rothrock v. Cedar Rapids	1750, 1977	Samaha v. Mason	1779
Rottner v. Buchner	1351	Sample v. Chicago B. & Q. R. Co.	283
Roundtree v. Charleston & W. C. R. Co.	1944	Sampson v. Hughes	1960
Roup v. Roup	2408	v. Northwestern Nat'l L. Ins. Co.	1678
Rourke v. Holmes St. R. Co.	463	Samuel v. Ofner	2467, 2474
Rouse v. State	111	Samuel & Jessie Kenney P. Home v. Kenney	7
Rouss v. King	657	Samuels v. State	522
Rowe v. Brenton	1670	Sanders v. Davis	18
v. Northport St. R. Co.	451	v. Keller	1077
Rowley v. Bowyer	2408	v. State	279, 1062
Roxbury v. Bridgewater	2506	Sanderson v. State	21, 1079
Royal Neighbors v. Hayes	1644	Sandon v. Sandon	2475
Ruch v. Ruch	2433	Sandford, <i>ex parte</i>	2195
Rucker v. State	2528	v. State	396, 1329
Rudolph v. State	2260, 2281, 2281a	Sands' Case	392
Rulofson v. Billings	21, 1133, 1461, 1491, 1777		

# TABLE OF CASES CITED

	SECTION		SECTION
Sanger v. Bacon	18, 1003, 1041, 1081	Schmidt v. Beiseker	714
Sanitary District v. P. F. W. & C. R. Co.	1640	v. Chicago City R. Co.	1719, 1890
San Juan Light & T. Co. v. Requena	2059	v. Clark	2066
Sankey v. Cook	2004	v. Dubuque Co.	461
San Rafael, The	104	v. Schmidt's Estate	2444
Sapir v. U. S.	326	Schmitt v. Stoss	2466
Sapp v. State	150	Schmoe v. Cotton	1943
Sappingfield v. King	2408	Schnase v. Goetz	1005
Sarasohn v. Kamaiky	2410	Schneider v. Sulzer	608, 2442
Sardis & D. R. Co. v. McCoy	1013	Schnier v. People	1393
Sarraile v. Calmon	2518	Schoepf, ex p.	1856, 2195, 2319
Sasser v. State	389, 1871	Schoepfel v. Daly	613
Saucier v. N. H. Spinning Mills	451, 461	Schoette v. Drake	258, 1067
Sauls, ex p.	2268	Schofield v. Thomas	1302
Saunders v. Atchison T. & S. F. R. Co.	65, 80, 1984	Scholl v. Bell	2251
v. State	111, 1157	v. Killorin	2434
v. Tuscumbia R. & P. Co.	1195	Scholten v. Barber	2133
Saures v. Stevens Mfg. Co.	2509	Schonhardt v. Pennsylvania R. Co.	826
Savage v. Bowen	570, 1036	Schorer, ex p.	346
v. Bulger	582, 1869	Schouweiler v. McCaull	20, 1302, 1531
v. Canadian Pac. R. Co.	2319	Schrader v. State	396
Savannah F. & W. R. Co. v. Evans	2536	Schreffler v. Chase	2334, 2337
Saxton v. Krumm	2503	Schriner v. Dickinson	2438
Sawyer v. U. S.	2276	Schroeder v. Blum	105
Saye v. State	59, 73	v. Chicago & N. W. R. Co.	1951
Sayre v. Sayre	209	v. Smith	2520
v. Woodward	1409	Schultz v. Culbertson	610, 1067, 2337, 2341
Sbarbero v. Miller	1671	v. People	326, 968
Scandinavian Amer. Bank v. Long	1031	v. State	59, 68
Scarlotta v. Ash	1951	v. Strauss	2374
Scarpelli v. Washington W. P. Co.	2491	Schurz v. Schurz	2498
Schaab v. Schaab	2239	Schuster v. State	2056
Schafer, Jr. & Co. v. Ely	1951	Schutz v. State	56, 968, 1079
Schall v. Northland M. C. Co.	1212, 2375	v. Union R. Co.	18, 1976
Schatz, in re	2066	Schuyler v. Stephens	2503
Schaumloeffel v. State	1852, 1854	Schwartz v. Com.	2043
Schick v. U. S.	1398	v. Winnipeg E. R. Co.	907, 2509
Scheidegger v. Terrell	1491	Schwent v. Roetter	2065
Schell v. Weaver	2538	Schwoebel v. Fugina	1890
Schermer v. McMahon	283, 2382	Scott v. Aultman Co.	2312
Schettler v. Fort Howard	2358	v. Chicago C. R. I. & P. R. Co.	1698
Schilling v. Curran	16, 1876	v. Crerar	87, 2024
Schillinger v. Bawek	2452	v. Hay	1938
Schillinger Bros. Co. v. Smith	1951	v. Herrell	1486, 1681
Schissler v. State	682, 688, 1873	v. Homesteaders	457
Schlesinger v. Ellinger	1859	v. Smith	2391
Schley v. State	561, 570	v. State	
Schlicher v. Keeler	2408	141 Ala.	2073
v. White	1074, 1555	Miss., 39 So.	1021
Schlotterbeck v. Schwinn	2536	v. Thrall	2525
Schmidt v. Barclay	2498	v. Townsend	1081, 1738
		Scott's Adm'r v. Scott	2506
		Scovel v. Detroit	2433

# TABLE OF CASES CITED

	SECTION		SECTION
Scribner v. State	2252, 2270, 2281a	Shank v. Wilson	2505
Scurry v. Seattle	2105	Shannon v. Swanson	507, 508
Seaboard Air L. R. Co. v. Scarborough	2220	Shapleigh v. Hull	530
Seaborn v. Com.	852, 987	Shapter's Estate	1302, 2314, 2391
Seal, re	2477	Sharp v. Erie Co.	916
Searies v. Insurance Co.	1958	v. State	784
Sears v. Duling	289	Sharpton v. Augusta & A. R. Co.	933, 1842
v. Howe	2120	Shaughnessy v. Holt	688, 1721, 1976
v. Vaughan	2503	Shaw, in re	2199
Searway v. U. S.	56, 1037	v. N. Y. Elev. R. Co.	463, 1387, 1493
Seattle v. Northern Pacific R. Co.	2450	Shawnee G. & E. Co. v. Motesen-	
Seaverns v. Lischinski	1168	bocker	283, 1662
Seawell v. Young	1778	Shawnee L. & P. Co. v. Sears	2509
Sebesta v. Supreme Court	1352	Shea v. Cloquet L. Co.	258
Sechrist v. Atkinson	754, 763	v. Sewerage & Water Board	1230
Seckerson v. Sinclair	18	Sheehan v. Allen	2303, 2306
Security Mutual L. I. Co. v. Klentsch	93	v. Hammond	458
Security Trust Co. v. Robb	392, 1212	v. Manchester	1351
	1256	Sheets v. Ins. Co.	20
See v. Wabash R. Co.	15, 283	Shehy v. Cunningham	2433
Seely v. Manhattan L. Ins. Co.	1807	Sheibley v. Fales	1347
v. Wells	1239	Shelburne and Queen's Election Case	343
SeEVERS v. Cleveland Coal Co.	1073	Shelbyville W. & L. Co. v. McDade	1078
Segura's Succession	803	Sheldon v. Wright	795, 2491
Seibel-Suessdorf C. & I. M. Co. v. Manufacturers' R. Co.	17, 1873	Shelly v. Philadelphia & R. R. Co.	456
Seibert v. Hatcher	1081	Shelton v. State	21
Selby v. Com.	1750	Shelton's Will	1736, 1738, 2016
Sellards v. Kirby	2523	Shenandoah L. & A. Co. v. Clarke	2465
Selleck's Will	1738	Shephard, re	2082, 2505
Sellers v. Farmer	1213	Shepherd v. Com.	363, 2336
v. Page	1186, 1681, 2088	v. Schomaker	616
v. State	794, 1021	Sheppard v. Austin	1770
Semet-Solway Co. v. Wilcox	568	Sheridan Coal Co. v. Hull Co.	779
Senn v. Greundling	1303	Sheridan Co. v. McKinney	2165, 2498
Senterfeit v. Shealy	1226, 2256	Sherin, in re	2336
Serdan v. Falk Co.	249, 1164, 2591	Sherlock v. Minneapolis St. P. & S. S.	
Sever v. Minneapolis & St. L. R. Co.	1976	M. R. Co.	792
Sewanee C. C. & L. Co. v. Williams	2195	Sherman v. Southern Pac. Co.	571, 1719
Sewell v. Detroit U. Ry.	2509	v. State	2183, 2264
v. Johnson	2579	Sherrill v. Louisville & N. R. Co.	454
Sexton v. Sexton	2336, 2338	Sherrod v. Farmers M. F. I. Ass'n.	95
Seymour v. Bruske	21, 347, 951	Shetla v. Stewart	2520
Shacklette v. Goodall	2503	Shields, in re	2475
Shade's Adm'r v. Covington C. E.		Shields v. Conway	1106
R. & T. & B. Co.	1722	v. Johnson	2496
Shaffer v. U. S.	233, 701, 792, 861, 1854, 2265	v. Lees	2066
Shailer v. Bullock	166, 987, 1141	v. Mongolian Explor. Co.	2418
v. Burnstead	232	Shilling v. Varner	18
Shandrew v. Chicago St. P. M. & O.		Shinkle v. McCullough	1041
R. Co.	18, 2509	Shinn Glove Co. v. Sanders	2509
		Ship Money Case	1795
		Shipley v. Mercantile T. & D. Co.	2467
		Shipp v. Com.	263

# TABLE OF CASES CITED

	SECTION		SECTION
Shires v. State	2071	Sloss-Sheffield S. & I. Co. v. Mobley	1951
Shockley v. Tucker	221	Slotofski v. Boston Elev. R. Co.	2550
Shoemaker v. Elmer	681	Smart v. Kansas City	1976, 2382, 2389, 2390
Shores-Mueller Co. v. Lonning	2416	Smartt v. State	1841, 2060
Short v. Frink	18	Smiley v. Padgett	1779
Shreve v. Crosby	2446	Smith v. Au Gres	6
Shrouder v. State	759	v. Bloom	2440
Shull v. Boyd	2200	v. Boston Elev. R. Co.	782
Shum's Adm'x v. Rutland R. Co.	2510, 2570	v. Britton	1873
Shute v. Bills	2440	v. Com.	
Sibley v. Maxwell	2471	140 Ky.	2277
Siegel, Cooper & Co. v. Trcka	461, 1951	148 Ky.	2060
Sielbeck v. Grothman	2523	154 Ky.	1873
Simmons v. State 158 Ala.	1820	v. Dotterweich	2409
Ala. 61 So.	1072	v. Dow	1951
Simms v. Forbes	1018, 2507	v. Fuller	2063, 2068, 2505, 2506
Simon v. Hamilton L. Co.	250	v. Goethe	1084
Simonds v. Cash	1235	v. Hanson	1461
Simons v. Mason City & F. D. R. Co.	463	v. Hendrix	357, 1135
Simpson v. Com.	580, 2059	v. Hewitt-Lea L. Co.	461
v. First Nat'l B'k	2118	v. Hockenberry	211
v. Foundation Co.	969	v. Holyoke St. R. Co.	1041
v. Weise	2105	v. Hubbell	406
Simrell's Estate	2048	v. International & G. N. R. Co.	1461
Sims, re	2195	v. International M. Co.	6, 1856
v. State		v. Keller	1738
139 Ala.	246, 1404, 1439, 1442, 1450, 1974, 1976	v. Lehigh Valley R. Co.	792, 1005
54 Fla.	18	v. Milwaukee E. R. & L. Co.	2115
59 Fla.	851	v. Mine & S. S. Co.	716
Sinclair v. Ruddell	258	v. Minneapolis St. R. Co.	681
v. State	105, 1614	v. Moore 142 N. C.	1458, 1465
Sing Tuck v. U. S.	1354	149 N. C.	1406, 2503
Singer Mfg. Co. v. Christian	1078	v. Ogden & N. W. R. Co.	1951
Sixby v. Chicago C. R. Co.	2578	v. Prosser	2419
Skajewski v. Zantarski	1352	v. Ryan	229, 1736
Skeen v. State	905	v. Sanitary District	463
Skellie v. James	2303	v. Seattle	458, 461, 2591
Skidmore v. Johnson	1070	v. Singles	406
v. State	398	v. Smith	
Skipper v. State	247	22 Ont.	2477
Slater v. Mexican Nat'l R. Co.	1953	65 Or.	1719
v. Sorge	2389, 2390	v. Sovereign Camp	2556
v. U. S.	987, 2513	v. Stanley	1568
Slattery v. New York N. H. & H. R. Co.	664	v. State	
Slaughter v. Heath	1671	142 Ala.	21, 59, 235
Slaughter Co. v. King Lumber Co.	805	145 Ala.	1966
Slauter v. Whitelock	1819	161 Ala.	987
Sledge v. Singley	1300	Ala., 62 So.	396
Sloan v. Warrenburg	283	74 Ark.	987, 2277
Slocum v. New York L. Ins. Co.	2495	48 Fla.	949
		81 Ga.	1819
		125 Ga.	835

# TABLE OF CASES CITED

	SECTION		SECTION
Smith v. State — <i>Continued</i>		Southern Pac. Co. v. Cavin	2509
3 Ga. App.	2183, 2264	v. Hetzer	249, 250, 1616, 1984
4 Ga. App.	2512	v. Wilson	803
165 Ind.	413, 944, 1807	Southern P. R. Co. v. Lipman	2579
102 Miss.	1117	Southern R. Co. v. Blanford's Adm'x	18, 199, 461, 987, 995
41 Tex.	1761	v. Bonner	1404, 1976
48 Tex. Cr. 65	1398, 1405, 1413	v. Brown	1750, 2088
48 Tex. Cr. 233	1079	v. Bunnell	969
60 Tex. Cr. 293	1669	v. Cunningham	1951
v. Terr.	1781	v. Dickens	2509
v. Vose & S. P. Co.	2465	v. Ellis	1819
Smith's Will	20	v. Hayes	2124
Smithers v. Lawrence	1273, 1678, 1680, 2158	v. Mooresville C. Mills	1530
Smithson v. State	2272	v. Morris	21, 716, 961
Smitley v. Pinch	207, 1614	v. Rice's Adm'x	65
Smoot v. Kansas City	2382, 2384	v. Simpson	283
Smyth v. Reed	2498	v. State	736
Smythe's Estate v. Evans	1244	v. Thompson	2509
Sneed v. Marysville G. & E. Co.	661	Southern States M. L. Ins. Co. v.	
v. Terr.	248, 293	Herlihy	2452
v. Woodward	1778	Sovereign Camp v. Welch	63, 64
Snell v. Weldon	260	Spacy v. Ritter	2408
v. Wilson	228, 1073, 1938	Spahr v. Mutual L. Ins. Co.	2531
Snow, <i>ex p.</i>	2307	Spain v. Rakestraw	1981, 1983
v. N. Y. N. H. & H. R. Co.	1062	Sparks v. Galena Nat'l B'k.	1960
Snowball's Estate	1072, 1081, 1738	v. Ross	1644, 2506
Snowman v. Mason	2058, 2059	v. Taylor	1392
Sokol v. People	507, 1398, 1644, 1960, 2536	v. Terr.	18, 21
Solander v. People	1079	Spearman v. Sanders	1044
Solberg v. Robbins Lumber Co.	2570	v. State	2338, 2340
Sonnemann v. Mertz	2498	Speer v. Speer	233, 1033
Soper v. Tyler	2464	Speiser v. Phoenix M. L. Ins. Co.	1213
Sorensen v. Sorensen	2496	Spence v. Central Accident Ins. Co.	2433
v. U. S.	835	Spencer v. Com.	1810
Sorenson v. U. S.	149, 1073, 2513	v. Razor	2520
Soto v. Terr.	1135, 1750, 1751	v. State	
Soucek v. Karr	568	187 N. Y.	2496
South Bend v. Turner	692	132 Wis.	1398, 1406, 1614
South Covington & C. St. R. Co. v.		Spencer's Appeal	18, 112, 1736, 1974
Finan's Adm'x	1043, 1163	Sperl's Estate	2495, 2503
South Omaha v. Sutcliffe	20	Spick v. State	26, 389, 390
Southard v. Arkansas V. & W. R. Co.	2433	Spiers v. Hendershott	1938
Southern Bank v. Nichols	1051, 1416	Spink v. N. Y. N. H. & H. R. Co.	1640, 2515
Southern Coal & C. Co. v. Swinney	1951	Spinney v. Boston Elev. R. Co.	1856
Southern Express Co. v. Owens	2536	Spire v. State	460, 1160
Southern Iron & E. Co. v. Smith	675	Spohr v. Chicago	18, 463, 719, 782, 1168, 1890
Southern L. & S. Co. v. Verdier	2123	Spokane v. Costello	1387
Southern L. & T. Co. v. Benbow	18, 747, 2098, 2099, 2496	Spokane Canal Co. v. Coffman	2433
Southern Mo. & A. R. Co. v. Woodard	1943	Sprague v. Atchison T. & S. F. R. Co.	455, 456

# TABLE OF CASES CITED

	SECTION		SECTION
Springfield & N. E. Traction Co. v. Warrick	1943	Stark v. Burke	1203, 2021
Spring Valley Coal Co. v. Chiaventone	20	Starke v. State	20, 233, 290, 1023
Springer v. Borden	463	Starling v. State	987
v. State	2183	Starr v. Aetna L. Ins. Co.	1750, 2510
Sprinkle v. U. S.	1079, 2149, 2572	v. State	218, 1803
Sprouse v. Com.	177	Starr B. G. Ass'n v. North L. C. Ass'n	1076
v. Story	1966	State v. Adams	
Squire v. Campbell	2465	138 N. C.	363
St. John v. Andrews Institute	2532	68 S. C.	396
St. Joseph v. Levin	2264	v. Ah Chuey	2265
St. Louis v. Bay State St. R. Co.	2509	State v. Aker	2061, 2349
St. Louis I. M. & S. R. Co. v. Carter	2416	v. Albanes	928, 1434
v. Flinn	18	v. Alderman	56
v. Inman	65	v. Alexander	913
v. Magness	1640	v. Allen, 23 Ida.	59
v. Raines	1890	113 La.	1681, 2536
v. Steed	283	34 Mont.	347, 1051
v. Webster	1352, 2594	v. Allison	832, 861
v. Williams	1722	v. Anderson	
St. Louis M. & S. E. R. Co. v. Aubuchon	1907	82 Conn.	78
v. Continental B. Co.	714	252 Mo.	507, 2239
St. Louis S. W. R. Co. v. Kennedy	2155	162 N. C.	2513
v. Plumlee	283	v. Andrews, 130 Ia.	1136, 1761
v. White S. M. Co.	747	73 S. C.	198, 248
St. Louis & O. R. Co. v. Union T. & S. Bank	2034	v. Apley	62, 133, 1760
St. Louis & S. F. R. Co. v. Chaney	1719	v. Ardoin	2512
v. Cundieff	1890	v. Armour Packing Co.	1350, 2592
v. Gosnell	2509	v. Armstrong	396
v. Johnson	2536	v. Arnold	987, 1871
v. Shannon	455	v. Arthur	
v. Sutton	1530	129 Ia.	2265
St. Mary's Home v. Dodge	2523	135 Ia.	1003
Stafford v. Sheppard	1351	70 N. J. L.	561
v. Tarter	1938	v. Aspara	279, 761, 821, 2130, 2264
Stafford's Trial	278	v. Atchley	1732
Stallworth v. State	396	v. Atkins	105, 111
Stamper v. Com.	1244, 2042	v. Austin	2501, 2531
Standcliff v. U. S.	1029	v. Averill	108, 2100
Standard C. Mills v. Cheatham	451	v. Baans	204
Standard Scale & Supply Co. v. Reiter	2465	v. Bailey, 79 Conn.	2044
Standard Mfg. Co. v. Slot	321, 2415	190 Mo.	20, 263, 1852
Standard Oil Co. v. Tierney	283	v. Baird	951
Standard Talking M. Co. v. Matthews	18	v. Baker, Ia.	
Standard Underground C. Co. v. Att'y-Gen'l	1350	135 N. W.	794
Stanley v. State	367	209 Mo.	923
Standard v. Aurora E. & C. R. Co.	2433	43 Wash.	2270, 2364
Stapley v. Canadian P. R. Co.	1859	v. Baldwin	111
		v. Banusik	852, 1810, 2272, 2496
		v. Barber	63, 1852
		v. Bardelli	953
		v. Barker, 43 Wash.	786, 2270
		56 Wash.	861
		v. Barkley	1136

# TABLE OF CASES CITED

	SECTION		SECTION
State v. Barnes		State v. Bond	
75 N. J. L.	1451	12 Ida.	694, 2059, 2183, 2276
47 Or.	2081	191 Mo.	2497
v. Barnett	2277	v. Booth	20, 2387
v. Barr	2264	v. Borchert	398
v. Barrett,		v. Bordelon	1440, 1442
117 La.	987, 2349	v. Bowen	347
240 Mo.	63	v. Bowman	1350
v. Barrick	789, 1618	v. Brache	41
v. Barrington	21, 141, 851, 1268, 1852, 1890, 2081	v. Brady, 129 Ia.	2511, 2513
v. Barris	2018	71 N. J. L.	59, 1076, 1619
v. Bartlett	968	v. Brandenburger	2277
v. Baruth	1072	v. Brantley	42
v. Barwick	852	v. Branton	2021
v. Bass	451	v. Brauneis	56, 2512
v. Bateman	1138	v. Briggs	321
v. Baudoin	923	v. Bringgold	1067, 1909
v. Bean		v. Brinkley	821, 2071
104 Mo. App.	2239	v. Brinte	2097, 2100
77 Vt.	952, 969, 1128, 2059, 2115	v. Brodie	1350
v. Bebb	133, 1135	v. Brooks, 74 Kan.	257, 1620, 2272
v. Beckner	18, 923, 2277	202 Mo.	987
v. Beebe	1079, 2100	220 Mo.	851
v. Beeson	143, 1725	v. Brown, Del., 85 Atl.	359
v. Beesskove	2349	Ia., 121 N. W.	398, 2060
v. Behan	203, 367	128 Ia.	2363
v. Belknap	987	130 Ia.	21, 1079
v. Bellard	1873, 1890	152 Ia.	1398, 1404
v. Bennett,		85 Kan.	2061
137 Ia.	1855, 1963	118 La.	2243
143 Ia.	861, 1958	181 Mo.	682, 988, 1958
21 S. D.	2272	188 Mo.	363, 1442
v. Berberick	492, 495, 841, 862, 2100	209 Mo.	507
v. Bessa	59	36 Utah	2501
v. Biango	1451	39 Utah	56
v. Biggs	987, 1853, 1890	v. Browning	1818
v. Biscome	1618	v. Bruin	157
v. Blackburn, Ia., 110 N. W.	62, 200, 1700, 1985, 2062	v. Bryant	928, 987
136 Ia.	168, 1618, 1700	v. Buck	457, 1719, 1976
v. Blackwell	63	v. Buckley	2043
v. Blay	851, 852, 2071, 2497	v. Bunker	1890
v. Blee	111, 198	v. Burch	1157
v. Blitz	2277	v. Burns, 145 Ia.	1620
v. Blodgett	1807	27 Nev.	2012
v. Blount	363, 523, 2034	v. Busse	1349
v. Blydenburg	1719, 1722, 2498	v. Butler	1404, 1411
v. Boatright	321, 1079	v. Byrd	1442, 1445
v. Bobbitt	987	v. Cahill	1350
v. Boice, 140 Ind.	1350	v. Callahan, 100 Minn.	1835
114 La.	780, 1873	76 N. J. L.	290, 2272
v. Bonar	1442	18 S. D.	905
		v. Cambron	770, 1615, 1620, 1770, 1852

# TABLE OF CASES CITED

	SECTION		SECTION
State v. Campbell		State v. Crawford	18, 21
129 Ia.	1062	v. Crea	1041, 1853
73 Kan.	821, 2363	v. Crean	1434, 1442, 1447
20 Nev.	1138	v. Cremeans	1614
v. Cardelli	150	v. Crofford	1079
v. Cardwell	2071	v. Crone	1451
v. Carey	2056, 2057, 2060	v. Crouch	357, 498, 498, 2062
v. Carlisle	2272	v. Crow	988
v. Carmean	331	v. Crowe	233, 682, 987
v. Caron	957	v. Crump	18
v. Carpenter	357, 2062	v. Cummings	2580
v. Carr	2513	v. Dacke	205
v. Carter, 144 Ia.	2513	v. D'Adame	905, 1043, 1072
74 Kan.	1684	v. Dahlquist	18
v. Case	580, 2060	v. Daley	2559
v. Castigno	18	v. Dalton, 43 Wash.	1839, 2100
v. Castle	933	65 Wash.	2056
v. Chamber of Commerce	2410	v. Danforth	166
v. Champoux	987	v. Daniels	1442
v. Charles	16, 1033, 1750	v. Darling	1079
v. Chisnell	2272	v. Davis	1818
v. Church	499, 841, 851, 2265	v. Davison	2446
v. Chynoweth	1018	v. Day, 108 Minn.	98
v. Clark, Ia., 140 N. W.	2513	188 Mo.	1618
34 Wash.	2501	v. Deal	2276
64 W. Va.	1254, 1445, 1450	v. Dean	198, 248, 1732
v. Clayton	246	v. Deatherage	276, 2272
v. Clifford	2194, 2221	v. Detwiler	62, 923
v. Cloninger	925	v. Dewey	2512
v. Cloud	2354	v. DeWitt	2272
v. Coblely	580, 2270	v. Dickerson	177, 363, 988, 1983
v. Coffman	168	v. Dilley	1079
v. Cohen	326	v. Dilts	2061
v. Coleman		v. Diplely	62, 1106
186 Mo.	108, 1671	v. Dix	1079
199 Mo.	1415, 1669	v. Dodson	2059, 2273
17 S. D.	363, 2016	v. Dolan	168
v. Colvin	246, 1442	v. Donovan	351
v. Connor	1620, 2061	v. Donovan	220, 460, 687
v. Conroy	1781	v. Doris	248, 988, 1434, 1451
v. Cook	852, 2501	v. Douglas	1873
v. Cooley	1974	v. Dowdy	1398, 1680
v. Coover	987	v. Downer	331
v. Corpening	2105	v. Drake, 128 Ia.	770
v. Corrivan	2514	11 Or.	580, 2273
v. Costa	367, 1249	v. Draughon	1730
v. Cottrell	987	v. Drew, 110 Minn.	2282
v. Court	2513	179 Mo.	2513
v. Cowing	681	v. Dudley	290, 778, 1136
v. Cox	2252, 2268, 2270, 2281	v. Duncan	1807
v. Craft, 117 La.	1005	v. Dunn, 13 Ida.	7, 150
118 La.	247	179 Mo.	681
v. Craig	1442	v. Dunwoody	414

# TABLE OF CASES CITED

	SECTION		SECTION
State v. Durr	2582	State v. Gebbia	2072, 2073
v. Eder	987	v. Gentry	1398, 1404, 1669
v. Effler	347	v. George	1974
v. Egbert	1130, 2062	v. Gerike	133, 168
v. Eggleston	19, 398, 2085, 2505	v. Gianfala	278, 821, 833, 1440, 1450, 2100
v. Elliott	728, 987	v. Gibson	2062
v. Emerson	111, 1051	v. Gilmore	1079
v. Erickson	1350	v. Goddard	1481
v. Ethridge	1072	v. Godwin	2356
v. Evans	923	v. Golden	246
v. Exum	63, 108, 934, 1041, 1131, 1819	v. Goldstein	702
v. Falsetta	2326	v. Good	457
v. Farrier	2451	v. Goodager	20, 1263
v. Faulk	2089	v. Goodson	786, 1005, 1840, 1876, 2079, 2191
v. Faulkner	2270, 2364	v. Goodsell	2060
v. Feeley	21, 63, 106, 1890	v. Gordon, 115 La.	2130
v. Ferguson	2349	105 Minn.	1270
v. Fetterly	168, 399, 1330, 2061	v. Graham	1977, 2265
v. Fields	1079	v. Gray	1029, 1442
v. Finch, 71 Kan.	852	v. Green, 115 La.	1871
54 Or.	390, 792, 1909	127 La.	988
v. Findling	1750	v. Green, 229 Mo.	248, 851
v. Fiore	42, 1388	v. Greene	
v. Fisk	2514	152 N. C.	231
v. Flanigan	561	33 Utah	13
v. Fleetwood	1033, 1433	38 Utah	1073, 1911
v. Fletcher	1021	v. Griffin	1135, 1136
v. Fogleman	1899	v. Griggsby	59, 987
v. Foley, 113 La.	1750	v. Grimes	1858
247 Mo.	321, 1890	v. Groves	1350
v. Forbes	2493	v. Gruber	290, 2272
v. Ford	150, 260	v. Hairston	59
v. Forrester	2344	v. Hall	331
v. Forsha	18, 1270, 1876	v. Halverson	2034
v. Forshee	1079	v. Hammons	2513
v. Foster, 136 La.	855, 861	v. Hancock	2230, 2550
14 N. D.	26, 944	v. Hanlon	106, 248
v. Fournier	987	v. Hansen	398
v. Fowler	1138	v. Hare	56, 2056
v. Fox	1270	v. Harmon	1330, 1398, 1404, 2098
v. Franklin, 69 Kan.	216	v. Harness	949, 987, 1136
80 S. C.	1442	v. Harras	2056
v. Freddy	2099	v. Harris	
v. Freeman	177	Del. 5 Pen.	2239
v. Freshwater	149, 694, 2024, 2149	112 La.	1440
v. Fujita	770, 2061	131 La.	247
v. Fuller, 34 Mont.	21, 1012, 2183, 2264, 2265	209 Mo.	988, 1157
52 Or.	1033, 1432, 1434	14 N. D.	21, 1620
v. Gallman	1442	74 Wash.	1328
v. Gallo	900, 918	v. Harvey	2514
v. Gaylord	111, 141	v. Hassing	689

# TABLE OF CASES CITED

	SECTION		SECTION
State v. Hatfield	238, 2513	State v. Hummer	
v. Haupt	923	128 Ia.	205, 1620
v. Hauser	2056	72 N. J. L.	216, 357, 1076
v. Haworth	499	73 N. J. L.	18
v. Hayden	1938	v. Humphrey	832, 852, 862
v. Hayes	1263	v. Hunt	168, 1154
v. Hazlett, 14 N. D.	770, 784, 1489,	v. Hunter, 181 Mo.	836, 2042, 2043
	1496	143 N. C.	177
16 N. D.	363, 2512	v. Hutchings	2094
v. Hazzard	363, 1041, 1750	v. Hyde	363, 1976
v. Headley	507	v. Icenbice	851, 860, 1135
v. Hector	2327	v. Ilomaki	1842
v. Heffernan	1362, 1375, 1397, 1398	v. Indianapolis Gas Co.	2580
v. Heft	398, 2060	v. Inman	851
v. Heidelberg	1873	v. Jack	2258, 2281
v. Hembree	41, 390	v. Jackson, 128 Ia.	969
v. Hencken	1779	150 N. C.	1072
v. Henderson, 19 Ida.	168, 200, 398	79 Vt.	2530
186 Mo.	1852, 2081	v. Jacob	326
74 S. C.	851	v. Jacobs	1157
29 W. Va.	89, 949	v. Jagers	118, 276
v. Hendrick	18, 68, 133, 987	v. James	2273, 2276
v. Hensley	1835	v. James Co.	1840
v. Herlihy	1398, 2098	v. Jeffries	2264
v. Hessenius	1976	v. Jennings	278, 905, 1349
v. Hetland	2062	v. Jensen	357, 507, 2276
v. Hetrick	581	v. Johnny	832, 857
v. Heusack	987, 1270	v. Johnson, 133 Ia.	1855, 2062
v. High, 116 La.	276, 987	Kan., 140 Pac.	2501
122 La.	1841, 1842	111 La.	357
v. Hinkley	1859	116 La.	1873
v. Hoben	2296	73 N. J. L.	905, 1072
v. Hoffman, 134 Ia.	1108, 1667, 1669	14 N. D.	1013, 2497
120 La.	1074	v. Johnston	2501
v. Hogan	499, 851, 1842	v. Jones, Cal., 139 Pac.	63, 794, 988
v. Hogg	276	127 La.	1476
v. Holcomb	200	145 N. C.	851
v. Holter	168, 398, 1963, 2062	53 Wash.	2056, 2059
v. Hooper	1349	v. Judd	398
v. Hope	1819	v. Juneau	2056
v. Hopkins		v. Kaemmerling	2201
115 La.	2364	v. Kammel	569
118 La.	1671, 2167	v. Kane	1725
v. Hopper	1974, 1977, 2059	v. Kapelino	2079, 2119
v. Hornaday	2060	v. Katon	987
v. Horner	851	v. Keefe	905
v. Horton, 247 Mo.	950, 2265	v. Keehn	784, 2349
100 N. C.	166	v. Keener	2276
v. Hosey	1983	v. Kehr	149
v. Houghton	1909	v. Kelleher, 201 Mo.	111, 1072, 1442,
v. Howard, 120 La.	570, 1755		2272
30 Mont.	218, 987, 1890	224 Mo.	1434
v. Hoyle	78, 2183	v. Kelliher	318, 2056

# TABLE OF CASES CITED

	SECTION		SECTION
State v. Kelly, 77 Conn.	41, 144, 166, 1725, 2044	State v. Leasia	1195, 1242
71 Kan.	2478, 2580	v. Le Blanc	988
22 N. D.	2513	v. Lee, 127 La.	839, 2550
v. Kennade	63	228 Mo.	2060
v. Kennedy	580	17 Or.	276
v. Kenny	218	v. Legg	390, 735, 763
v. Kent	694, 2016, 2024	v. Lem Woon	41, 936, 2277
v. Kesner, 72 Kan.	276, 2071, 2073, 2081	v. Leo	1451, 2497
v. Kight	952, 2276	v. Leuhraman	18, 2119, 2595
v. Kilduff	851	v. Levich	326
v. Kimes 278, 988, 1330, 1398, 2273, 2276, 2513		v. Levy	21, 390, 2272
v. Kincaid	282	v. Lewis, 139 Ia.	2591
v. Kinchen	1732	112 La.	20, 357, 851
v. King	1398	181 Mo.	390
v. Kline	1404	v. Lieberman	2056
v. Klute	1447	v. Lindsay	1921
v. Knapp, 70 Oh.	2072, 2100	v. Lindsey	1750
S. D., 144 N. W.	2273	v. Linhoff	2511
v. Kniffen	1680, 2239	v. Lloyd	2195, 2269, 2270
v. Knoll	1442	v. Long, 201 Mo.	987
v. Knowles		238 Mo.	2062
98 Me.	1270	Mo., 165 S. W.	2061, 2390
185 Mo.	1625, 2071, 2100	v. Longstreth	1387, 1669
v. Knudtson	580, 2059	v. Loser	2529
v. Koller	278, 391	v. Louie Moon	248, 1129
v. Krinski	2264	v. Lovell	1072, 2115
v. Kritchman	2056	v. Lovitt	1106
v. Kwiatkowski 762, 839, 861, 2071		v. Lowell	1141
v. Kysilka	905, 1043, 1072	v. Luper	2237
v. Labore	2273	v. Lu Sing	2100
v. Labriola	1821	v. Lyons	
v. Lambert	276, 1614, 1616	113 La.	233, 568, 689, 851, 1938, 2382, 2501, 2511
v. La Mont	2276	70 N. J. L.	2056
v. Lancaster	398	v. McAllister	360
v. Landers	851, 861	v. McAnarney	149
v. Landry 117, 1154, 1163, 1168, 1802, 1803		v. McBride	701, 2016, 2020
v. Larkin	2273	v. McClellan	1614
v. Larkins	2276	v. McClure	205
v. La Rose	363	v. McCool	169, 2062
v. Lastor	1157, 1750	v. McCoomer	1442
v. Laughlin	851, 860	v. McCord	2081
v. Law	569, 1445, 2385	v. McDaniel	1126, 1750, 2512
v. Lawhorn	1138	v. McDonald	1481, 1487, 1490, 1492, 1605, 1633, 1646, 1680, 1684
v. Lawrence, 28 Nev.	987, 2276, 2277	v. McDonough	1890, 2115
74 Oh.	398	v. McDowell	218
v. Lawson, 44 Mont.	1852, 1853, 2059	v. MacFarland	1073
40 Wash.	1354	v. McGlothlen	2061
v. Lax	2513	v. McGruder, 125 Ia.	754, 1920, 1958
v. Leakey	227, 689, 2512	v. McIntosh	1072, 2275
		v. McKay	2239
		v. Mackinnon	1254

# TABLE OF CASES CITED

	SECTION		SECTION
State v. McKowen	390, 460, 2265	State v. Mitchell, 130 Ia.	247
v. McLain	140	229 Mo.	2276
v. McMillan	1858	v. Mobley	133, 398, 2061
v. McNamara	397	v. Momberg	2493
v. McRae	1398	v. Monich	16, 561, 861, 862, 1442, 1451, 2550
v. Madison	1908, 2183	v. Montgomery, 35 Miss.	530
v. Maggard	1126, 1128	26 S. D.	861
v. Magill	246	56 Wash.	905
v. Major	1072	v. Moon	901, 905
v. Mallahan	2056	v. Moore, 77 Kan.	397
v. Mallonee	1620	36 Utah	821
v. Malmberg	951, 1005	Utah, 126 Pac.	2086
v. Mann	987, 1079, 2100, 2232	v. Moran	19, 858
v. Manning	1079	v. Morgan	196 Mo. 2395
v. Manuel	987	35 W. Va.	500
v. Marion	852	v. Morin	581, 1058
v. Marselle	398, 2071	v. Morris	2512
v. Martin, 229 Mo.	19	v. Mortensen, 27 Utah	1802, 1803
47 Or.	390, 396, 1330	v. Mosher	1382, 1398
v. Marx	2044	v. Mount	987, 1270
v. Matejousky	1853	v. Moyer	59, 392
v. Matheson	276, 795, 1041	v. Mullins	852
v. Mathews, 133 Ia.	1856, 2237	v. Mungeon	1072, 2060, 2269, 2270
119 La.	246, 247	v. Murphy, 17 N. D.	318
202 Mo.	278	128 Wis.	2281, 2281a
v. Matlack	2215	v. Murray	664
v. Mattivi	398, 2273	v. Myers, 198 Mo.	580, 1852, 2100, 2115
v. May	852	221 Mo.	2276
v. Mayo	1033, 2511	v. Myrberg	507
v. Megorden	568	v. Nash	276
v. Meister	1620	v. Nathoo	166, 168, 1154
v. Melton	276	v. Naughton	2252
v. Menard	1335	v. Neasby	1496
v. Merchants' Bank	1079	v. Nelson, 68 Kan.	1398, 1404
v. Merkel	2100	91 Minn.	21, 2327
v. Merrill	2072, 2081	v. Nelson, 17 N. D.	2512
v. Meyer	507, 1821	39 Wash.	18, 168, 398, 2088, 2235, 2237, 2239, 2339
v. Meyers	1013, 1398	v. Nergaard	987, 1143
v. Middleton	834, 855, 858	v. Nethken	238
v. Miles	1873, 2273, 2356	v. Neubauer	398, 851
v. Miller		v. Nevada C. R. Co.	1230, 1960
Del., 3 Penn.	2083, 2086, 2239	v. Newberry	2239
71 Kan.	21, 168, 667, 770, 1481, 1644	v. Newcomb	2265
67 Mo.	1034	v. Newman	
71 N. J. L.	1918, 1977, 2252, 2265	93 Minn.	2497
43 Or.	792, 1157, 2277	34 Mont.	318
68 Wash.	815, 855	73 N. J. L.	331
24 W. Va.	2042	v. Nieburg	68, 2088, 2245
v. Millican	142	v. Nippert	1219, 1273, 2375, 2582
v. Mills	987	v. Norris	2062
v. Minneapolis Milk Co.	669		
v. Minnick	1051, 2513		

# TABLE OF CASES CITED

	SECTION		SECTION
State v. North	1028	State v. Poe	276, 2511
v. Novak	1136, 1761	v. Poole	851
v. Nowells	457, 568	v. Pope	2595
v. Noyes	1810	v. Porter	2569
v. Nugent		v. Potello	2513
134 Ia.	168	v. Potter	63
116 La.	783	v. Powell	111, 792, 987, 1157, 2591
v. Nyhus	987, 1835, 2276	v. Powers	1750
v. O'Brien	2555	v. Pratt	2042
v. Oden	367, 1269, 1890, 2276	v. Pray	1842
v. Oien	987	v. Priest	923
v. Oliphant	923	v. Pruitt	398
v. Olson	1159, 1978	v. Pryor	359
v. O'Neil	341, 1230	v. Psycher	2513
v. Oppenheimer	321	v. Pugh	987
v. O'Rourke	1010	v. Quen	105
v. Orth	224	v. Quigley	233, 2501, 2511
v. Osborne	276, 1111, 1835	v. Quirk	987
v. Oswalt	398, 1135	v. Raice	63, 248
v. Overland	987, 1270	v. Ralston	2062
v. Overson	2497	v. Rambo	2272, 2354
v. Overton	397	v. Raphael	2513
v. Owens	1036	v. Rasco	177
v. Page	20, 397	v. Rash	133, 398, 2061
v. Palmberg	168, 398, 1154, 2582	v. Ray	2056
v. Pamela	851	v. Raymo	1732
v. Papa	276, 788	v. Raymond	2062
v. Parker, 134 N. C.	21, 1138	v. Rea	216
60 Or.	246	v. Ready	112
v. Patchen, 36 Nev.	2089	v. Reed, 53 Kan.	1450
37 Wash.	2061	250 Mo.	63
v. Patton	759, 905	v. Rees	19
v. Paxton	1058	v. Reese	987
v. Peacock	1439	v. Register	2056
v. Pearson	527, 2056	v. Reilly, 22 N. D.	2059
v. Peck	2513	25 N. D.	18, 681
v. Peebles	2276	v. Reinheimer	1667
v. Pell	1841	v. Remington	793, 1978
v. Pemberton	963	v. Rennick	2060
v. Pence	2259	v. Rester	691
v. Penna	689, 1012, 1013	v. Rhoades	1230
v. Peterson	987	v. Rhoads	1850
v. Petty	2265	v. Rhys	1808
v. Phelps	2374	v. Richard	2595
v. Phillips, 118 Ia.	1669	v. Richards	276, 728, 988, 1983
24 Mo.	2115	v. Richardson, 194 Mo.	923, 1072, 2233
185 Mo.	2062	248 Mo.	2042
18 S. D.	2060	v. Richey	398
v. Phylar	363	v. Richmond, 138 Ia.	1062
v. Pienick	2072	186 Mo.	2513
v. Pierce	1974	v. Ricksecker	2575
v. Pirkey	1807	v. Riddle	1405
v. Pitt	507, 1817, 1828		

# TABLE OF CASES CITED

	SECTION		SECTION
State v. Rivers, 82 Conn.	133, 987	State v. Sederstrom	905
58 Ia.	969	v. Seery	2130, 2272
v. Roberts, 201 Mo.	321	v. Sejours	499, 1404
28 Nev.	216, 792, 987, 1442	v. Seligman	321, 1873
v. Robertson	905	v. Sexton, 91 Kan.	987
v. Robinson, 126 Ia.	770	37 Wash.	1877
112 La.	218, 2272	v. Seymour	2016
v. Roby	1157	v. Sharp	1126, 1131
v. Rocker 1645, 2085, 2230, 2231, 2506		v. Shaw	18, 987, 1674
v. Roderick	198, 247, 248	v. Sheets	398
v. Rodriguez 20, 246, 247, 1876, 1906		v. Shelton	580, 2056
v. Rogers, 115 La.	1021, 1040, 1861	v. Sheltrey	2079
31 Mont.	987, 1810, 2276	v. Shockley	21, 987, 2270, 2276
v. Rogne	2264	v. Shouse	928, 2243
v. Rogoway	862, 2071	v. Silverio	2497
v. Romeo	21, 2100	v. Simes	492, 497, 498, 770, 778
v. Romero	62, 200, 923, 1335	v. Simmons, 74 Kan.	18, 928, 1983
v. Ronk	198, 451	78 Kan.	1404, 2276
v. Rooke	1853	143 N. C.	1967
v. Rosa, 71 N. J. L.	967, 1042	v. Simon, 131 La.	397
72 N. J. L.	1072	70 N. J. L.	254, 1781
v. Roselair	1958	71 N. J. L.	21, 2056
v. Rosenthal	158, 664, 961, 1244, 1272, 1678, 1712	v. Simonds	2276
v. Routzahn	352	v. Skillman	797, 2016, 2272
v. Rowell	21	v. Slattey	205
v. Royce	821, 2183, 2264	v. Smalls, 73 S. C.	363
v. Ruck	1079, 2265	63 Wash.	2027
v. Rudolph	351	v. Smith, 124 Ia.	819
v. Rugero	21, 855	129 Ia.	2529
v. Rumble	689, 1935, 1938	203 Mo.	498, 811
v. Russell	166	33 Nev.	18, 2060
v. Rutledge, 135 Ia.	63, 1732	138 N. C.	851, 2300
37 Wash.	1977, 2042	18 S. D.	200, 987
v. Ryan	276, 1079	v. Smokalem	2273
v. Ryder	1729, 2020	v. Snyder, 67 Kan.	991
v. Ryno	791, 797, 2016	86 Vt.	68
v. Sanders	2265	v. Sortor	396
v. Sappienza	2512	v. Southern R. Co.	1684, 2572
v. Sargood	363, 609	v. Sobern	111
v. Sauls	944	v. Spanos	862
v. Savings Bank	1350	v. Sparks	2513
v. Scaduto	111	v. Spaugh	276, 390, 851
v. Scampini	2577	v. Speyer	228, 1938
v. Schaeffer	1219, 1273, 2158, 2375	v. Spivey	987, 1270, 2277
v. Schmidt	1159, 2183, 2264	v. Springer	1644, 2529
v. Schmulbach	276	v. Staber	21
v. Schnettler	21, 343	v. Stackhouse	2061
v. Schonberg	2513	v. Stallings	860, 1750
v. Schreiber	2497	v. Standard Oil Co., 218 Mo.	2259
v. Schueller	398	Mo., 91 S. W.	94, 2195
v. Scott	19	v. Stapp	2056, 2384
v. Sebastian	398, 1135, 1141	v. Stark	318, 2061
		v. Start	194, 360

# TABLE OF CASES CITED

	SECTION		SECTION
State v. Stebbins	851, 861	State v. Toohey	351, 414
v. Steele	1850	v. Tracey	1012
v. Steen	254, 1621	v. Trail	111
v. Stephens	905	v. Trimble, 104 Md.	747
v. Stephenson	1530, 1558	Mo., 163 S. W.	1859
v. Stevens		v. Trueman	1974
133 Ia.	1159, 2062	v. Truskett	63, 2511
19 N. D.	1378	v. Trusty	357, 1481, 1855
v. Stewart, 85 Kan.	1388, 1398,	v. Turley	1124, 1126, 1128
	1409, 2241	v. Turner, 82 Kan.	821, 855, 2183
117 La.	2079, 2191, 2595, 2241	82 S. C.	205, 2061
v. Stimpson	200, 923, 987	v. Twining	2272
v. Stone, 74 Kan.	398	v. U. S. Railways & El. Co.	2509
66 Wash.	21, 1003, 1270, 1620	v. Underwood	682
v. Stout	142	v. Urie	2276
v. Strait	2183, 2264	v. Usher, 126 Ia.	1349
v. Strodemeier	1029, 1051, 2349	136 Ia.	2155
v. Strong	792, 841, 1157	v. Uzzo	1033, 1907
v. Stukes	987	v. Vacos	63, 106
v. Stutches	2513	v. Vance 21, 1398, 1404, 1450, 1669,	2276
v. Sublett	2062	v. Vanella 660, 728, 1398, 1974, 2592	
v. Sudduth	1071, 1072	v. Van Winkle, Del., 86 Atl.	1442
v. Suitor	2183	18 Ia.	2270
v. Superior Court	1074	v. Vaughan	218
v. Swartz	1022	v. Vey	851, 2264
v. Sweeney	1021	v. Vickers	2155
v. Swenson	682, 1072, 1442	v. Viscome	1618
v. Swindall	133	v. Von Kutzleben	861
v. Swink	2577	v. Voorhies	1977
v. Swisher	1072	v. Waldron	198
v. Sysinger	398, 987, 2025, 2339	v. Waldrop	2132
v. Tawney	1983	v. Walke	168
v. Taylor		v. Walker, 124 Ia.	1079
36 Kan.	852	133 Ia.	774
202 Mo.	1867, 2276	v. Wallace, 78 Conn.	1152
57 W. Va.	772, 1819, 2243	162 N. C.	2183, 2339
v. Teachey	759, 1442	v. Waln	1012, 1873
v. Teasdale	1234	v. Walsh	1645, 2059
v. Terre Haute & I. R. Co.	1350	v. Walton	1398, 1404
v. Thomas, 135 La.	821, 1873	v. Wappenstein 343, 1079, 2056, 2060	
250 Mo.	851, 860, 861	v. Warner	2281a
v. Thompson, 127 Ia.	105, 194, 1700	v. Warren	27, 905
116 La.	1329, 2119	v. Washelesky	2044, 2072, 2073
161 N. C.	2265	v. Washing	852, 861
49 Or.	63, 111	v. Waterbury	2513
31 Utah	168, 2059, 2086, 2529	v. Waterman	2061
v. Thorne	21, 987, 2268, 2276	v. Waters	1853
v. Thornhill	2277	v. Watkins	1442, 1447
v. Thornton	2270	v. Way	1750
v. Thrailkill	248, 396	v. Weil	1384
v. Tilden	398	v. Welch	2061
v. Tillinghast	267, 2085, 2088	v. Wellman	923
v. Tolla	247, 507		

# TABLE OF CASES CITED

	SECTION		SECTION
State v. Wells, 33 Mont.	959	State v. Woodworth	1111
35 Utah	861	v. Wooley	2232
v. Wentworth	158	v. Woolridge	1330, 1331, 1349
v. Wenzel	7, 367	v. Wooten	2529
v. Werner 507, 1138, 1761, 1867, 2382		v. Workman	205, 1620
v. Wertz 1051, 1890, 1969		v. Worthen	1835, 1839, 2512
v. West, 11 Ida.	2354	v. Wright, 199 Mo.	2513
24 S. D.	2115	20 N. D.	2495
v. Westcott	832, 861, 2071	v. Yates	21, 106
v. Wetter	232	v. Yee Gueng	1043, 1446
v. Wheeler, 172 Ind.	1350, 1684	v. Zarlanga	1411
129 Ia.	21	v. Zeller	862
89 Kan.	351	v. Zorn	246, 1446, 1451
141 N. C.	2192	ex rel. Boston & M. C. C. & S. M.	
v. Whitbeck	1977	Co. v. District Court	1862
v. White, 48 Or.	561, 580, 1079, 1976	ex rel. Crenshaw v. Joseph	1350
77 Vt.	1781	ex rel. Heinze v. District Court	1862
v. Whitsett	397, 497	ex rel. Mendenhall v. District	
v. Whitworth	2062	Court	1862
v. Wideman	1062	ex rel. Nowakowski v. Lockridge	1909
v. Wigger	1807	State Bank v. McCabe	1073
v. Wilcox, 90 Kan.	2298	v. Young	2433
21 S. D.	2595	State Bank & T. Co. v. Evans	1213
v. Wilhite	1693	State Historical Ass'n v. Silverman	2465
v. Wilkerson	2494	State Life Ins. Co. v. Johnson	340
v. Wilkins	397	Statham v. Statham and Gaekwar of	
v. Willet	398, 1135	Baroda	2566
v. Williams, 30 La.	2079	Staunton Coal Co. v. Bub	208
111 La.	905	Steadman v. Steadman	1304
120 La.	851	Stealey v. Kansas City	2575
96 Minn.	21, 1750	Stearns v. Kennedy	1067
28 Nev.	21, 1810, 2272	v. Long	66, 76
31 Nev.	861	Stebbins v. Duncan	1404
35 Nev.	2059	Steber v. Chicago & N. W. R. Co.	1012
46 Or.	2081	Steen v. State	1853
36 Utah	357, 987, 1135	Stegall v. Thurman	2375
v. Willing	861, 866	v. Wright	2432
v. Wilmbusse	1853	Steidtman v. Lay Co.	2464
v. Wilson, 5 Penn. Del.	605	Steininger v. Hoch's Ex'r	285
Ia., 141 N. W.	1807, 1976	Steinkuehler v. Wempner	2500
158 N. C.	59, 988	Steketee v. Newkirk	2383
68 Wash.	861	Stemmler v. New York	2593
v. Winalow	1135	Stephens v. Collison	2336, 2337
v. Winter	326, 1326, 2513	v. Elliott	1158, 1160, 1164, 1698
v. Wise	1625	v. Hoffman	1388
v. Wolfley	150, 2511	Sterling v. Park	2456
v. Wong Si Sam	2059, 2060	v. Union Carbine Co.	223
v. Wood	398	Stevens v. Boston Elev. R. Co.	282, 283
v. Woodard	1669	v. Continental C. Co.	1073, 1076, 2510
v. Woodrow	1750, 2239	v. Friedman	1719
v. Woodward		v. Oliver	1681
182 Mo.	852	v. People	688, 967
191 Mo.	923, 987, 1270, 2277	v. State	246

# TABLE OF CASES CITED

	SECTION		SECTION
Stevens v. Stevens	1736, 2523	Streator I. Tel. Co. v. Continental T. C. Co.	2496
v. United G. & E. Co.	2510	Strebin v. Lavengood	966, 1044, 1351
v. Worcester	2203	Strecker v. Railson	1681
Stevenson v. Haynes	1154	Streeter v. Marshalltown	1808
Steward v. State	1873	Strickland v. Capital C. Mills	2313, 2315
Stewart v. Com.	200	v. State	1938, 2071
v. Doak Bros.	1049, 1082	Stroberg v. Merrill	20
v. Fleming	2416	Strode v. Beall	1777
v. Hunter	150	Strong v. Carver C. G. Co.	2465
v. Iowa C. R. Co.	2509	v. State	280, 952
v. L. B. Land Co.	1680	Stroupe v. Hewitt	2410
v. N. C. R. Co.	2122	Struth v. Decker	1938, 1958
v. Sloss-Sheffield S. & I. Co.	561, 1339	Stuart v. Pederson	1684
v. State	950, 1263	Studebaker v. Faylor	1330
v. U. S.	276, 1684	Studwell v. Bush Co.	2442
v. Van D. C. Co.	2509	Stuke v. Glaser	1303
v. Walker	1267, 1736, 2329, 2503	Sturgis v. State	905, 1079, 2272
Stickney v. Hughes	18, 2433	Stutsman v. Sharpless	680, 689, 1938
Stickney's Estate	1350	Suckow v. State	1012
Stiebel v. Grosberg	2410, 2432	Suffolk & C. R. Co. v. West End L. & I. Co.	1640
Stiles v. Beed	2520	Sullivan v. Blount	1564, 1582
Still v. State	1434	v. Fugazzi	916
Stitt v. Rat Portage L. Co.	19, 2497, 2498	v. Girson	285, 382, 716, 720
Stitzel v. Miller	2016, 2026	v. Godkin	1555
Stockham v. Malcolm	246, 950	v. Hill	2195, 2374
Stocking v. Fairchild	2134	v. Manston M. Co.	377
Stockton v. State	1853	v. State	359
Stokes v. Hardy	1382	v. Sullivan	291
Stone v. Case	2508	Sullivan Timber Co. v. Louisville & N. R. Co.	2124
v. Com.	1576	Suman v. Harvey	2463, 2472
v. L. B. & B. St. R. Co.	792	Summitt v. U. S. Life Ins. Co.	1684
v. Montgomery	530	Sun Fire Office; see Sun Ins. Office	
v. Moody	2416	Sun Ins. Office v. Western W. M. Co.	662, 1921, 1976, 2580
v. Seattle	1700	Sundvall v. Interstate Iron Co.	2415
v. Stone	1053, 1076	Superior Drill Co. v. Carpenter	1078
v. Victor E. Co.	1417	Supple v. Suffolk S. Bank	1676
Stone & Webster E. Co. v. Melovich	461	Supreme Council v. Champe	1201
Stoner v. Zachary	2415, 2464	Supreme Lodge v. Meyer	5, 2388
Storer v. Gowen	2113, 2115	Supreme Lodge K. of P. v. Bradley	1073
v. Markley	20	Surbaugh v. Butterfield	1078
Stotler v. Chicago & A. R. Co.	571	Surface v. Bents	2306
Stouse v. State	235	Sutton v. Com.	1852
Stout v. Sands	291, 907	v. State	68
v. State	177	v. Weber	2442
Strader v. Snyder	74	Swaine v. Marriott	2520
Strahl v. Western G. Co.	2441	Swaisland v. Grand Trunk R. Co.	2319
Strand v. Grinnell A. G. Co.	2354	Swanson v. Pacific Shipping Co.	1750
Strasser v. Goldberg	581	Swanzy v. Kolb	582
v. Stabeck	791	Swearingen v. Wabash R. Co.	41
Stratton v. Athol Savings Bank	2408		
v. Nichols L. Co.	282, 969		
Strauss v. Hutson	2235		

# TABLE OF CASES CITED

	SECTION		SECTION
Swedish-Amer. Tel. Co. v. Fidelity & C. Co.	1859, 2264, 2275	Taylor v. Taylor	233, 1671
Sweeney v. Erving	2509	v. Taylor's Estate	1414, 1415, 2015
v. Sweeney		v. Tigerton L. Co.	1062
119 Ga.	1078, 1195, 1664	v. U. S.	2270
121 Ga.	1129	Teasley v. Bradley	1062
Swiger v. Swiger	1352, 2498	Teckenbroeck v. McLaughlin	1738
Swindell v. Ford	1299, 1320, 2529	Telfair v. State	950
Swing v. Cloquet Lumber Co.	1256	Telluride Power Co. v. Bruneau	463
Swope v. Seattle	1907	Telluride P. T. Co. v. Crane Co.	2434
v. Ward	21, 1778, 1779	Temple v. Phelps	2311, 2537
Swygart v. Willard	229, 1021, 1938, 1975	Tennessee C. I. & R. Co. v. State	463
Sykes v. Beckwith	1244	Terrell, <i>ex p.</i>	2199
v. State	398	Territory v. Boyd	967, 1260
Sylvester v. Ammons	717	v. Caldwell	218
		v. Castro	1076, 2086
		v. Cheong Kwai	584
		v. Chung Ning	851, 2265
		v. Cotton	1951
		v. Eagle	1442
		v. Emilio	851
		v. Evans	1398
		v. Harwood	747, 754
		v. Kawano	1393, 1810
		v. Livingston	218, 905, 2513
		v. Lucero	276
		v. McNab	1938
		v. Meredith	784
		v. Neatherlin	1079
		v. Pierce	59
		v. Schilling	1761
		v. Sing Kee	969, 2183
		v. Trapp	111
		v. Valles	150
		v. Watanabe	363, 1163
		v. West	347
		Terry v. Broadhurst	1312
		v. Clark	1779
		v. State	1273
		Teston v. State	969
		Tetterton v. Com.	1873
		Tewes v. North German L. S. S. Co.	2415
		Texas & P. R. Co. v. Goggin	21, 1067
		Thaw, <i>in re</i>	2199
		Thayer v. Usher	1072
		Theriot's Succession	528
		Thibodeaux v. Thibodeaux	1411, 2047
		Thiede v. Utah	1850, 1854
		Thomas v. Byron Tp.	1808, 2382
		v. Clarkson	2536
		v. Com.	20
		v. Fos	916
		v. Johnston	2442
		v. Northwestern M. L. Ins. Co.	2537
T			
Taber v. New York P. & B. R. Co.	907, 2008		
Tabor v. Tabor	1198		
Tackman v. Brotherhood	460, 1073		
Taft v. Little	759, 760, 1250, 1387, 2115		
v. Taft	969		
Tagert v. State	1195, 1974		
Taggart v. U. S.	2511		
Tainter v. Wentworth	2442		
Tait v. Locke	2416		
Talbert v. State	2501		
Taliaferro v. U. S.	367		
Talmadge v. Baker	207		
Tang Tun, <i>in re</i>	1354		
Taplin v. Marcy	581, 2556		
Tarasinski v. State	851, 1079		
Tate v. Rose	382, 1956		
v. State	2060		
Tayloe v. Riggs	2448		
Taylor v. Felder	1404		
v. General Acc. Ins. Co.	41		
v. Globe Ref. Co.	1392		
v. Grand Ave. R. Co.	1976		
v. Grand Lodge	1081, 1491		
v. Higgs	2498		
v. Johnson	615		
v. McClintock	616, 682		
v. Schofield	377, 987		
v. State			
120 Ga.	1433, 1674		
121 Ga.	111, 247, 1732, 1985		
126 Ga.	1404		
Ga. App. 79 S. E.	56		
185 Mo.	2364		
Tex. Cr., 97 S. W.	158, 2153		

# TABLE OF CASES CITED

	SECTION		SECTION
Thomas v. Shea	406	Tilton v. State	1835
v. State		Times v. Com.	852, 2273
139 Ala.	2272	Timer v. State	1157
47 Fla.	293, 782	Tingley v. Times M. Co.	692
v. Thomas	2525	Tinker v. State	2512
v. U. S.	2511	Tinkle v. Wallace	1871, 1873
v. Weintraub	1840	Tinman v. Fitzpatrick	2106
v. Williamson	1658, 1681	Titanic, The	6
v. Young	2115	Title Ins. & Trust Co. v. Ingersoll	1109
Thomas' Estate	1739	Titterington v. State	1012
Thompkins v. Com.	1852	Tobakin v. Dublin S. D. T. Co.	2319
Thompson, in re	1081, 1458	Tobin v. McArthur	2442
Thompson v. Calhoun	2184, 2520	Todd v. Crail	1880
v. Coulter	2065	v. Fenton	1738
v. Great Western Acc. Ass'n	2450	v. Todd	2421, 2500
v. King	1313	Toledo Computing S. Co. v. Comput-	
v. Los Angeles & S. D. B. R. Co.	664	ing S. Co.	1657
v. Mecosta	1042	v. Garrison	2415
v. Purdy	2094	Toledo St. L. & W. R. Co. v. Burr &	
v. State, 66 Fla.	2529	Jeakle	1062
84 Miss.	396	Toledo Traction Co. v. Cameron	6, 792,
6 Okl. Cr.	1079		1404, 1411
Tex. Cr., 89 S. W.	2079	Toliver v. State	68
v. Thompson	1081	Tollifson v. People	967, 987
v. U. S.		Tom Hong v. U. S.	1354
144 Fed.	216, 270, 390	Tomlin v. Woods	1681
202 Fed.	523	Tomlinson v. Derby	1028
v. Williams	2504	v. Sovereign Camp	1671
Thompson-Starrett Co. v. Warren	1003	Tompkins v. Com.	2110, 2237
Thomson v. Issaquah S. Co.	283	v. Fonda G. L. Co.	1458
v. Maryland Gas Co.	2319	v. Tompkins	2165
Thorgrimsen v. Northern Pac. R. Co.	2509	Tong Kai v. Terr.	2056
Thorman's Estate	987, 2052	Tonopah Lumber Co. v. Riley	1044
Thornton v. Smith	1239	Tonopah & G. R. Co. v. Fellanbaum	382
Thornton-Thomas M. Co. v. Brether-		Toole v. Crafts	581
ton	18	v. State	1354
Thorp's Will	1072, 1651	Toomer v. State	861
Thrash v. State	1270	Topeka v. Cook	2575
Thrasher v. State	2385, 2389	Topfer v. Topfer	2046
Throckmorton v. Holt	112, 1736	Toronto G. T. Co. v. Municipal C.	
Thrush v. Fullhart	1073	Co.	1856
Thurkettle v. Frost	258	Totten v. Totten	1135
Thurman v. Leach	1587	Tousey v. Hastings	2498
v. State	834, 860, 862	Towaliga Falls P. Co. v. Sims	569
Thurston v. Fritz	1436	Tower Co. v. Southern Pac. Co.	2464
v. Tubbs	2408	Towle v. Stimson M. Co.	2509
Thurston's Adm'r. v. Prather	87	Towles v. McCurdy	2384, 2391
Tibbs v. Com.	1442	Towner v. Towner	2500
Tiborsky v. Chicago M. & St. P. R.		Townsend's Estate	229, 1738
Co.	1750, 2509	Tracy v. O'Reilly	2474
Tichborne Case, The	1005	Tracy & Co., in re	2264
Tift v. Green	1680	Trafton v. Osgood	527
Tillman v. State	1476	Trailer v. State	728

# TABLE OF CASES CITED

	SECTION		SECTION
Traylor's Case	867	Tyrrel v. State	507, 2115
Trammell v. Swift F. Wks.	2444	Tyson v. Joyner	2516
Travelers' Ins. Co. v. Davies	1700	v. Shueey	1587
v. Henderson C. Mills	1493, 1503		
Travers v. Casey	2467		
v. Reinhardt	2082, 2083	U	
Treiber v. McCormack	2338, 2340	Ugges v. Bazille	1040
Triangle Lumber Co. v. Acree	2220	Ulrich v. People	1393
Trim v. Fore River S. B. Co.	2509	Underwood v. Com.	1802, 1852
Tripp v. Macomber	1576	v. State	2183, 2264
Tri-State Milling Co. v. Breisch	1704	Ung King, ex p.	1354
Trombley v. Seligman	1971	Union Construction Co. v. Western U.	
v. Stevens-Duryea Co.	150	Tel. Co.	2155
Trometer v. District	1907	Union C. Ins. Co. v. Pollard	2573
Trough v. Trough	2067, 2069	Union Coll. Co. v. Superior Court	1856
Trull v. Modern Woodmen	2388	Union Hosiery Co. v. Hodgson	437, 1969
Truman, re	2531	Union I. & F. Co. v. Sonnefield	1371
Tsuruda v. Farm	1405	Union Pacific R. Co. v. Day	2303
Tubbs v. Mechanics' Ins. Co.	716, 1955,	v. Field	21, 961, 1807
	2464	v. Lucas	716
		v. M'Mican	688
Tucker v. B. & M. R. Co.	93	v. Stanwood	463
v. Duncan	1225	v. Thomas	2382, 2389
v. Colonial F. Ins. Co.	21, 716	Union R. Co. v. Hunton	20, 463, 714, 1873
v. Glew	2520	Union Selling Co. v. Jones	2463
v. Helgren	1676, 2520	United Amer. F. Ins. Co. v. American	
v. People	1877	Bonding Co.	1077, 1078
v. Tucker	1194	United Breweries Co. v. O'Donnell	1012
v. U. S.	278, 2264	United R. & E. Co. v. Corbin	18, 569, 687
Turgeon v. Woodward	1566	United States v. American Tobacco	
Turley v. State	1977	Co.	2200
Turlock F. J. Co. v. Pacific & P. S. B.		v. Armour & Co.	2281a
Co.	2463	v. Brod	2281
Turman v. State	1130, 2265	v. Chu Hang	1354
Turnbull v. North British R. Co.	2203	v. Cobban	2364
Turner v. American Security & T.		v. Cohen	1404
Co.	19, 689, 1938	v. Collins	2200, 2271, 2272
v. Cocheco Mfg. Co.	792	v. Densmore	198
v. Com.	789	v. Foster	2551
v. Mfrs.' & Consumers' Coal Co.	2416	v. Gin Hing	1354
v. Osgood A. C. Co.	2556	v. Goldstein	2282
v. State, 100 Ark	524, 1270	v. Greene	260, 1373, 1398
95 Miss.	1008, 1013	v. Griego	2511
61 Tex. Cr.	1938	v. Halstead	2264
v. Turner	1078, 1465, 2296	v. Harris	2264
v. Williams	2506	v. Hung Chang	
Turner's Trial	56	126 Fed.	571, 1354, 2256
Turner's Trustees v. Washburn	610	134 Fed.	167, 1154, 2246
Turpin v. Com.	1806	v. Jordan	1662
Tuttle v. Boston	1350	v. Ju Toy	1354
v. Missouri Pac. R. Co.	2509	v. Kimball	2268, 2281, 2281a
v. People	821, 852	v. Louie Juen	2066
Tutwiler C. C. & I. Co. v. Nichols	18	v. Meyers	2245
Twining v. New Jersey	2250, 2252, 2272	v. Mills	2183

## TABLE OF CASES CITED

	SECTION		SECTION
United States v. North	2016	Van Horn v. Van Horn	64, 68
v. Pierson	1680	Van Houten's Will	1671
v. Praeger	2270	Vann v. State	1037
v. Price	2268	Van Ness v. New York & N. J. T. Co.	714
v. Regan	2498	Vannest v. Murphy	1738, 2503
v. Rhodes	2281	Van Norman v. Modern Brotherhood	1414,
v. Rispoli	2239		2510
v. Sanborn	2199	v. Young	2408
v. Shipp	1815	Vano v. Canadian C. C. Mills	1856
v. Simon	2281, 2282	Vansant v. McPherson	2215
v. Sims	520	Vantine v. Butler	1491
v. Sing Tuck	1354	Vanvalkenberg v. Vanvalkenberg	1738
v. Swift	2281	Varner v. Interstate Exchange	2536
v. Tallmadge	2364	Vaughn v. State	950
v. Terminal R. Ass'n	2200	Veazey's Will	2314
v. Thompson	527, 2042, 2056,	Veeder v. Gilmer	1347
v. Tom Wah	2256	Veit v. Glass & N. B. Co.	199
v. Wilson	2183, 2264	Venbuve v. Lafayette W. Mills	2509
v. Wrenn	847	Venner v. Chicago City R. Co.	1858
United States, for use of E. L. C. Cu.		Vermillion v. Parsons	1779
v. U. S. Fidelity & G. Co.	1063, 2592	Vezey v. Rashleigh	2455
United States F. & G. Co. v. Des		Vick v. State	987
Moines Nat'l B'k	38	Vickers v. U. S.	414
United States Smelting Co. v. Parry	1951	Vickery v. State	586
United States Wringer Co. v. Cooney	1036	Vidger Co. v. Great Northern R. Co.	463
United Surety Co. v. Meenan	2169	Viemeister v. White	2580
University College of N. W. v. Taylor	2452	Vigel v. Hopp	2047
Updike v. State	1445	Villineuve v. Manchester St. R. Co.	1028,
Upton v. Tribilcock	2415		1263
Urdangen v. Doner	1086	Vincent v. Mutual R. F. L. Ass'n	1873,
Usher v. Daniels	2438		2491, 2537
v. Severance	2498	Vineberg v. Jones	2444
Utermehle v. Norment	1738	Vines, Estate of	797, 2463
Utter v. Sidman	2462	Vinson v. Knight	2515
Uuku v. Kaio	1495	Virginia-Carolina C. Co. v. Knight	393,
Uzzell v. Horn	1225, 1651, 2495		1063, 1951, 2319
		Virginia I. C. & C. Co. v. Tomlinson	561,
			1951
V		Vivian's Appeal	1715, 1738
Vagts v. Utman	1779	Vizard v. Moody	1299, 2016
Vaillancourt v. Grand Trunk R. Co.	2416	Vogel v. State	2061
Valente v. Sierra R. Co.	2509	Vogeler v. Devries	2494
Valiquette v. Clark B. C. M. Co.	377	Vogt v. Shienebeck	2463
Van Alstyne, <i>in re</i>	2408	Volusia Co. Bank v. Bigelow	745
Vance v. Heath	2442	Von Ferber v. Enright	1859
v. Terr.	1853	Vreeland v. Vreeland	2506
Van Cott v. North J. St. R. Co.	2495		
Van der Aa v. Van Drunen	2408		
Vander Velde v. Leroy	458		
Van Diemen's Land Co. v. Marine Board	2465		
Vandiveer, <i>ex p.</i>	1010, 1620		
Van Hall v. Rea	1651		
		W	
		W. v. S.	2020
		W. v. W.	2221
		Wabash R. Co. v. Hassett	2536
		v. Thomas	2415

# TABLE OF CASES CITED

	SECTION		SECTION
Wabash S. D. Co. v. Black	250, 949, 1951	Warren v. Porter	251
Wade v. Atlantic L. Co.	1350	v. State, 103 Ark.	1130
v. Carolina T. & T. Co.	1943	6 Okl. Cr.	20, 1398, 1405
v. Galveston H. & S. A. R. Co.	2016	Warren Construction Co. v. Powell	2498
v. McDougle	1062, 1257, 1778	Warren L. S. Co. v. Farr	15
v. Southern R. Co.	1062	Warrick v. Reinhardt	1706
Wadleigh v. Phelps	2437	v. State	111, 246, 248, 664, 1750
Waggoner v. State	660	Warth v. Loewenstein	290, 1263, 2496
Walden v. Bankers' Life Ass'n	1671	Warwick v. Hitchings	2433
Waldner v. Bowdoin S. Bank	377	Washburn v. R. Co.	2570
Waldrop v. State	1008	Washburn L. Co. v. Swanby	2165
Walker v. Baldwin	772	Washington v. State	
v. Green	2408	143 Ala.	1339, 2016
v. Harold	1086	124 Ga.	1263, 2060
v. Lee	18	Washington A. & M. V. R. Co. v.	
v. Shepard	1352	Lukens	678
v. Southern R. Co.	1232	Washington G. Co. v. State District	1387
v. State		Washington Nat'l Bank v. Daily	1859, 2192, 2193, 2259
139 Ala., 35 So.	141, 293	Washington R. & E. Co. v. Wright	1750
137 Ga.	1750	Washington-Virginia R. Co. v. Bouk-	
165 Ind.	133, 398, 905, 987	night	2509
v. Walker	2086	Washoe Copper Co. v. Junila	261, 1082
v. Warner	2520	Waterbury Nat'l Bank v. Reed	2579,
v. Williamson	458	Waters v. Merrit P. Co.	2054
Walker's Assignees v. Walker	615	v. Phelps	2432
Wallace v. North Ala. T. Co.	1950	v. Waters	229, 1738, 2500
v. Seaboard A. L. R. Co.	461	Waters-Pierce Oil Co. v. Deselms	2509,
v. State	2061		2580
v. Wallace	2063	Watford v. Alabama & F. L. Co.	2536
Wallen v. Wallen	1738	Watkins v. Cope	1856
Waller v. People	968, 1128, 1129	v. Havighorst	1665
v. Ross	2509	Watkins L. M. Co. v. Campbell	21, 714
v. U. S.	274, 278, 1938	Watson v. Barnes	1880
Walnut Ridge M. Co. v. Cohn	1456	v. Bigelow Co.	451, 1072
Walsh v. Board	718	v. Colusa P. M. & S. Co.	1943
Walston v. Allen	18, 21	v. Hinson	2452
Walter v. Calhoun	1280	v. Lamb	2465
v. Sperry	2103	v. State	
Walter Cabinet Co. v. Russell	1210	Ala., 61 So.	1612, 2236
Walters v. Rock	681, 688	7 Okl. Cr.	987
Walton v. Burchel	2532	Watts v. State	
v. Draper	2471	Ala. App., 63 So.	166, 988, 1154
v. State	1447, 1890	99 Md.	860, 1938
Wan Shing v. U. S.	1354	Way v. Greer	2433
Ward v. Conklin	2408	v. State	988
v. Gay	2466	Waycaster v. State	1037
v. Merriam	2083	Weatherall v. Weatherall	2083
v. State	2570	Weatherford v. Union P. R. Co.	18
Ware v. State	390	Weaver v. State	
Warner v. Maine C. R. Co.	1078	139 Ala.	18
v. Marshall	2465, 2466, 2477	142 Ala.	2061
Warren v. Lucas	2271	83 Ark.	2276

# TABLE OF CASES CITED

	SECTION		SECTION
Weaver Mercantile Co. v. Thurmond	2509	West Virginia Architects & Builders	
Webb v. Gray	258, 406	v. Stewart	1530, 1549
v. Reynolds	1960	Wester v. State	7, 2239
v. Ritter	411, 1378, 1573, 2520	Western Carolina Bank v. Moore	2444
v. State	2511	Western Glass Mfg. Co. v. Schoeninger	2220
v. Webb	2520	Western L. & S. Co. v. Waisman	2066
Webb G. & C. Co. v. Boston & M. R. Co.	1129	Western Mfg. Co. v. Cotton	2416
Weber v. Lape	615	Western N. L. Ins. Co. v. Williamson	
Webster Coal & C. Co. v. Cassatt	1859	H. F. Co.	616, 2550
Wechsler v. U. S.	2281	Western Travelers' Acc. Ass'n v. Munson	1719, 2388
Weckerly v. Taylor	2235	Western Union O. Co. v. Newlove	1021
Weeks v. Boston El. R. Co.	1576, 1722	Western Union Tel. Co. v. Hanley	1389
v. Hutchinson	18	v. Long	1966
v. U. S.	2183, 2264	v. Merrill	1951
Weibert v. Hanan	676	v. Northcutt	2134
Weidenhoft v. Primm	1603	v. Ring	1943
Weidner v. Standard L. & A. Ins. Co.	290	v. Taggart	1350
Weigand v. Rutschke	2336, 2408	Western W. S. Co. v. McMillen	2438
Weil v. Quidnick Mfg. Co.	2416	Westfall v. Wait	1738, 1890, 2494
Weir v. Long	2442	Westheimer v. Habinck	2536
Weiss v. Kohlhausen	1062, 1951	Westinghouse Machine Co. v. Electric S. B. Co.	1412
Welborn v. Faulconer	1855	Westlake v. Westlake	1730
Welch v. Barnett	338	Weston v. Teufel	1012, 1658, 2503
v. Com., 111 Ky.	987	Wetzel v. Firebaugh	1911, 1958
Ky., 108 S. W.	216, 2276	Whalen v. Gleeson	2149
v. State	1128	Wharton v. Tacoma F. D. Co.	1003
Weldon v. State	1761	Wharton's Will	233
Wellcome, vs	1398	Whatley v. State	860
Wellmaker v. Wheatley	2465	Wheadon v. Turregano	2525
Wells v. Com.	987	Wheaton v. Liverpool & L. & G. Ins. Co.	2408
v. Chase	1330, 1669	v. Pope	2474
v. Hays	1539, 1540	Wheeler v. Com.	111
v. Terr.		v. Metrop. Stock Exchange	2406
14 Okl.	396, 1079	v. Oregon R. & N. Co.	1461, 1750
15 Okl.	524, 580	Wheeling M. & F. Co. v. Wheeling S. & I. Co.	1951
v. Toogood	209, 2374	Wheelock's Will	582, 1671, 1739
v. Utah C. Co.	2509	Whidby v. State	2060
Wells Whip Co. v. Tanners' M. F. Ins. Co.	1530	Whigby v. Burnham	2086
Wells & M. Council v. Littleton	2593	Whisner v. Whisner	1076, 1263, 1938
Welsbach Incand. G. L. Co. v. New Sunlight I. Co.	1856	Whitaker v. State	2183
Welty v. State	2511	v. Thayer	704
Wendling v. Bowden	987	v. Whitaker	1778
Wenkowski v. Crivitz P. & P. Co.	282	White v. Boston	1907
Werner v. Marx	1676	v. Com.	19
Wesnieski v. Vanek	1058, 1066	v. Credit Reform Ass'n	1856
West v. Houston Oil Co.	68, 1085	v. Manter	1858
v. Louisiana	1398, 1404	v. Poole	608
West Pub. Co. v. Edward Thompson Co.	1079	v. Southern R. Co.	18, 1750
West Seattle v. W. S. L. & I. Co.	2575		
West Skokie Drainage District v. Dawson	463, 961, 1908		

# TABLE OF CASES CITED

	SECTION		SECTION
White v. State, 59 Fla.	21, 1732	Williams v. Lansing	437, 438
4 Okl. Cr.	247	v. Miles	2523
v. White	1730, 2336, 2340	v. National Cash R. Co.	2446
v. Willard	2408	v. Sleepy H. M. Co.	1669, 2509
White's Goods	2452	v. Southern R. Co.	1750
White's Succession	2008	v. Spokane F. & N. R. Co.	2388, 2509
White Star Mining Co. v. Hultberg	2358	v. State	
Whitehouse v. Whitehouse	2477	144 Ala.	987, 988, 2511
Whitehurst v. Atlantic C. L. R. Co.	456	149 Ala.	2239
v. Com.	1671	151 Ala.	2086
Whitelaw's Adm'r v. Whitelaw's		48 Fla.	851
Adm'r	1081	123 Ga.	2073
Whiting, in re	569, 2328	168 Ind.	18, 1442, 1451
v. Hoglund	2408	175 Ind.	2016
Whiting-Middleton C. Co. v. Preston	437	87 Miss.	2277
Whitney v. Dewey	2408	4 Okl. Cr.	363
v. Hanington	2452	52 Tex. Cr.	497
Whitt v. Com.	21, 1018	v. U. S.	934, 2272
Whitten v. Western U. Tel. Co.	2219	v. Williams	
Wichita F. & N. W. R. Co. v. Holloman	1060	20 Colo.	1730
Wicker v. Jones	2525	221 Ill.	2165
Wickes v. Walden	2341	v. Winthrop	252, 458
Wickham v. Torley	1876	Williamson v. Musick	1351
Wicks v. Walden	2341	v. U. S.	342
Wiers v. Treese	2438	Williamson I. Co. v. McQueen	1950
Wiess v. Hall	1605	Willis v. U. S.	1349
Wiggins v. State	398, 1761	v. W. U. Tel. Co.	1978
Wikman's Estate	2148	v. Zorger	2498
Wilbur v. Grover	2420	Willoughby v. Queneby	2426
v. Rhode Island Co.	2509	v. Terr.	1450
v. Selden	2405	Wills v. Russell	1890
Wilcox v. Bergman	1652, 1680	Wilmington S. Bank v. Waste	238, 2015
Wilder v. A. D. & R. E. Traction Co.	1662	Wilmoth v. Hamilton	1873
v. Franklin's Ex'r	2054	v. Wheaton	1669
v. Gr. Western C. Co.	461	Wilson v. Braden	1573, 2105
Wilenou v. Handlon	2408	v. Com.	1032
Wiley v. McBride	2235, 2337	v. Gordon	2312
v. State	2513	v. Harnette	1802, 1951
Wilkerson v. State	967, 987	v. Jernigan	2494
Wilkie v. Chehalis Co. L. & T. Co.	41, 461	v. Johnson	2494
Wilkins v. Brock	1722	v. Mulloney	2446
v. Somerville	2408	v. Ohio F. Ins. Co.	2271, 2327
Wilkinson v. Aetna L. Ins. Co.	2510	v. Pritchett	18
v. People	1911	v. Snow	1573, 2144
v. Service	1738, 2329	v. State	
Willcox v. Priester	2433	140 Ala.	1404
Willett v. Morse	18, 1873	Ala., 39 So.	2446
Williams v. Belmont C. & C. Co.	20, 1750	138 Ga.	1354
v. Chicago R. I. & P. R. Co.	2433	175 Ind.	1398, 1405, 1807
v. Com.	1873	87 Nebr.	987, 1853
v. Fourth Nat'l B'k,	1354	49 Tex. Cr.	1447, 1751
v. Fulkes	682	v. Terry	2054
v. Holbrook	458		

# TABLE OF CASES CITED

	SECTION		SECTION
Wilson v. U. S.		Wood v. Holah	748
149 U. S.	1977, 2272	v. Le Blanc	1385
221 U. S.	2259	v. Metropolitan St. R. Co.	1976
232 U. S.	934, 2497	v. Wilmington C. R. Co.	2509
v. Wilson	2520	v. Wood	2046
v. Wood	1244	Woodall v. State	1254
v. Young	74	Woodruff v. State	168, 205, 276, 398, 770, 1620
Wilson's Estate	1938	Woods v. Dailey	933, 2498
Wilson, Close & Co. v. Pritchett	18, 2415, 2439	v. Faurot	1086, 1890
Wilson-Ward Co. v. Farmers' U. G. Co.	2498	v. Lisbon	2389
Wiltse v. Fifield	2410	Woodson v. Beck	2436
Wiltsey's Will	21, 1388, 1369, 1738	Woodstock Iron Works v. Kline	1405
Wimberly v. State	1404	Woodvine v. Dean	7
Winding Gulf C. Co. v. Campbell	1956	Woodward v. Chicago M. & St. P. R. Co.	2487, 2494
Windsor v. St. Paul M. & M. R. Co.	2433	ex p.	1354, 1966
Winkleman v. White	382	Woodward, in re	1644
Winn v. Cleveland C. C. & St. L. R. Co.	1698	Woodworth v. Detroit U. R. Co.	252, 458
Winn v. Coggins	2579	Woody v. State	2081
v. Itzel	530, 1890, 2502	Wooldridge v. State	276, 318, 704, 1254, 2015, 2016
Winsky v. State	2081, 2513	Woolfolk v. Albrecht	1350
Winslow v. Norfolk H. Co.	2509	Wootton v. Sevier	1856
v. Smith	2349, 2350	Worden v. Cole	2575
Winslow's Will	1554	Worden L. & S. Co. v. Minneapolis St. P. & S. S. M. R. Co.	1639
Winston v. Winston	2060	Worman v. Seybert	1312, 1513
Wipfler v. Wipfler	2408	Worrell v. Kinnear	944, 2212
Wipperman Merc. Co. v. Robbins	1779	Worthington v. Elmer	2510
Wirsching v. Grand Lodge	2416	Worthy v. Jonesville Oil Mill	283
Wisconsin Steel Co. v. Maryland Steel Co.	1530	Wray v. Knoxville L. F. & J. R. Co.	1943, 2581
Wise v. Kerr Thread Co.	1681	v. State	1390
Wisehart v. Applegate	582	Wrede v. Richardson	1350
Wistrand v. People 213 Ill.	222, 1168, 2072	Wrenn, in re	2421, 2463
218 Ill.	59, 2100	Wright v. Anderson	2429
Withaup v. U. S.	6, 318, 2008, 2016	v. Chicago B. & Q. R. Co.	1555
Withey v. Pere Marquette R. Co.	716, 1943	v. Com.	196
Witmer v. District Court	2195	v. Crane	660
Witty v. State	2501	v. Davis	93, 286
Wixom v. Bixby	2354	v. Hicks	166, 2063
Woburn Nat'l Bank v. Woods	2466	v. Hull	2139, 2517
Wogan, re	5, 1382, 2218	v. Kansas City	987
Wolf v. Chicago S. P. Co.	2496	v. Michigan C. R. Co.	1235
Wolfe v. N. B. Cordage Co.	1974	v. State	
Wolters, ex p.	2195	47 Tex. Cr.	2059
v. Redward	1195	63 Tex. Cr.	987
Wolverine L. Co. v. Phoenix Ins. Co.	2465	Wrynn v. Downey	1770, 2061
Womble v. Merchants' G. Co.	2509	Wüta v. Interstate Iron Co.	252
Wong Din v. U. S.	580, 2056	Wyatt v. Pacific Elec. R. Co.	2509
v. Custer	73	v. State	417
v. Dominion L. Co.	1856	Wyckoff v. Chicago City R. Co.	2354
Wood v. Etiwanda W. Co.	2327		

# TABLE OF CASES CITED

	SECTION		SECTION
Wyman v. Lynde	75	Young v. McWilliams	2408
Wynne v. U. S.	2166	v. People	1182, 1200, 1236
Wysocki v. Wisconsin L. I. & C. Co.	1029	v. State	
		122 Ga.	1820
		125 Ga.	1821
		v. Valentine	21, 1392, 1416
		v. Welch Mfg. Co.	2195
		v. Woodman	2486
		Young's Estate	1738, 2314
		Younge v. Guilbeau	2408, 2520
		Younger v. Hehn	1350
		v. State	1136, 2183
		Yow v. Hamilton	1564
		Z	
		Zarnik v. Reiss C. Co.	1951
		Zdrahal v. Shatney	1644, 2085
		Ziegenhagen's Will	2523
		Ziehn v. United El. L. & P. Co.	283
		Zimmer v. Fox River V. E. R. Co.	460
		Zimmerle v. Childers	282
		Zimmermann v. Brooks	2477
		v. Freshour	2503
		Zinsmeister v. Rock Island C. Co.	1770
		Zipperian v. People	390, 1438, 1442, 2512
		Zipperlen v. Southern Pac. Co.	905
		Zobel v. Fanny Rawlings M. Co.	2595
		Zucker v. Whitridge	97
		Zuckerman v. People	861
		Zych v. American Car & F. Co.	1381,
			1411

## Y

Yager v. Bruce	406
Yakima V. Bank v. McAllister	341
Yancy v. Waddell	1350
Yanelli v. Littlejohn	987
Yarber v. Chicago & A. R. Co.	20, 1951
Yardley v. State	2311
Yates v. Covington	252, 458
v. People	1064
v. Yates	2060
Yazoo & M. V. R. Co. v. Hughes	2508
v. Humphrey	2508
Yeatman v. Hart	1751
Yeiser v. Cathers	1236, 2154
Yellow P. L. Co. v. Ford	2536
Yellowstone P. R. Co. v. Bridger C. Co.	463
Yeska v. Swendrzynski	1058
Yess v. Yess	2503
Yokell v. Elder	2450
Yore v. Newton	458, 1164
York v. Everton	923
Youlden v. London G. & A. Co.	1722
Young v. Chandler	2495
v. Corrigan	21, 75, 692
v. Hayes	2409
v. Kinney	457



## **INDEX OF TOPICS**



# INDEX OF TOPICS

BY HARVEY C. VOORHEES, ESQ., OF THE BOSTON BAR

Refer also to complete table of contents, volume one, page xiii, or part thereof at beginning of each volume, or at head of each chapter.

**SCOPE NOTE.** — The fact that in the older works on Evidence, such as those of Starkie and Greenleaf, extra volumes were added to cover numerous points of substantive law and procedure arising at trials in the shape of offers of evidence, should not lead the practitioner to consult this work for such *extraneous subjects*. The bulk of the modern law of Evidence, in the strict sense, makes their inclusion nowadays impossible. In § 2 of this work will be found a further explanation of its scope. For example, the question whether in burglary there must be "evidence" of an entering of a dwelling house at night time is a question of the substantive criminal law.

**EXPLANATORY NOTE.** — Indexed section numbers in *plain figures*, thus: 1678, mean that the matter referred to will be found in the main treatise only. If preceded by letter "s," thus: s 1678, the matter referred to will be found in both main treatise and supplemental volume. If in *italic figures*, thus: *1678*, the matter will be found in the supplemental volume only.

## A

[Figures set thus: 1678 refer to main treatise; *1678* (italics) refer to supplement; s 1678 refer to both.]

**Abbreviations;** see INITIALS.

	Section
<b>Abduction</b> , what is corroborative evidence in . . . . .	<i>note three</i> 2062
<b>Ability</b> , to do an act . . . . .	s 83-89, s 221
<b>Abortion</b> , procuring of, as evidence of paternity . . . . .	s 282
other offences, as evidence of intent . . . . .	s 359
motive for . . . . .	s 391
reputation of place of procuring . . . . .	s 391
dying declarations of woman in . . . . .	s 1432
who is accomplice in . . . . .	s 2060
what is corroborative evidence in . . . . .	<i>note three</i> 2062
marital privilege in . . . . .	s 2239
request to commit, not privileged . . . . .	<i>note two</i> s 2385
<b>Absence of entry or record</b> , how proved . . . . .	s 1230, s 1244, s 1678, s 1957, s 1978
of maker of regular entries . . . . .	s 1521, s 1561
of deponent . . . . .	s 1404
of declarant of facts against interest . . . . .	s 1456
of pedigree declarant . . . . .	s 1481
presumption of death from . . . . .	s 2531
<b>Absent Witness</b> , testimony of, based on personal observation . . . . .	670
expected testimony of, received to avoid postponement . . . . .	807, s 1398
impeached like others . . . . .	888, s 1034
testimony at a former trial; see FORMER TESTIMONY.	
effect of admission of affidavit of . . . . .	s 2595
see also WITNESS, XII.	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Abstract, of burnt records</b> . . . . .	1227, § 1267, § 1705, § 2105, 2107
not preferred to extract . . . . .	<i>note six</i> 1273
of copy, in general . . . . .	1282
<b>Abstract of Title-deeds, production of original</b> . . . . .	§ 1223
as hearsay . . . . .	§ 1705
as giving substance of deed . . . . .	§ 2105
whether preferred to oral testimony . . . . .	§ 1273
<b>Acceptance; see BILL OF EXCHANGE.</b>	
<b>Accessory; see ACCOMPLICE.</b>	
<b>Accident, cause of, as evidenced by its effects</b> . . . . .	§ 437-461
insurance against, as evidence of negligence . . . . .	§ 282, § 393, § 949, § 969
see also NEGLIGENCE; INTENT; HIGHWAY; MACHINE; PREMISES; COR-	
PORAL INJURY; RES GESTÆ.	
<b>Accomplice, as disqualified by his guilt</b> . . . . .	§ 526
as disqualified by interest . . . . .	§ 580
as impeached . . . . .	§ 967
moral character of, admissible against principal . . . . .	68
confession of principal used in trial of . . . . .	§ 1079
confession of crime by, as hearsay . . . . .	§ 1476, 1477
corroboration required . . . . .	§ 2056
policy of the rule . . . . .	§ 2057
kind of crime affected by the rule . . . . .	2058
nature of corroborative evidence required . . . . .	§ 2059
who is an accomplice . . . . .	§ 2060
in sexual crimes . . . . .	§ 2060
in abortion . . . . .	§ 2060
woman not, in rape . . . . .	§ 2060
pretended confederate as . . . . .	§ 2060
other participator in bribery or subornation not an . . . . .	<i>note one</i> § 2060
thief not, in receipt of stolen goods . . . . .	<i>note one</i> § 2060
burden of proving an . . . . .	§ 2060
restoring credit by consistent statements . . . . .	§ 1128
as affected by judgment of conviction of principal . . . . .	§ 1389
see also Co-INDICTEE.	
<b>Account, voluminous, proved by summary</b> . . . . .	§ 1230, § 1244
stated, original document in . . . . .	§ 1235
stated, as embodying an agreement . . . . .	§ 1071
assented to, as an admission . . . . .	§ 1070
rendered, as an admission . . . . .	§ 1073
<b>Account-books; see BOOKS OF ACCOUNT.</b>	
<b>Accused; see DEFENDANT.</b>	
<b>Acknowledgment of deed of married woman; see WIFE.</b>	
of deeds in general, whether certificate is conclusive . . . . .	§ 1347, § 1352
whether admissible . . . . .	§ 1676
<b>Aconite; see POISON.</b>	
<b>Act, character affecting the doing of an</b> . . . . .	55
ability to do an . . . . .	§ 83-89, § 221
done, evidenced by course of business . . . . .	92
one criminal, not evidence of another . . . . .	192
evidential facts arising before an . . . . .	§ 51-119
concurrent with an . . . . .	§ 130-144
after an . . . . .	§ 148-177
reason for an . . . . .	§ 1729
scope of term . . . . .	<i>note one</i> 1772
made voidable by duress . . . . .	§ 2423
of the Legislature; see STATUTE; LEGISLATIVE JOURNAL; RECITAL.	
see also PARTICULAR ACTS; SIMILAR ACTS; PAROL EVIDENCE RULE.	
<b>Acting, expressing testimony by</b> . . . . .	§ 789
<b>Adjournment of Court, for a view</b> . . . . .	1803

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Adjournment of Court</b> ( <i>continued</i> ).	
as affecting publicity of trial . . . . .	§ 1835
<b>Administrative</b> officer, conclusiveness of certificate of . . . . .	§ 1354
<b>Administrator</b> , admissions of . . . . .	§ 1076, § 1081
see also <b>WILL</b> ; <b>EXECUTOR</b> .	
<b>Admiralty</b> , rules of evidence applicable in . . . . .	§ 6
seal of foreign court of, presumed genuine . . . . .	§ 1681, § 2164
nautical expert witnesses not allowed in . . . . .	568
<b>Admissibility</b> , general theory of . . . . .	9, 10
distinguished from materiality . . . . .	2
relevancy . . . . .	12
proof or weight . . . . .	12
multiple, of the same fact for several purposes, although inadmissible for another . . . . .	13, 215, § 216
conditional, of a fact not yet appearing relevant . . . . .	14, 40, 304, § 1871
curative . . . . .	§ 15
judicial discretion as applied to . . . . .	§ 16
procedure on questions of . . . . .	§ 17
objection to, time and form of . . . . .	§ 18
judge to determine . . . . .	§ 2550
external conditions as affecting . . . . .	442
<b>Admissions of a Party</b>	
1. <i>Whether admissible</i>	
2. <i>Whether sufficient</i>	
3. <i>Sundries</i>	
1. <i>Whether admissible</i>	
general theory . . . . .	§ 1048-1058
not necessarily against interest . . . . .	§ 1048, § 1049
distinguished from hearsay exception . . . . .	816, § 1049
confessions . . . . .	816, 1050
testimonial contradiction . . . . .	§ 1051
conduct indicating guilt . . . . .	1052
estoppel . . . . .	§ 1056, § 1058, 2589
death not necessary . . . . .	§ 1049
distinction between arbitration and . . . . .	§ 1056
quasi and solemn . . . . .	1057
under duress . . . . .	1050
receipt as . . . . .	156
prior question not necessary . . . . .	§ 1051
cannot be by conduct . . . . .	267, 1052
personal knowledge; infants . . . . .	§ 1053
— as insufficient proof . . . . .	§ 1055
made to third persons . . . . .	§ 1056
— not conclusive . . . . .	§ 1058, 2588, § 2590
putting in the whole . . . . .	§ 1058, § 2097, § 2099
— implied admissions . . . . .	267, § 1060
offer of compromise . . . . .	§ 1061
in pleadings . . . . .	§ 1063, § 1067
limitations on admissions by attorney . . . . .	§ 1063
bills and answers in equity . . . . .	1065, § 1076
by reference to a third person . . . . .	§ 1070
by assenting to an account . . . . .	§ 1070
by flight, concealment, etc. . . . .	§ 273-284
by silence in general . . . . .	292, 1052, § 1071
silence in specific situations . . . . .	§ 1072
collateral facts involved in party's silence . . . . .	§ 1072
by failure to produce evidence . . . . .	§ 285-292
to reply to a letter . . . . .	§ 1073
of sending or receiving letters . . . . .	note one § 2153

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678—refer to both.]  
Section

## Admissions of a Party (continued).

by rendering an account . . . . .	1073
in a third person's document . . . . .	§ 1073
corporation books . . . . .	§ 1074, § 1076
affidavits and depositions used . . . . .	§ 1075
by adopting statement of third person . . . . .	§ 1075
husband or wife . . . . .	§ 1078, § 1086, § 2232
other parties to the cause . . . . .	§ 1076
administrator . . . . .	§ 1076, § 1081
injured person . . . . .	§ 1076
co-defendant, etc. . . . .	§ 1076
guardian . . . . .	1076
guardian <i>ad litem</i> . . . . .	1063
privies in obligation . . . . .	§ 1077, 1079
joint promisor . . . . .	§ 1077
agent . . . . .	§ 1078, 1797
partner . . . . .	§ 1078
attorney . . . . .	§ 1078
deputy-sheriff . . . . .	§ 1078
interpreter . . . . .	§ 1078
spouse . . . . .	§ 1078
co-conspirator . . . . .	§ 1079, 1797
joint tortfeasor . . . . .	§ 1079
privies in title . . . . .	§ 1080-1087
decedent . . . . .	§ 1081
insurer as real plaintiff . . . . .	<i>note six</i> 1081
insured . . . . .	§ 1081
bankrupt . . . . .	§ 1081
co-legatee . . . . .	§ 1081
co-executor . . . . .	§ 1081
grantor . . . . .	§ 1082-1087
assignor . . . . .	§ 1082-1087
indorser . . . . .	§ 1082-1087
transfers in fraud of creditors . . . . .	§ 1082-1087
after transfer . . . . .	§ 1085
as assignor of chose in action . . . . .	§ 1082
to bill of exchange . . . . .	1084
vendor of personality, under New York rule . . . . .	§ 1083
Massachusetts rule . . . . .	§ 1083
as applied to negotiable instruments . . . . .	1084
producing the original of a document admitted correct . . . . .	§ 1235, 1255
books of bank as . . . . .	§ 1235
assessor's books as . . . . .	§ 1640
after delivery, in advancement to a child . . . . .	<i>note three</i> 1777
made during possession of land . . . . .	§ 1778, § 1779
on cross-examination as to "understanding" . . . . .	<i>note two</i> § 1969
2. <i>Whether sufficient</i> . . . . .	
loss of a document . . . . .	1054, § 1196
contents of a document . . . . .	1054, 1255
by failure to object to document . . . . .	<i>note twenty-seven</i> 18
dispensing with the attesting witness . . . . .	§ 1300
specimens of handwriting . . . . .	2013, § 2021
divorce charge . . . . .	§ 2067
accused in general . . . . .	816, 2070
bigamy, adultery, etc. . . . .	§ 2086
of marriage, in civil cases . . . . .	§ 2086
execution of a document . . . . .	§ 2132, § 2596
3. <i>Sundries</i> . . . . .	
distinguished from estoppel, etc. . . . .	§ 1056, § 1058, 2589

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

Section

### Admissions of a Party (*continued*).

hypothetical . . . . .	§ 1061
independent, of a fact . . . . .	§ 1062
by another not a party . . . . .	§ 1069 <i>et seq.</i>
before grand jury, not privileged . . . . .	§ 2363
interpreter as agent to make . . . . .	668, § 1077
of genuineness of a writing, as qualifying a witness . . . . .	700
by plea of guilty, admissible in a civil case . . . . .	§ 815
distinguished from confessions . . . . .	816
from judicial admissions . . . . .	2588
of agent, as <i>res gestæ</i> . . . . .	1797
by predecessor in title . . . . .	336
of a third person, as to facts against interest . . . . .	§ 1458
in a party's books of account . . . . .	§ 1557
marriage certificate as . . . . .	§ 1645
of execution of recorded deed . . . . .	§ 1653
of a trust in Texas, two witnesses . . . . .	§ 2054
decedent's oral, not sufficient to establish claim against his estate . . . . .	<i>note four</i> 2054
meaning of, may be explained . . . . .	1972
whole must be proved . . . . .	§ 2097, § 2098, § 2099
may be proved . . . . .	§ 2115, § 2119
answer in equality used as . . . . .	1065, 1076, 2121, § 2122
separate utterances excluded . . . . .	§ 2119
by express stipulation; see JUDICIAL ADMISSION.	

[Examine analysis of "Admissions," Vol. II, p. 1216.]

### Adoption of child; see FAMILY HISTORY.

of statement, as an admission . . . . .	§ 1075
---	--------

### Adultery, character of third person as evidence . . . . .

intercourse with third persons, as evidencing paternity . . . . .	§ 68
on charge of, previous acts with others immaterial . . . . .	§ 133, 134
venereal disease, as evidence of . . . . .	<i>note six</i> § 205
plan, as evidence of . . . . .	§ 168
sexual desire as evidencing . . . . .	§ 238, <i>note one</i> 239
other offences, as evidence of intent or motive . . . . .	400
privilege, husband or wife . . . . .	360, § 398
against self-crimination in . . . . .	§ 2235, § 2239
proof beyond a reasonable doubt . . . . .	§ 2257
who is accomplice in . . . . .	§ 2498
confession of respondent in . . . . .	§ 2060
eye-witness of marriage in . . . . .	§ 2067, 2074
admissions in . . . . .	§ 2085, § 2086
marriage celebrant's certificate not preferred to eye-witness . . . . .	§ 2086
during period of gestation inadmissible . . . . .	§ 2088

### Advancement to Child, shown by words accompanying transfer . . . . .

declarations after delivery, as admission . . . . .	<i>note three</i> 2527
parole evidence to rebut presumed intent . . . . .	§ 1777
presumption of . . . . .	§ 2475
	§ 2526

### Adverse Possession; see POSSESSION.

### Advertisement, in newspaper, as evidencing knowledge . . . . . § 255

see also NOTICE.

### Affection; see CRIMINAL CONVERSATION; ALIENATION OF AFFECTIONS; MENTAL CONDITION, STATEMENTS OF; BREACH OF PROMISE.

<b>Affidavit</b> , in interlocutory proceedings . . . . .	§ 4
whether <i>lex fori</i> is applicable to the taking of . . . . .	§ 5
satisfies witness-rule as to number . . . . .	1305
excluded at common law . . . . .	§ 1384, 1708
exceptions . . . . .	1709
admissible by statute . . . . .	§ 1710
of a third person, as an admission . . . . .	§ 1075

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

### Affidavit (*continued*).

Section

of common source of title . . . . .	§ 1385
of attesting witness to will . . . . .	§ 1312
of party, to loss of document . . . . .	§ 1196
filed original, required . . . . .	1216
jurat as evidence of . . . . .	§ 1676
of juror impeaching verdict . . . . .	2348
of absent witness' testimony admitted . . . . .	§ 2595
of denial of document's genuineness . . . . .	§ 2596
presumed genuine, in official files . . . . .	§ 2158
from identity of name . . . . .	§ 2529

**Affirmation;** see OATH.

### Against Interest, statements of facts

admissions not necessarily . . . . .	§ 1048, § 1049
exception to the Hearsay rule . . . . .	1455
witness unavailable from death, absence, insanity . . . . .	§ 1456
receipt for money . . . . .	§ 1456, § 1460
admissions of third persons . . . . .	§ 1458
proprietary interest . . . . .	§ 1458
landlord and tenant . . . . .	1473
pecuniary interest . . . . .	§ 1460
indorsements, receipts . . . . .	§ 1460, § 1466
sundry interests . . . . .	§ 1461-1463
the fact, not statement, to be . . . . .	1462
penal interest; confession of crime . . . . .	§ 1476
no motive to misrepresent . . . . .	§ 1464
debit and credit entries . . . . .	§ 1464
subsequent and separate entries excluded . . . . .	§ 1465
statement, admissible for <i>all</i> facts stated . . . . .	§ 1465
time of statement . . . . .	§ 1466, 1467
mode of proof . . . . .	1468, 1469
statement, may be oral or written . . . . .	1469
death or absence of declarant . . . . .	§ 1456
testimonial qualifications of declarant . . . . .	1471
authentication of statement . . . . .	1472
distinction between statements, admissions, and confessions . . . . .	1475

[Examine analysis of "Statements of Facts against Interest," Vol. II, p. 1820.]

<b>Age, as affecting an infant's disqualification . . . . .</b>	<b>§ 506</b>
as evidenced by appearance . . . . .	222, § 257, § 660, § 1154, § 1168
of a witness, as impeaching him . . . . .	§ 934, <i>note six</i> 1005
of defendant may be part of <i>corpus delicti</i> . . . . .	<i>note five</i> 2072
of a person incapable of child-bearing . . . . .	§ 2528
of a document; see EXECUTION OF DOCUMENTS.	
as excusing absence of attesting witness . . . . .	1315
of deponent . . . . .	1406
statement of age, as hearsay; see FAMILY HISTORY.	
testimony to one's own . . . . .	§ 667
<b>Aged Witness, deposition may be taken . . . . .</b>	<b>1406</b>
<b>Age of Consent in rape, consent immaterial . . . . .</b>	<b>402</b>
appearance, to evidence . . . . .	§ 1154
woman not accomplice, in rape under . . . . .	§ 2060
<b>Agency, course of business in, as evidence of a transaction . . . . .</b>	<b>94, 372, § 377, 379</b>
admission of, by silence . . . . .	<i>note eleven</i> 1072
proof of, without producing instrument . . . . .	§ 1249
words accompanying acts to determine . . . . .	§ 1777
opinion testimony to . . . . .	§ 1960
no presumption of authority upon proof of signature . . . . .	<i>note one</i> 2134
proof of authority to execute ancient deed . . . . .	2144

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

Section

### **Agency** (*continued*).

presumption of continuance of . . . . . § 2530  
see also AGENT.

### **Agent, fraud by, as evidence of party's guilt** . . . . . § 280

disqualification of opponent as witness to a transaction with a deceased . . . . . § 578,  
§ 1576, § 2065

wife or husband testifying to acts as agent . . . . . § 616

offer of compromise by . . . . . § 1061

admissions by, in general . . . . . § 1078

as *res gestæ* . . . . . 1797

notice to produce to . . . . . § 1208

words accompanying acts as . . . . . § 1777

privileged communications of . . . . . 2301, § 2317

parol agreement to hold only as . . . . . § 2438

personal liability of one who signs as . . . . . § 2444

authority to execute not presumed . . . . . § 2520

see also AGENCY.

### **Agreement, collateral, shown by parol** . . . . . 2435, note one § 2441, § 2442

novation, alteration, waiver . . . . . § 2441

subsequent agreements . . . . . § 2441

affecting express terms of document . . . . . § 2444

affecting implied terms of document . . . . . § 2445

see also CONTRACT; ASSENT; DOCUMENT; PAROL EVIDENCE RULE; COL-  
LATERAL AGREEMENTS.

### **Alcohol; see LIQUOR.**

### **Alibi, mode of evidencing** . . . . . 136

in civil cases . . . . . 136

perjury or subornation in proving . . . . . § 279

failure to prove, as evidence of guilt . . . . . § 279

burden of proof of . . . . . § 2512

### **Alien, disqualification as a witness** . . . . . § 516

necessity of interpreter . . . . . § 811

qualifications of interpreter . . . . . § 571

credibility impeached by showing his acquaintance with the language of the  
forum . . . . . 1005

by his race . . . . . 936

conclusiveness of immigration-inspector's certificate . . . . . § 1354

adequacy of cross-examination in foreign language . . . . . § 1393

see also RACE; INTERPRETER; OATH.

### **Alienation of Affections, expressions of husband or wife showing feelings** . . . . . § 1730

character of wife, as cause for cessation of affection in . . . . . § 391

marital privilege in . . . . . § 2239

see also CRIMINAL CONVERSATION.

### **Allegans suam turpitudinem, as excluding testimony** . . . . . § 525-531

### **Almanac, used in evidence** . . . . . § 1698

judicially noticed . . . . . 2566

### **Alteration, of entries, fraudulent intent in; see FRAUD.**

expert witness to . . . . . § 570, 2027

shown by parol . . . . . § 2441, § 2455

as avoiding an instrument . . . . . 1198

liability on altered document . . . . . 2419

affecting liability of signer . . . . . note two 2134

time of, presumed . . . . . § 2525

### **Ambiguity in a document** . . . . . § 2472

latent, in a will . . . . . note two § 2471, § 2472

### **Ambiguous Question; see QUESTION TO A WITNESS.**

### **Ambassador, deposition of** . . . . . § 1384, 1407

privilege of . . . . . 2372

### **Amendment; see FOURTH AMENDMENT.**

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Analytic Rules</b> defined . . . . .	1172
<b>Ancestors</b> , insanity of, as evidence . . . . .	§ 232
expectation of life evidenced by long life of . . . . .	<i>note two</i> 223
declarations of, as evidence; see <b>FAMILY HISTORY</b> ; <b>ADMISSIONS</b> .	
<b>Ancient Boundary</b> ; see <b>BOUNDARIES</b> .	
<b>Ancient Document</b> , as evidence of possession of land . . . . .	§ 157
calling the attesting witness to . . . . .	§ 1311
lost original . . . . .	§ 2143
proof of genuineness; see <b>EXECUTION OF DOCUMENTS</b> .	
<b>Ancient Writings</b> ; see <b>WRITING</b> .	
<b>Animal</b> , character of, as evidence . . . . .	§ 68, § 201, § 1621
trespass of another, as evidence . . . . .	142
brands on, as evidence . . . . .	§ 150, § 1647, § 2152
conduct of, as evidence of ownership or crime . . . . .	§ 177, § 1154
as evidence of the animal's disposition . . . . .	§ 201
bloodhound in tracking accused . . . . .	§ 177
precautions taken with, to show knowledge of viciousness . . . . .	§ 282
symptoms of injury, etc., as evidence of cause . . . . .	§ 457
fright of, as evidence of dangerous object . . . . .	§ 461
cruelty of treatment, as affected by other like methods . . . . .	§ 461
proof of owner's knowledge of viciousness . . . . .	§ 251, § 282
injuries to, as evidencing a highway defect . . . . .	§ 458
condition at other times, as evidence . . . . .	§ 437
produced before the jury . . . . .	§ 1154, § 1161
disposition or pedigree of, evidenced by reputation . . . . .	§ 1621
corporal traits of, to evidence pedigree . . . . .	<i>note one</i> 167
state of mind of, Alabama doctrine . . . . .	<i>note one</i> 1966
printed stock-book, to prove pedigree . . . . .	§ 1706
personal knowledge, to evidence disposition . . . . .	<i>note four</i> 1984
value of; see <b>VALUE</b> .	
<b>Anonymous crimes</b> , as evidence of intent . . . . .	303
<b>Answer of Witness</b> , to a leading question . . . . .	§ 772
non-responsive . . . . .	§ 785, § 1392
prepared beforehand, in a deposition . . . . .	787
by reference to other testimony . . . . .	787
see also <b>QUESTION</b> ; <b>EXAMINATION</b> ; <b>OBJECTION</b> .	
<b>Answer in Chancery</b> , as a party's admission . . . . .	1065, § 1076, 2121, § 2122
original's production not required . . . . .	§ 1215, 1216
giving discovery, scope of; see <b>DISCOVERY</b> .	
proof of bill and answer together . . . . .	2111
responsive parts are evidence . . . . .	2121
New York rule . . . . .	§ 2123
presumed genuine, in official files . . . . .	§ 2158
from identity of name . . . . .	§ 2529
<b>Apparatus</b> , possession of, as evidence of a crime . . . . .	88, § 238
defects of, as evidence of negligence . . . . .	§ 441-461
<b>Appeal</b> , evidence excluded because not transmissible on . . . . .	§ 1168
on interlocutory judicial order . . . . .	<i>note six</i> 2270
record of preliminary probate, not evidence on . . . . .	1668
<b>Appearance</b>	
as evidence of age . . . . .	222, § 257, § 660, § 1154, § 1168
intoxication . . . . .	§ 235, § 660, § 1154
competence as workman . . . . .	§ 1154
health . . . . .	§ 223
identity . . . . .	§ 660, § 1154
lunacy . . . . .	§ 1154, 1160
paternity . . . . .	§ 1168
of wound, to indicate distance of assailant . . . . .	§ 457
as affected by opinion rule . . . . .	§ 1974

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

**Appliances**; see MACHINE.

**Appointment**, to office, production of original. . . . . 1228  
of officer, presumed . . . . . § 2535

**Appraiser**, report of an . . . . . § 1672

**Approval** of bill by governor, whether journals of legislature can be used to prove  
1350

**Arbitration**, distinguished from an admission . . . . . § 1056

**Arbitrator**, former testimony before, whether admissible . . . . . § 1373

award in another cause, as reputation . . . . . 1594

as a witness . . . . . 1912

not to impeach award . . . . . § 2358

misconduct of, to invalidate award . . . . . § 2358

distinction between general and special submissions . . . . . *note one* § 358

**Argument**, distinguished from evidence . . . . . 1, 1806

form of, is inductive . . . . . 30

practical requirements of the . . . . . 31

case stated for . . . . . § 1066

improper statements by counsel in . . . . . 1806

offering evidence after argument begun . . . . . § 1878

**Arrest**, belief of officer as to probable cause . . . . . § 258

conduct under, as evidence of guilt . . . . . § 273, § 1072

resistance to, as evidence of guilt . . . . . § 276

submission to, as evidence of innocence . . . . . § 293

confession made under . . . . . § 851

impeachment of a witness by . . . . . § 980, 982

silence under, as an admission . . . . . § 1072

immunity of witness from . . . . . § 2195

**Arsenic**; see POISON.

**Arson**, threats as evidence of . . . . . § 105-109

materials and tools, as evidence of . . . . . § 149, § 238

other offences, as evidence of intent . . . . . § 354

motive for, as shown by circumstances . . . . . § 391, § 392

as shown by conduct . . . . . *note five* § 396

proof beyond reasonable doubt, in insurance . . . . . § 2498

see also INSURANCE.

**Assault**, similar acts to show intent in . . . . . § 364, 396

see also RAPE; INDECENT ASSAULT; HOMICIDE.

**Assent**, shown by parol evidence; see PAROL EVIDENCE RULE.

see also CONTRACT.

**Assessment**, privilege against disclosure of . . . . . § 2374

**Assessor's Books**, production of original . . . . . § 1240

admissible as official records or as admissions . . . . . § 1640

admissible to prove occupancy . . . . . § 1640

ownership . . . . . § 1640

property value . . . . . § 1640

lack of property . . . . . § 1640

by statute . . . . . *note nine* § 1640

copy of whole required . . . . . § 2109

**Assignee** in bankruptcy; see BANKRUPT.

**Assignment**, of patent of invention . . . . . § 1226

record of . . . . . § 1657

**Assignor**, admissions of, against assignee . . . . . § 1082

see also VENDOR.

**Assumpsit**; see CONTRACT; BILL OF EXCHANGE; LOAN; NOTE.

**Asylum**; see SANITY.

**Atheism**; see RELIGIOUS BELIEF; WITNESS.

**Attachment**, debtor's admissions made after attachment; see ADMISSIONS.

**Attendance** as witness; see WITNESS, IX.

**Attested Copy**; see CERTIFIED COPY.

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]  
Section

### Attesting Witness

1. *Rule requiring attesting witness to be called*
  2. *Rule permitting attestation to be evidence*
  3. *Sundries*
1. *Rule requiring attesting witness to be called*
    - history of the rule . . . . . 1287
    - kind of document . . . . . § 1290
    - document collaterally in issue . . . . . 1291
    - who is an attesting witness . . . . . § 1292
    - official signature is not of . . . . . § 1292
    - signing subsequent to execution . . . . . § 1292
    - document used for others . . . . . 1293
    - execution not disputable because of estoppel, admission, etc. . . . . § 1294-1298
    - attester preferred to maker . . . . . § 1299
    - attester preferred to admissions . . . . . § 1300
    - to opponent's testimony . . . . . 1301
    - attestor denying or not recollecting . . . . . § 1302, § 1303
    - other witnesses not excluded . . . . . § 1302, § 1303
    - Illinois rule admitting only, in probate . . . . . § 1303
    - number of attestors required to be called . . . . . § 1304, 2049
    - affidavit or deposition satisfies witness-rule . . . . . 1305
    - number of signatures to be proved
      - of attestors . . . . . 1306
      - of maker . . . . . § 1320
      - proof of signature dispensed with . . . . . 1321
    - excuses for not calling the attester . . . . . 1308, 1319
      - death . . . . . § 1311
      - ancient document . . . . . § 1311, § 2138
      - absence from jurisdiction . . . . . § 1312
      - proponent's knowledge of intended absence of . . . . . § 1312
      - effort to secure deposition of absent . . . . . § 1312
      - inability to find . . . . . § 1313
      - name unknown . . . . . 1314
      - age . . . . . 1315
      - illness . . . . . 1315
      - imprisonment . . . . . 1315
      - loss of memory . . . . . 1315
      - incompetence by interest, etc. . . . . § 1316
      - production of, excused for blindness . . . . . § 1316
      - refusal to testify . . . . . 1317
      - privilege from testifying . . . . . 1317
      - copy of recorded document . . . . . 1318
  2. *Rule permitting attestation to be evidence*
    - exception to the Hearsay rule . . . . . 1505
    - attester must be deceased, etc. . . . . 1506
    - who is an attester . . . . . 1509, § 1510
    - must be competent at time of attestation . . . . . § 582, § 1510
    - implied purport of attestation . . . . . § 1511, § 1512
    - proof of maker's signature also . . . . . 1513
    - attester may be impeached or supported . . . . . 1514
    - using the depositions given at preliminary probate . . . . . § 1417
    - prima facie* effect of . . . . . note two § 2500
  - B. *Sundries*
    - disqualified by confession of falsehood . . . . . § 528
      - by interest . . . . . 583
    - testifying without recollection . . . . . § 747
    - may be impeached by proponent . . . . . 917
      - by self-contradiction . . . . . § 1033
    - illiterate person as, by his mark . . . . . 1292

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]  
Section

### **Attesting Witness (continued).**

opinion to sanity . . . . .	1936
privilege of attorney, as attester . . . . . § 2315, §	2329
of physician . . . . .	§ 2390
parol evidence to explain signature of . . . . .	§ 2406
attestation as a required formality . . . . .	2456

[Examine analysis of "Preference for an Attesting Witness," Vol. II,  
p. 1564.]

<b>Attorney, testimony to value of services of . . . . .</b>	<b>§ 715, note one § 1944</b>
improper consultation with witness before trial . . . . .	788
offer of compromise by . . . . .	§ 1061
pleading drafted by, as an admission . . . . .	§ 1063, § 1067
admissions by, in general . . . . .	§ 1063, § 1078
judicial admissions . . . . .	2594
competency as a witness . . . . .	§ 1911
notes of testimony taken by . . . . .	§ 1669
consultation with sequestered witness . . . . .	§ 1840
exclusion from court while a witness . . . . .	§ 1841
going over to service of opponent, restrained . . . . .	note two 2323
statement of, that matter is privileged . . . . .	note three 2322
office of, judicially noticed . . . . .	§ 2578
power of; see AGENCY.	
privilege of, as attesting witness . . . . .	§ 2315, § 2329
privileged communications of; see ATTORNEY AND CLIENT.	
see also COUNSEL.	

### **Attorney and Client, Communications between,**

history and policy of the privilege . . . . .	2290, 2291
statutes . . . . .	§ 2292
irrespective of litigation . . . . .	2294
non-legal purposes . . . . .	§ 2296
prosecuting attorneys . . . . .	§ 2296
conveyancing . . . . .	§ 2297
wills . . . . .	§ 2297
criminal transaction . . . . .	2298
protects past but not future wrongdoing . . . . .	2298
persons not attorneys . . . . .	§ 2300
attorneys' clerks and agents . . . . .	2301
client's belief . . . . .	2302
attorney as a friend . . . . .	§ 2303
casual consultation . . . . .	§ 2303
time of consultation . . . . .	§ 2304
communications made during negotiation of relation . . . . .	§ 2304
communications, not conduct . . . . .	§ 2306
documents . . . . .	§ 2307-2309, 2318
distinction between pre-existing and subsequently drawn documents . . . . .	§ 2307
production of documents . . . . .	§ 2307
contents of pre-existing document . . . . .	2308
signing of note or receipt, not privileged . . . . .	§ 2309
relevancy of communication . . . . .	§ 2310
separation of privileged from unprivileged . . . . .	note one § 2310
confidential nature . . . . .	§ 2311
third person present . . . . .	§ 2311
joint attorney; opponent's presence . . . . .	§ 2312
identity of client . . . . .	§ 2313
purpose of suit . . . . .	§ 2313
execution and contents of will or deed . . . . .	§ 2314
temporary confidentiality . . . . .	§ 2314
attorney as attesting witness . . . . .	§ 2315
question of fact, who is the client . . . . .	note one § 2317

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]  
Section

### **Attorney and Client, Communications between (continued).**

if through interpreter is privileged . . . . .	note two 2317
communications by third persons . . . . .	§ 2317
client's agents . . . . .	§ 2317
client's documents . . . . .	2318
reports by medical agent . . . . .	note one § 2319
reports of accidents . . . . .	note one § 2319
depositions for purpose of litigation . . . . .	note one § 2319
short-hand notes . . . . .	note one § 2319
attorney's communications . . . . .	2320
privilege is the client's . . . . .	2321
who may claim . . . . .	2321
inference from claim . . . . .	2322
attorney's statement that matter is privileged . . . . .	note three 2322

### **Attorney and Client, Communications between (continued).**

termination of client's relation . . . . .	2323
indirect disclosure by attorney . . . . .	§ 2325
third person overhearing . . . . .	§ 2326
waiver by testifying . . . . .	§ 2327
by agent or assignee . . . . .	§ 2328
by deceased client's representative . . . . .	§ 2329
[Examine analysis of "Communications between Attorney and Client," Vol. IV, p. 3193.]	

Auctioneer, statement of, varying printed catalogue . . . . .	note one 2442
---	---------------

Auditor, findings of an . . . . .	§ 1672
-----------------------------------	--------

Authentic Acts, in Louisiana law, evidence of . . . . .	1352
---	------

**Authentication of a document; see EXECUTION; CERTIFIED COPY.**

**Authority as agent; see AGENCY.**

opinion testimony to . . . . .	§ 1960
person in, obtaining a confession; see CONFESSION.	
to certify copy . . . . .	1677
of officer, presumed . . . . .	§ 2535
judicially noticed . . . . .	2576

Author, shown to be an authority . . . . .	1694
--	------

Authorship, of letter, evidenced by faulty impression of typewriter . . . . .	note one 149
---	--------------

receipt of letter, as evidence of . . . . .	§ 2519
---	--------

individuality of expression, to show, in anonymous letter . . . . .	note three 87
traits of spelling, as evidence of . . . . .	99

Automobile, by statute, tag <i>prima facie</i> evidence of ownership and operation . . . . .	note four 160
--	---------------

chauffeur's statement of own responsibility admitted . . . . .	note two 1041
driver of, compellable to disclose name, etc . . . . .	2264

Autopsy, of corpse, to obtain evidence, . . . . .	1862, 2194, 2220
---	------------------

**Autoptic Preference; see REAL EVIDENCE.**

Average, impeaching a verdict determined by . . . . .	§ 2354
---	--------

**Award; see ARBITRATOR.**

## B

Ballee, loss by, presumed negligent . . . . .	§ 2508
speedy complaint by, of robbery . . . . .	1142
document deposited with, as original . . . . .	1231, § 1235

Ballot, production of original . . . . .	§ 1240
--	--------

disclosure of, privileged . . . . .	§ 2215
-------------------------------------	--------

destruction of, unopened . . . . .	§ 2215
------------------------------------	--------

mistake shown by parol . . . . .	§ 2421
----------------------------------	--------

must be in writing . . . . .	§ 2452
------------------------------	--------

Bank, books of, original required . . . . .	§ 1223
---	--------

books of, as an admission . . . . .	§ 1235
-------------------------------------	--------

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

Section

## Bank (*continued*).

- incorporation of, proved by repute . . . . . § 1625
- attested copy admitted . . . . . § 1683, § 1710
- see also BOOKS OF ACCOUNT.
- Bank-note**, forgery of, as evidence of intent . . . . . § 318
- expert witness to, qualifications of . . . . . § 570, 705
- person whose name is forged, not a preferred witness . . . . . § 1339
- Bank-officer**, as an expert witness to genuineness of notes . . . . . § 570
- not a preferred witness . . . . . § 1339
- prima facie* evidence of knowledge of insolvency . . . . . § 1354
- communications to, not privileged . . . . . § 2286
- Bankrupt**, admissions of . . . . . § 1081, § 1082, § 1086
- answer "not in," at residence, as act of bankruptcy . . . . . *note eight* 1770
- declarations of intent by . . . . . 1728, 1783
- privilege of husband or wife of . . . . . § 2235
- against self-crimination by . . . . . § 2257, § 2260, *note five* § 2282
- Barrator**, other acts, to evidence a common . . . . . § 203
- Bastardy**, third person's character, as evidence . . . . . § 68
- third person's intercourse, as evidence . . . . . § 133
- resemblance of child, as evidence of paternity . . . . . § 166, § 1154, § 1168
- notorious reputation of putative father's recognition . . . . . § 70, *note three* 1605
- procurement of abortion, as evidence of paternity . . . . . § 282
- sexual desire as evidencing . . . . . 401
- prior intercourse, as evidence of motive . . . . . § 398
- mother's complaint in travail . . . . . § 1141, 1763
- uncorroborated complainant in . . . . . § 2061
- using the mother's examination . . . . . § 1417
- family hearsay as evidence . . . . . § 1492
- parent's testimony to . . . . . § 2063
- proof beyond a reasonable doubt . . . . . § 2498
- presumption of legitimacy in . . . . . § 2527
- see also FATHER; LEGITIMACY; MOTHER.
- Battery**, plaintiff's reputed good character in . . . . . *note one* 76
- see also HOMICIDE; SCHOOLMASTER.
- Beer**, meaning of, judicially noticed . . . . . § 2582
- Belief**, testifying to one's own belief or intent . . . . . § 581
- belief as distinguished from knowledge . . . . . 658
- testifying to another person's belief or intent . . . . . § 661
- belief in genuineness of handwriting . . . . . 698
- belief or impression, as showing sufficient memory . . . . . 726
- conduct and circumstances as evidence of; see KNOWLEDGE.
- Belladonna**; see POISON.
- Beneficiary** of insurance; see INSURANCE.
- Best Evidence**, history and meaning . . . . . 1173-1175, 1286
- rule for producing originals; see ORIGINAL DOCUMENT.
- rule for attesting witness; see ATTESTING WITNESS.
- rule against hearsay; see HEARSAY RULE.
- official documents as best evidence . . . . . § 1335
- Bias**, securing experts without . . . . . § 562
- former hostility to show . . . . . 396
- impeaching one's own witness by proof of . . . . . § 901
- instruction to jury on witness' . . . . . *note one* 940
- mode of evidencing, in general . . . . . § 943-948
- witness may state whether he has . . . . . 940, *note three* 948, § 1963
- effect of witness admitting . . . . . *note three* 948
- relationship, employment, etc. . . . . § 949, § 969
- evidenced by pecuniary relations . . . . . *note three* 949
- detective impeached for . . . . . § 949, § 969
- expressions and conduct . . . . . § 950, § 1730

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italica*) refer to supplement; § 1678 refer to both.]

	Section
<b>Bias, details of a quarrel</b> . . . . .	§ 951
preliminary inquiry . . . . .	§ 953
contradiction by other witnesses . . . . .	§ 1005, § 1022
restoring credit by consistent statements . . . . .	§ 1128
excluding evidence for possible . . . . .	1484
see also <b>INTEREST; CORRUPTION.</b>	
<b>Bible, as evidence of pedigree; see FAMILY HISTORY.</b>	
<b>Bigamy, other offences, as evidence of intent or motive</b> . . . . .	360, § 398
disqualifying the wife as witness . . . . .	§ 605
reputation evidence insufficient to prove . . . . .	§ 1604
eye-witness of marriage required . . . . .	§ 1604, § 2085
admissions of defendant sufficient . . . . .	§ 2086
marriage celebrant's certificate not preferred to eye-witness . . . . .	§ 2088
proof by husband or wife, privileged . . . . .	§ 2231
valid marriage presumed . . . . .	§ 2506
<b>Bilateral Acts; see PAROL EVIDENCE RULE, B.</b>	
<b>Bill in Chancery, as a party's admission</b> . . . . .	1065
must be read with the answer . . . . .	2111
see also <b>CHANCERY.</b>	
<b>Bill of Discovery; see DISCOVERY.</b>	
<b>Bill of Exceptions, must exhibit grounds of objection</b> . . . . .	§ 17, § 18
as evidence of former testimony . . . . .	1668
<b>Bill of Exchange, evidence of forgery of; see FORGERY.</b>	
authority to accept, other transactions as evidence of . . . . .	§ 377
impeaching one's own instrument . . . . .	529
admission of parties to . . . . .	1084
production of original; see <b>ORIGINAL DOCUMENT.</b>	
indorsement on, as statement against interest . . . . .	§ 1460, § 1466
delivery in escrow, shown by parol . . . . .	§ 2409, § 2420
collateral agreement, shown by parol . . . . .	§ 2443-2445
signed by mistake . . . . .	§ 2415-2419
parol acceptance . . . . .	§ 2451
presumption of title from possession of . . . . .	§ 2516
of payment . . . . .	§ 2517, § 2518
protest of, as evidence; see <b>NOTARY.</b>	
<b>Bill of Lading, assent presumed</b> . . . . .	§ 2537
shown by parol . . . . .	§ 2415
terms varied by parol . . . . .	§ 2432
presumption of excepted loss in . . . . .	§ 2509, note two 2537
see also <b>CONTRACT.</b>	
<b>Bill of Legislature; see STATUTE; LEGISLATIVE JOURNAL.</b>	
<b>Bill of Particulars, to avoid unfair surprise</b> . . . . .	1848
<b>Birth, register of; see REGISTER OF MARRIAGE, BIRTH, AND DEATH.</b>	
date of; see <b>AGE.</b>	
declaration of, by deceased person; see <b>FAMILY HISTORY.</b>	
reputation of . . . . .	§ 1605
see also <b>RACE.</b>	
<b>Birthmark, as evidence of events in pregnancy</b> . . . . .	§ 168
<b>Black; see RACE.</b>	
<b>Blackmail, impeaching a witness by evidence of</b> . . . . .	§ 963
other offences as evidence of intent . . . . .	352
<b>Blank, delivery of document having a</b> . . . . .	§ 2410, 2419
interpretation of a . . . . .	§ 2473
indorsement in . . . . .	§ 2445
<b>Blindness, as disqualifying a witness</b> . . . . .	§ 500
as excusing production of attesting witness . . . . .	§ 1316
as needing an interpreter . . . . .	§ 811, 1393
<b>Blockade by belligerent, evidence of intent to evade</b> . . . . .	§ 367
<b>Blood, witness' experience with, as qualifying him.</b> . . . .	§ 568

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
Blood, opinion testimony to . . . . .	§ 1975, § 1977
explaining away traces of . . . . .	34, § 149
absence of, stains . . . . .	§ 149
Bloodhound, use of, in tracking an accused . . . . .	§ 177
character or conduct of; see DOG; ANIMAL.	
Blotter-press copies, as originals . . . . .	§ 1234
Bodily Injury; see CORPORAL INJURY.	
Body, inspection of . . . . .	1155, § 1158, § 2194, 2216, § 2220, § 2265
Bona Fides; see KNOWLEDGE; MOTIVE; INTENT.	
Bond, proof of execution of; see EXECUTION OF DOCUMENT.	
as impeaching the obligor-witness . . . . .	§ 969
production of original; see ORIGINAL DOCUMENT.	
as part of the court files . . . . .	§ 1215
indorsement on, as statement against interest . . . . .	§ 1460, § 1466
Bookkeeper, entries of; see REGULAR ENTRIES.	
aiding recollection by entries; see RECOLLECTION.	
Books of science, used in evidence . . . . .	§ 1690-1700
of election as evidence . . . . .	§ 1640
of history, used in evidence . . . . .	1597, 1690, 1699
of partnership presumed correct . . . . .	<i>note two</i> 2537
see also DOCUMENT; BOOKS OF ACCOUNT; PRINTED MATTER; LEARNED TREATISES.	
Books of Account, wife of party as witness to . . . . .	§ 612
used to aid recollection; see RECOLLECTION.	
of a bank, original required . . . . .	§ 1223
of parties or deceased persons, as hearsay; see REGULAR ENTRIES.	
distinguished from records of corporation . . . . .	1661
of a corporation or partnership, as admissions . . . . .	§ 1074, § 1557
production of original . . . . .	§ 1223
offered by surviving party against deceased opponent . . . . .	§ 1554
use of, by representative of deceased party, not a waiver to opponent's testimony . . . . .	§ 1554
admissions in, to impeach evidence . . . . .	§ 1557
parol evidence rule not applicable to . . . . .	1558
inspection of, before trial; see DISCOVERY.	
putting in the whole . . . . .	§ 2118
entries made in, after suit begun, excluded . . . . .	<i>note one</i> 2118
making evidence by inspection . . . . .	2125
privileged from production . . . . .	§ 2193, 2205, § 2286
see also ORIGINAL DOCUMENT.	
Borrowing; see LOAN; DEBTOR.	
Boundaries, evidenced by possession . . . . .	378
surveyor's testimony not required . . . . .	§ 1339
evidenced by perambulations . . . . .	1563
deceased persons' declarations . . . . .	
exception to Hearsay rule . . . . .	1563, § 1564
Massachusetts doctrine . . . . .	1563, <i>note seven</i> 1567
death of declarant . . . . .	1565
insanity, etc., not sufficient . . . . .	1565
no interest to misrepresent . . . . .	§ 1566
owner's declarations . . . . .	§ 1566
declarations on the land . . . . .	§ 1567, 1764
declarant's knowledge . . . . .	1568
maps, surveys . . . . .	1570
opinion testimony to . . . . .	§ 1963
ancient deed-recital of . . . . .	§ 1573
reputation about . . . . .	
must be question of past generation . . . . .	§ 1582
kind of reputation . . . . .	§ 1583-1591

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

Section

### Boundaries (*continued*).

must be more than individual assertion . . . . .	§ 1584
must be of right itself and not of specific instance . . . . .	§ 1585
must relate to matter of general interest . . . . .	§ 1586
application of reputation rule to private . . . . .	§ 1587
form of reputation . . . . .	§ 1592-1595
official surveys, to prove . . . . .	§ 1665
of county or town, judicially noticed . . . . .	§ 2575

### Boycott, statements concerning . . . . . *note two* 1729

Brands on animals, or timber, as evidence of ownership . . . . .	§ 150, § 2152
proving genuineness of . . . . .	§ 2152
register of . . . . .	§ 150, § 1647
unrecorded, to evidence ownership . . . . .	<i>note two</i> 150

### Breach of Promise of marriage,

character of plaintiff as in issue or mitigating damages . . . . .	§ 75, 77
acts of unchastity, as excusing or mitigating . . . . .	206, 213
prior relations, as evidence . . . . .	§ 398
state of affection inferable in . . . . .	401
defendant's wealth, provable by repute . . . . .	§ 1623
plaintiff's conduct, as <i>res geste</i> . . . . .	§ 1770
seduction not evidence of prior promise of marriage . . . . .	<i>note three</i> 1770
opinion testimony to damages by . . . . .	<i>note one</i> 1944
uncorroborated complainant in . . . . .	§ 2061
circumstantial evidence sufficient . . . . .	2090

### Bribery, by a party, as evidence of guilt . . . . . § 278

other offences, as evidencing intent . . . . .	§ 343
offer of money to injured party in criminal prosecution not . . . . .	279, 1062
used to impeach one's own witness . . . . .	§ 901
attempt to, as impeaching a witness . . . . .	960, 962
contradiction as to, not collateral . . . . .	§ 1005, § 1022
who is an accomplice in . . . . .	<i>note one</i> 2060

### Bridge, defective; see HIGHWAY.

refuting evidence of injury caused by vibration of . . . . .	34, 35
standard of conduct of employee on . . . . .	§ 461

### Brief of Evidence, to prove former testimony . . . . . 1668

### Building, other injuries to . . . . . § 451

see also PREMISES.

### Bullet, shown to fit gun of accused . . . . . § 149

### Burden of Proof, and Presumptions

#### 1. General Principles

- (a) *burden of proof*
- (b) *presumptions*
- (c) *prima facie evidence*
- (d) *measure of persuasion*

#### 2. Burdens and Presumptions in Specific Issues

- (a) *sanity*
- (b) *undue influence and fraud*
- (c) *marriage*
- (d) *negligence and accident*
- (e) *crimes*
- (f) *ownership*
- (g) *payment*
- (h) *execution and contents of document*
- (i) *gifts*
- (j) *miscellaneous*

#### 1. General Principles

production of evidence by the parties . . . . .	2483
evidence sought by the judge <i>ex mero motu</i> ; questions to witnesses by the judge . . . . .	§ 2484

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Burden of Proof, and Presumptions (<i>continued</i>).</b>	
(a) <i>burden of proof</i> ; first meaning: risk of non-persuasion . . . . .	2485
test for this burden; negative and affirmative allegations; facts peculiarly within a party's knowledge . . . . .	§ 2486
second meaning: duty of producing evidence . . . . .	§ 2487
test for this burden . . . . .	2488
shifting the burden of proof . . . . .	2489
effect on, inference from failure to call witness . . . . .	§ 2491
(b) <i>presumptions</i> ; legal effect of a presumption . . . . .	2490
presumptions of law and presumptions of fact . . . . .	§ 2491
conclusive presumptions; rebuttable presumptions . . . . .	2492
conflicting presumptions; counter presumptions . . . . .	2493
(c) <i>prima facie evidence</i> ; sufficient evidence for the jury; scintilla of evidence . . . . .	§ 2494
direction of a verdict, motion for a nonsuit, and demurrer to evidence, distinguished . . . . .	§ 2495
waiver of motion by subsequent introduction of evidence . . . . .	§ 2496
(d) <i>measure of persuasion</i> : proof beyond a reasonable doubt; rule for criminal cases . . . . .	§ 2497
proof by preponderance of evidence; rule for civil cases . . . . .	§ 2498
<b>2. Burdens and Presumptions in Specific Issues</b>	
(a) <i>sanity</i> : testamentary and other civil causes; suicide . . . . .	§ 2500
criminal causes . . . . .	§ 2501
(b) <i>undue influence and fraud</i> : testamentary causes . . . . .	§ 2502
confidential relations of grantee or beneficiary . . . . .	§ 2503
fraudulent conveyances against creditors . . . . .	§ 2504
(c) <i>marriage</i> : consent, from cohabitation or ceremony . . . . .	§ 2505
capacity, as affected by intervening death, divorce, or marriage . . . . .	§ 2506
(d) <i>negligence and accident</i> : contributory negligence . . . . .	§ 2507
loss by bailee . . . . .	§ 2508
defective machines, vehicles, and apparatus . . . . .	§ 2509
death by violence . . . . .	§ 2510
(e) <i>crimes</i> : innocence, malice, guilt, etc. . . . .	§ 2511
self-defence . . . . .	§ 2512
alibi . . . . .	§ 2512
possession of stolen goods . . . . .	§ 2513
capacity (infancy, intoxication, coverture) . . . . .	§ 2514
(f) <i>ownership</i> : possession of land and personalty . . . . .	§ 1779, § 2515
possession of negotiable instrument . . . . .	§ 2516
(g) <i>payment</i> : lapse of time . . . . .	§ 2517
possession of instrument . . . . .	§ 2518
(h) <i>execution and contents of document</i> : letters and telegrams . . . . .	2519
execution of deeds (delivery, date, seal) . . . . .	§ 2520
ancient documents . . . . .	2521
lost grant or other document . . . . .	§ 2522
lost will (contents and revocation) . . . . .	§ 2523
spoliation of documents . . . . .	2524
alteration of documents . . . . .	§ 2525
(i) <i>gifts</i> (wife's separate estate, child's advancement) . . . . .	§ 2526
(j) <i>miscellaneous</i>	
legitimacy . . . . .	§ 2527
chastity . . . . .	§ 2528
child-bearing . . . . .	§ 2528
identity of person (from name, etc.) . . . . .	§ 2529
continuity; in general . . . . .	§ 2530
life and death . . . . .	§ 2531
survivorship . . . . .	2532
seaworthiness . . . . .	2533
regularity; performance of official duty and regularity of proceedings . . . . .	§ 2534

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Burden of Proof, and Presumptions (<i>continued</i>).</b>	
appointment and authority of officers . . . . .	§ 2535
similarity of foreign law . . . . .	§ 2536
contracts, bill of lading . . . . .	§ 2537
of showing performance of a condition precedent . . . . .	§ 2537
in insurance policy . . . . .	<i>note one</i> 2537
statute of limitations . . . . .	§ 2538
malicious prosecution . . . . .	2539
reduction of agreement to writing . . . . .	2447
confessions . . . . .	§ 860
of accomplice . . . . .	§ 2060
qualifications of witness . . . . .	484, § 497, § 508, § 560, § 584, § 654
[Examine analyses of "Burden of Proof and Presumptions," Vol. IV, pp. 3520, 3548.]	
<b>Burglary, tools, etc., as evidence of</b> . . . . .	§ 149, § 153, § 238
possession of stolen goods, as evidence of . . . . .	§ 153, § 2513
other crimes as evidence of intent . . . . .	§ 351
motive for . . . . .	§ 391
evidence of identity . . . . .	§ 413
<b>Burnt Records, abstract of</b> . . . . .	1227, § 1267, § 1705, § 2105, 2107
statutes respecting . . . . .	2107
<b>Business, course of, as evidence of a transaction</b> . . . . .	94, 372, § 382
amount of, as evidence of nuisance, value, etc. . . . .	§ 462
prudence in matters of, as evidenced by acts of others . . . . .	§ 461
stock of goods in, as evidence of amount of . . . . .	§ 461
loss of patronage of, as evidence of injury . . . . .	§ 462
entries in the course of; see <b>REGULAR ENTRIES</b> .	
<b>By-law; see BEST EVIDENCE.</b>	
<b>Bystander, exclamations of, during <i>res gestæ</i></b> . . . . .	§ 1755

## C

<b>Calendar, used in evidence</b> . . . . .	§ 1698
<b>Calling a Witness, what constitutes, on direct examination</b> . . . . .	1892
out of the usual order; see <b>EXAMINATION, III.</b>	
as preventing impeachment; see <b>IMPEACHMENT.</b>	
<b>Canada, conflict of laws of Empire, Dominion, and Provinces</b> . . . . .	§ 6
<b>Cancellation, marks on will in testator's custody presumed genuine</b> . . . . .	<i>note two</i> 2148
<b>Capacity, physical, as evidence of an act done</b> . . . . .	§ 83-85
distinguished from tendency, possibility, cause . . . . .	446
instances of human conduct, to evidence . . . . .	§ 220
of a weapon, machine, etc., as shown by its effects . . . . .	§ 441-461
of testator or grantor . . . . .	§ 1958, § 2500
of accused . . . . .	§ 1958
of infant, opinion to . . . . .	<i>note two</i> 1958
presumption of, in marriage . . . . .	§ 2506
in testamentary cases . . . . .	§ 2500
in criminal cases . . . . .	§ 2514
mental, of a party; see <b>SANITY; UNDUE INFLUENCE; TESTATOR.</b>	
testimonial, of a witness; see <b>WITNESS, I, Qualifications; CHILD.</b>	
<b>Capital of a State or county, noticed.</b> . . . .	§ 2575
<b>Car; see VEHICLE.</b>	
<b>Carbon Copy; see TYPEWRITING.</b>	
<b>Carefulness, presumption of</b> . . . . .	§ 2507, § 2510
jury may use general knowledge to determine . . . . .	§ 2570
opinion as to . . . . .	§ 1949-1951
see also <b>NEGLIGENCE; SKILL; CONDUCT.</b>	
<b>Carriage; see VEHICLE.</b>	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
Carrier, wife of plaintiff, as witness against	§ 612
loss by, presumed negligent	§ 2508
see also BILL OF LADING.	
Case Closed, calling a witness after; see EXAMINATION.	
Case Stated for argument	§ 1086
Cash, regular entry to prove payment of	§ 1539, § 1549
Cattle, brands as evidence	§ 150
see also ANIMALS.	
Cattleguard; see HEIGHT; SUFFICIENCY.	
Cause of an illness, injury, accident, etc., as evidenced by its effects,	§ 437-461
distinguished from tendency, capacity, possibility	446
expert opinion as to	§ 1976
Census, as evidence of population	§ 1671
judicially noticed	§ 2577
Ceremony of marriage, presumed valid	§ 2506
Certificate	
(a) in general	
(b) of land-grant	
(c) of entry	
(d) of location	
(e) of marriage	
(a) in general	
contradicting one's own official	§ 530
admissible when made by authority	
sundry officers	§ 1674
distinguished from return	§ 1674
private persons	§ 1674
of effect of the record	§ 1674, § 1675
notary's protest	§ 1675
deed-acknowledgment; oath	§ 1352, § 1676
of deposition	§ 1676
certified copy	§ 1677-1683
printed copy	§ 1684
authenticated by seal or signature	§ 2162
presumed correct	§ 2534
whether conclusive for	
married woman's acknowledgment	§ 1347
election	§ 1351
oath	§ 1352
acknowledgment	§ 1352
of immigration inspector	§ 1354
(b) of land-grant; see DEED.	
(c) of entry of land-title; see DEED.	
(d) of location of land-patent; see DEED.	
(e) of marriage	
constitutionality of, as evidence	§ 1398
in criminal case	§ 1398, § 2082
made evidence by party's possession	268
admissible as a public document	§ 1645
not required in bigamy, etc.	§ 2088
presumed genuine, from custody	§ 2159
conclusive, under parol evidence rule	§ 2453

[Examine analysis of "Certificates," Vol. III, p. 1976.]

### Certified Copy.

1. *Public Documents*
  2. *Private Documents*
1. *Public Documents*
  - scope of authority to certify . . . . . 1677
  - time and manner of certifying . . . . . 1677

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Certified Copy (continued).</b>	
certificate of effect, or non-existence . . . . .	§ 1678
authentication of certified copy . . . . .	§ 1679
kinds of documents thus provable,	
sundry public records . . . . .	§ 1680
judicial records . . . . .	§ 1681
probate of wills . . . . .	§ 1681
lost deeds . . . . .	1682
copy of whole required . . . . .	§ 2107-2111
attested by seal . . . . .	§ 2162
whether preferred to sworn copy . . . . .	§ 1273
distinction between, and sworn copy . . . . .	§ 1273, 1655
excusing from production of attesting witness . . . . .	1318
<b>2. Private Documents</b>	
bank-books . . . . .	§ 1683
corporation records . . . . .	§ 1683
parish registers, etc. . . . .	§ 1683
see also COPY.	
[Examine analysis of "Certificates," Vol. III, p. 1976.]	
<b>Chain of Title, dispensing with proof of prior deeds forming</b> . . . . .	note three 2132
affidavit of common source in . . . . .	§ 1385
<b>Chancery, rules in, distinguished from rules at law</b> . . . . .	§ 4
rules in, as affected by Federal statutes . . . . .	§ 6
trials in Federal Courts of . . . . .	§ 6
special rule for depositions . . . . .	§ 1417
for cross-examining to character . . . . .	§ 986
for one witness to a bill . . . . .	§ 2047
bill or answer in, as an admission . . . . .	1065, 2121, § 2122
proving the whole of a decree . . . . .	§ 2110
a bill . . . . .	2111
an answer . . . . .	2111
a deposition . . . . .	2111
responsive parts of answer as evidence . . . . .	2121
history of subpoena in . . . . .	§ 2190
discovery from opponent in . . . . .	§ 1856, § 1857, § 2218, § 2219
privilege of witness against self-crimination in . . . . .	§ 2271
see also DISCOVERY.	
<b>Character</b>	
<i>In general</i>	
1. <i>As Evidence or In Issue</i>	
(a) <i>Accused's character</i>	
(b) <i>Animals</i>	
(c) <i>Complainant in rape</i>	
(d) <i>Deceased in homicide</i>	
(e) <i>Parties in civil cases</i>	
(f) <i>Plaintiff in mitigation</i>	
(g) <i>Third persons</i>	
(h) <i>Witness impeached</i>	
(i) <i>Witness supported</i>	
2. <i>Mode of Evidencing by Conduct</i>	
(a) <i>In general</i>	
(b) <i>Of a party</i>	
(c) <i>Of a witness in impeachment</i>	
(d) <i>Of a witness in support</i>	
3. <i>Mode of Evidencing by Reputation</i>	
4. <i>Mode of Evidencing by Personal Opinion</i>	
<i>In general, distinguished from reputation</i> . . . . .	52, 920, 1608
conduct to evidence, as distinguished from relevancy of character itself . . . . .	53
special chancery rules for cross-examination to . . . . .	§ 986

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

## Character (*continued*).

1. *As Evidence or In Issue* . . . . . 52
  - (a) *Accused's character* as relevant to show an act done or not done . . . . . 55
    - distinction between evidential, and in issue . . . . . 54
    - general, distinguished from particular acts in rape . . . . . § 62, § 200
    - distinguished from habit . . . . . 92
    - course of conduct distinguished from . . . . . § 203
    - good character always admissible for him . . . . . § 56
    - presumed . . . . . § 290
    - bad character not admissible against him . . . . . 57
      - erroneously admitted, rebuttal is not a waiver *note twenty-six* 18
    - prosecution may rebut . . . . . 58
    - kind of character . . . . . § 59
    - evidence of, must be in reference to specific trait in issue . . . . . § 59
    - time of character . . . . . 60
    - place of character . . . . . 60
    - accused as witness . . . . . 61, 890
    - failure to prove, as evidence of bad character . . . . . § 290
    - of arrested person to show reasonable ground for suspicion in arrest by officer . . . . . § 258
    - to justify breach of promise . . . . . 77
    - houses of ill-fame and inmates . . . . . § 78
    - in seduction . . . . . 79, 210
    - of employee as affecting liability of employer . . . . . § 80
  - (b) *Animal* . . . . . § 68, § 201
  - (c) *Complainant in rape* and similar crimes . . . . . § 62
    - for chastity, presumption of . . . . . § 2528
  - (d) *Deceased in homicide*, to evidence aggression . . . . . § 63, § 246
    - to evidence defendant's apprehension of aggression from deceased . . . . . § 246
  - (e) *Parties in civil cases* in general . . . . . § 64
    - in negligence . . . . . § 65
    - in defamation . . . . . 66
    - in malpractice . . . . . 67
    - of opponent from his own interrogatories . . . . . *note eight* § 1856
    - of both father and daughter in issue in father's action for seduction . . . . . 210
    - of both husband and wife in issue in action for criminal conversation . . . . . § 211
    - of plaintiff in issue in action for indecent assault . . . . . 212
  - (f) *Plaintiff, in mitigation of damages* . . . . . § 70-76, § 209-213
    - in issue for sundry purposes . . . . . § 77-80
  - (g) *Third persons* in general . . . . . § 68
  - (h) *Witness impeached* . . . . .
    - one's own witness . . . . . § 900
    - actual character . . . . . 920
    - kind of character . . . . . 922
    - other traits than veracity . . . . . 924
    - distinction between unchastity in sexes, as affecting truthfulness *note two* 924
    - time of character . . . . . 927
    - place of character . . . . . 930
    - mode of evidencing by conduct; see *infra*, 2.
    - mode of evidencing by reputation; see *infra*, 2.
    - character as to sanity, skill, etc.; see IMPEACHMENT.
    - attesting witness . . . . . 1514
  - (i) *Witness supported* . . . . .
    - good character, in general . . . . . 1104
    - attesting witness . . . . . 1514
2. *Mode of Evidencing by Conduct*
  - (a) *In general* . . . . .
    - of an accused in a criminal case . . . . . § 192-197, § 215-218
    - unfair surprise in showing . . . . . § 194, 202, 1849

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Character, rumors of misconduct as affecting credibility of witness' testimony:</b>	
concerning . . . . .	197
privilege not to disclose crimes . . . . .	§ 2268-2277
see also SELF-CRIMINATION.	
of a deceased in homicide . . . . .	§ 198
of a negligent party in a civil case . . . . .	§ 199
of a complainant in rape . . . . .	§ 200
of an animal . . . . .	§ 68, § 201
(b) <i>Of a party, to show character in issue</i> . . . . .	§ 202-208
to mitigate damages . . . . .	§ 209-213
(c) <i>Of a witness, in impeachment</i>	
by other witnesses . . . . .	979
by conviction of crime . . . . .	§ 980
by cross-examination to misconduct . . . . .	981
privilege for disgracing answers . . . . .	985
privilege for crimes . . . . .	§ 2268-2277
rumors of misconduct . . . . .	§ 988
contradiction by other witnesses . . . . .	§ 1005
form of question in impeaching veracity . . . . .	note fourteen 1985
unfair surprise in showing; see UNFAIR SURPRISE.	
(d) <i>Of a witness, in support</i>	
good character . . . . .	1104
impeaching the impeaching witness . . . . .	§ 1111
explaining away bad repute . . . . .	1112
denial of crime . . . . .	§ 1116
consistent statements . . . . .	§ 1124
rebuttal of testimony to unchaste, in seduction . . . . .	1620
3. <i>Mode of Evidencing by Reputation</i>	
general principle of reputation . . . . .	1608-1610
reputation distinguished from rumors . . . . .	1611
distinction between conduct to evidence, and relevancy of character itself . . . . .	53
extent and place of reputation . . . . .	§ 1612-1616
number of utterances necessary . . . . .	1613
absence of utterances to evidence good . . . . .	§ 1614
reputation outside of place of residence . . . . .	§ 1616
time of reputation . . . . .	1617, § 1618
kind of character that may be thus proved	
chastity . . . . .	§ 1620
house of ill-fame . . . . .	§ 1620
common offender . . . . .	§ 1620
sanity . . . . .	§ 1621
temperance . . . . .	§ 1621
expert qualifications . . . . .	§ 1621
negligence . . . . .	§ 1621
animals . . . . .	§ 1621
solveney . . . . .	§ 1623
partnership . . . . .	§ 1624
legal tradition . . . . .	§ 1625
incorporation . . . . .	§ 1625
sundry facts . . . . .	§ 1626
limitation of number of witnesses . . . . .	1908
qualifications of a witness to repute . . . . .	§ 691
4. <i>Mode of Evidencing by Personal Opinion</i>	
defendant's moral character . . . . .	1981, § 1983
witness' moral character; belief on oath . . . . .	1982, § 1985
skill, care, competence . . . . .	§ 1984
see also UNFAIR SURPRISE; IMPEACHMENT OF A WITNESS; CHASTITY.	
[Examine analyses of "Character," Vol. I, pp. 118, 227; Vol. II, pp. 1055, 1931; Vol. III, p. 2626.]	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Charge to Jury</b> , right to judge to give . . . . .	§ 2495, 2557, 2559
party offering evidence after . . . . .	§ 1879
<b>Charge and Discharge</b> statements taken together . . . . .	2117
<b>Charter</b> of city, judicially noticed . . . . .	§ 2572
of corporation proved by copy . . . . .	§ 1680
<b>Chastity</b> , character of complainant in rape, etc., to show consent . . . . .	§ 62
character of the woman in seduction, etc., as mitigating damages or in issue . . . . .	§ 75-80
conduct, to evidence rape-complainant's character for . . . . .	§ 200
unfair surprise in showing acts disproving . . . . .	§ 200
mitigation of damages, as affected by lack of . . . . .	§ 210-213
character in issue, as involving acts of unchastity . . . . .	§ 204-206
of male and female, distinguished . . . . .	<i>note two</i> 924
provable by reputation . . . . .	§ 1620
presumption of . . . . .	§ 2528
of a witness, in impeachment; see <b>IMPEACHMENT</b> .	
<b>Chattel</b> , possession of stolen; see <b>STOLEN GOODS</b> .	
failure to produce, as evidence . . . . .	§ 291
value, as evidence of price agreed . . . . .	§ 392
marks, as evidence of identity . . . . .	§ 150, § 413
identified from appearance . . . . .	§ 660
sales of other goods, as evidence of value . . . . .	§ 463
condition or quality of, as shown by effects, etc. . . . .	§ 437-461
qualifications of a witness to value; see <b>VALUE</b> .	
whether production in court is necessary . . . . .	§ 1181, § 1182
words accompanying delivery of . . . . .	§ 1777
inspection of, before trial . . . . .	§ 1862
obtained by illegal search . . . . .	§ 2183
inspection or production of, compellable . . . . .	§ 2194, 2221, § 2264
<b>Chauffeur</b> ; see <b>AUTOMOBILE</b> .	
<b>Cheat</b> , other acts, to evidence a common cheat . . . . .	§ 203
to evidence intent . . . . .	§ 321
see also <b>FALSE REPRESENTATIONS</b> .	
<b>Check</b> , evidence of forgery of ; see <b>FORGERY</b> .	
parol transaction collateral to instrument . . . . .	§ 1235, 1245, 2443
see also <b>BILL OF EXCHANGE</b> ; <b>PAYMENT</b> ; <b>DOCUMENT</b> .	
<b>Chemical Matters</b> , witness' experience as qualifying him . . . . .	§ 568
opinion testimony to . . . . .	§ 1975
<b>Chief</b> , case in; see <b>EXAMINATION, III</b> .	
examination in; see <b>DIRECT EXAMINATION</b> .	
<b>Child</b> , resemblance of, to show paternity . . . . .	§ 166, § 1154, § 1168
appearance of, to evidence age . . . . .	222, § 257, § 660, § 1154, § 1168
capacity to testify . . . . .	§ 505-509
to take the oath . . . . .	§ 1820, § 1821, § 1825
to testify, though not capable of perjury . . . . .	§ 1832
corroboration required as witness . . . . .	§ 2066
presumption of advancement to . . . . .	§ 2526
of gratuitous services by . . . . .	§ 2526
see also <b>ADVANCEMENT</b> ; <b>AGE</b> ; <b>INFANT</b> ; <b>LEGITIMACY</b> .	
<b>Childbearing</b> , presumption against . . . . .	§ 2528
<b>Chinese</b> as witness; corroboration required . . . . .	§ 2066
exclusion of . . . . .	516
witnesses sufficient to prove presence before 1892 . . . . .	<i>note two</i> 2066
see also <b>RACE</b> .	
conclusiveness of immigration officer's finding against . . . . .	§ 1354
<b>Chose in Action</b> , admissions of assignor . . . . .	§ 1082
<b>Church</b> , register of; see <b>REGISTER OF MARRIAGE, BIRTH, AND DEATH</b> .	
law of; see <b>ECCLESIASTICAL LAW</b> .	
<b>Circumstantial</b> evidence, defined . . . . .	25
distinguished from testimonial evidence . . . . .	25

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Circumstantial evidence (<i>continued</i>).</b>	
relative value . . . . .	§ 26
general theory of . . . . .	§ 33
classification of . . . . .	43
may be proved by the same kind . . . . .	§ 41
criminal's identity as evidenced by traces . . . . .	148
distinguished from <i>res gesta</i> . . . . .	§ 1715
confusion of issues in . . . . .	1904
unfair prejudice in . . . . .	1904
sufficiency for <i>corpus delicti</i> . . . . .	§ 2081
for breach of promise . . . . .	2090
to authenticate a document . . . . .	§ 2131
proof beyond reasonable doubt . . . . .	§ 2497
<b>Citizenship of immigrant or deported person, administrative officer's conclusive certificate as to . . . . .</b>	§ 1354
<b>City charter, ordinance, boundary, etc., judicially noticed . . . . .</b>	§ 2572, § 2575
ordinance proved by printed copy . . . . .	§ 1684
<b>Civil Cases, parties in, character of . . . . .</b>	§ 64
eye-witness to marriage not required in . . . . .	§ 2086
marriage celebrant's certificate not preferred to eye-witness in . . . . .	§ 2088
similar acts, to evidence Knowledge, Design, or Intent in . . . . .	370
to evidence Habit in . . . . .	<i>note three</i> 376
<b>Claim of Title, as part of <i>res gesta</i> . . . . .</b>	§ 1778
<b>Claims, prior false, as evidence to impeach a witness . . . . .</b>	§ 963
as evidence of party's intent to defraud . . . . .	§ 340, § 352
<b>Classification of the rules of evidence . . . . .</b>	3
of the rules of admissibility . . . . .	11
of circumstantial evidence . . . . .	43
of the rules of relevancy . . . . .	24
of prospectant evidence . . . . .	51
<b>Clergyman, confession to, not excluded . . . . .</b>	840
privileged communications to . . . . .	§ 2394
entries of; see REGULAR ENTRIES; REGISTER.	
<b>Clerk using an entry to aid recollection; see RECOLLECTION.</b>	
entries of a deceased; see REGULAR ENTRIES.	
of public officer or court; see CERTIFIED COPY.	
of an attorney, admissions of . . . . .	§ 1063
signature presumed genuine . . . . .	§ 2164
communications to, not privileged . . . . .	§ 2286, 2301, § 2317
<b>Client, who is a . . . . .</b>	<i>note one</i> § 2317
privileged communications of; see ATTORNEY AND CLIENT.	
see also ATTORNEY; ATTORNEY AND CLIENT; PARTIES.	
<b>Close of Case, evidence offered after; see EXAMINATION, III.</b>	
<b>Clothing, as evidence of identity . . . . .</b>	§ 413, § 660
testimony to value of; see VALUE.	
exhibition to jury . . . . .	§ 1157
<b>Cocaine, use of, to discredit witness . . . . .</b>	<i>note one</i> § 934
<b>Co-conspirator, admissions of, in general . . . . .</b>	§ 1079
as part of <i>res gesta</i> . . . . .	1797
see also ACCOMPLICE.	
<b>Co-defendant, impeached . . . . .</b>	§ 967, § 968
admissions of . . . . .	§ 1076
husband or wife of, privileged . . . . .	§ 2236
accused's failure to call . . . . .	§ 2273
see also DEFENDANT; CO-INDICTEE.	
<b>Co-indictee, disqualification as witness . . . . .</b>	§ 580
wife of, disqualification as witness . . . . .	§ 609
impeachable when called by co-party . . . . .	§ 916
impeached by his situation . . . . .	§ 967

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

- Co-indictee** (*continued*).  
    admissions of . . . . . § 1079  
    see also ACCOMPLICE.
- Co-obligee**, admissions of . . . . . § 1081
- Co-obligor**, admissions of . . . . . § 1077
- Co-party**, admissions of . . . . . § 1076  
    see also CO-DEFENDANT; CO-INDICTEE; PARTY.
- Co-promissee**, admissions of . . . . . § 1081
- Co-promisor**, admissions of . . . . . § 1077
- Co-tortfeasor**, admissions of . . . . . § 1079
- Cohabitation**, as evidence of marriage . . . . . 268, § 2083  
    as evidence of adultery, etc.; see ADULTERY; INCEST; MARRIAGE.  
    presumption of marriage from . . . . . § 2505
- Coin**, evidence of counterfeiting; see COUNTERFEITING.  
    expert witness to genuineness of . . . . . § 570
- Collateral Agreements**, to written contracts . . . . . § 2429, 2435, § 2442  
    shown by parol . . . . . § 1235, 1245, § 2443-2445
- Collateral evidence**, admitted to rebut other collateral evidence . . . . . § 15  
    inadmissible when irrelevant . . . . . 39  
    of crimes, to show intent, etc. . . . . § 216, 300  
    facts, misuse of doctrine . . . . . 1248  
    facts, doctrine of, in producing originals . . . . . 1252  
    contradictions of witness by; see CONTRADICTION; SELF-CONTRADICTION.  
    privilege of a witness against disgrace by . . . . . § 986  
    unfair surprise in impeachment of witness by, facts . . . . . 1002, § 1007  
    test of collateralness . . . . . § 1003  
    contradiction as to bribery not . . . . . § 1005, § 1022  
    contents of a document collaterally in issue . . . . . 1252  
    attesting witness to a document collaterally in issue . . . . . 1291
- Collision**, other instances, as evidencing a defect . . . . . § 458  
    spontaneous exclamations of one in a . . . . . note three § 1750, note two § 1755  
    see also NEGLIGENCE.
- Color**, as impeaching a witness or evidencing race; see RACE.
- Color of Title**, deed admitted as . . . . . § 1653, 1655, § 1778, § 2132
- Coloring**, as used in *res gestæ* doctrine . . . . . 365, § 1778
- Commerce**, facts of, judicially noticed . . . . . § 2580
- Commercial Agency**, communications to, not privileged . . . . . § 2286
- Commercial Lists** used in evidence . . . . . § 1702
- Commission**, mode of taking testimony on; see DEPOSITION.  
    former testimony before, whether admissible . . . . . § 1373  
    certificate of; see CERTIFICATE.
- Commitment** to an insane asylum; see SANITY.
- Common Carrier**, loss by, presumed negligent . . . . . § 2508  
    bill of lading by, burden of proof for . . . . . § 2537
- Common Law**, trials at, in Federal Courts . . . . . § 6  
    see also CHANCERY.
- Common Offender**, other acts to evidence character . . . . . § 203  
    prior conviction, to increase sentence . . . . . § 196  
    provable by reputation . . . . . § 1620
- Common Source of Title**, dispensing with proof of prior deeds . . . . . note three 2132  
    affidavit denying, in ejectment . . . . . note six 1385
- Communications**, privilege for; see PRIVILEGE, II.  
    exciting insane belief, disproof of . . . . . 262, 263
- Comparison of Hands**; see HANDWRITING.
- Competence**, of evidence; see ADMISSIBILITY.  
    of employee; see EMPLOYEE.  
    of physician; see PHYSICIAN.  
    of persons in general; see SKILL; NEGLIGENCE.  
    of witnesses in general; see WITNESS, I, *Qualifications*.

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Complainant</b> , uncorroborated in rape, bastardy, breach of promise, etc. . . . .	§ 2061
in rape, too young to be a witness . . . . .	1139, 1761
<b>Complaint</b> , of rape; see RAPE.	
admissions in pleading . . . . .	§ 1063
failure to make, as an admission . . . . .	§ 284
in sodomy . . . . .	note one 1135
of bailee, after robbery . . . . .	1142
of owner, after robbery . . . . .	1762
after larceny . . . . .	1142
mother's, in travail . . . . .	§ 1141, 1763
<b>Completeness</b> , verbal . . . . .	§ 2094
of dying declarations . . . . .	§ 1448, § 2099
oral utterances . . . . .	§ 2097
documents . . . . .	§ 2102
see also WHOLE OF AN UTTERANCE; DOCUMENT.	
<b>Compromise</b> , offer to, as an admission . . . . .	§ 1061
offers of, by agent . . . . .	§ 1061
<b>Compulsory Process</b>	
to obtain witnesses	
history . . . . .	§ 2190
constitutional guaranty . . . . .	§ 2191
does not include right to consult witness before trial . . . . .	note two 2191
use against Executive . . . . .	2369
exemptions from; see PRIVILEGE.	
to compel answers; see PRIVILEGE.	
to compel bodily exposure . . . . .	§ 2194, 2216, § 2220, § 2265
confession obtained by; see CONFESSION.	
<b>Compurgation</b> ; see WAGER OF LAW.	
<b>Concealment</b> , as evidence of guilt . . . . .	§ 276
of a document . . . . .	§ 291, § 1198, 1199
<b>Conclusiveness</b> , of official certificates or records . . . . .	§ 1345-1352
of magistrate's report of testimony . . . . .	§ 1349
of enrolled statute . . . . .	§ 1350
of certificate of election . . . . .	§ 1351
constitutionality of statutes declaring . . . . .	1353
of presumption . . . . .	2492
of judicial notice . . . . .	2567
of judicial admission . . . . .	§ 1058, § 2588, 2590
of ordinary admission . . . . .	§ 1058, 2588
distinguished from parol evidence rule . . . . .	§ 2453
<b>Condition</b> , of a human being as to health, etc.; see HEALTH; SANITY.	
prior dangerous, to evidence notice . . . . .	§ 252
subsequent repaired, to evidence negligence . . . . .	§ 283
of a highway, machine, place, weapon, etc., as evidenced by effects, etc. . . . .	§ 437-462
in one place as evidence of, in another . . . . .	§ 438
<b>Condition Precedent</b> , shown by parol evidence . . . . .	§ 2408, § 2410, § 2420
burden of proof of performance of . . . . .	§ 2537
<b>Conditional admissibility</b> . . . . .	14, 40, 304, § 1871
<b>Conduct</b> , as evidence . . . . .	190, 191
to show character in issue . . . . .	§ 70-80, 202
unfair surprise in showing . . . . .	§ 194, 202, 1849
to evidence capacity . . . . .	§ 220
as evidence of insanity . . . . .	§ 228
cannot amount to an admission . . . . .	267, 1052
when under arrest, as evidence of guilt . . . . .	§ 273, § 1072
as evidence of innocence . . . . .	§ 293
to prove arson . . . . .	§ 396
as measure of time, space, light, sound, etc. . . . .	§ 460
of others, as measure of negligence . . . . .	§ 461

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Conduct (*continued*).

care . . . . .	§ 461, <i>note two</i> 459
cruelty . . . . .	§ 461
danger . . . . .	§ 461
insufficiency . . . . .	§ 461
unreasonableness . . . . .	§ 461
unskilfulness . . . . .	§ 461
horses' fright . . . . .	§ 461
passengers' behavior . . . . .	§ 461
safeguards for railroads . . . . .	§ 461
highways . . . . .	§ 461
machines . . . . .	§ 461
malpractice . . . . .	§ 461
customs . . . . .	§ 461
libel, etc. . . . .	§ 461
reasonableness of, for jury . . . . .	2553

see also CHARACTER; CONSCIOUSNESS OF GUILT, OF INNOCENCE; INTENT;  
DESIGN; IDENTITY; KNOWLEDGE; SANITY; MARRIAGE; DEMEANOR;  
FLIGHT; DEFENDANT; CAREFULNESS.

Confession of falsehood disqualifying attester . . . . .	§ 528
of judgment, as an admission . . . . .	§ 1061
Confession of Crime, rules of, applicable to accused persons only . . . . .	§ 815
not applicable to witness or civil party . . . . .	§ 815
distinguished from admissions . . . . .	816, 1050
hearsay . . . . .	916, § 1049
history of the rules . . . . .	817-820
what is a confession . . . . .	§ 821
distinguished from denials, guilty conduct, and self-contradictions . . . . .	§ 821
principles of exclusion . . . . .	§ 822-826
intoxication does not necessarily exclude . . . . .	§ 499, § 841
not excluded for breach of confidence . . . . .	823
for illegality in obtaining . . . . .	823
under privilege against self-accrimination . . . . .	823
inducement in obtaining . . . . .	§ 824-826, § 833, 853
voluntariness of . . . . .	826, 843
person in authority . . . . .	§ 827-830
English and American authorities distinguished . . . . .	§ 829-830
nature of the inducement . . . . .	§ 831-841
to clergymen, not excluded . . . . .	840
statutory definition of "inducement" in . . . . .	§ 831
obtained on advice to "tell the truth" . . . . .	§ 832
in "sweat box" of police . . . . .	§ 833, 851
by threat of corporal violence . . . . .	§ 833
by promise of pardon . . . . .	834
of reward of money . . . . .	§ 835
of better treatment . . . . .	§ 835
of withholding legal action . . . . .	§ 836
by assurances . . . . .	837-839
by religious or moral influence . . . . .	840
by trick or fraud . . . . .	§ 841
in sleep, or drug influence . . . . .	<i>note two</i> § 500
under arrest, or on examination by magistrate . . . . .	§ 842-852
before coroner . . . . .	§ 852
time of beginning and ending of the inducement . . . . .	§ 853-855
confirmation by subsequent facts . . . . .	§ 856-859
corroborated by finding stolen goods . . . . .	§ 856-858
facts disclosed by inadmissible . . . . .	§ 858, 859
burden of proof . . . . .	§ 860
judge and jury . . . . .	§ 861, § 862

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Confession of Crime</b> ( <i>continued</i> ).	
right to cross-examine to admissibility of . . . . .	§ 861
admissibility of, determined by evidence . . . . .	§ 861
voluntariness of, a question for court . . . . .	§ 861
sundry rules . . . . .	863
sentimentality in receiving . . . . .	865
value of confessions . . . . .	§ 866
future of the doctrine . . . . .	§ 867
of perjury, as impeaching a witness . . . . .	§ 959
distinguished from admissions . . . . .	1050
of principal or co-conspirator . . . . .	§ 1079
report of prior testimony used as . . . . .	§ 1328
of crime by a third person, as hearsay . . . . .	§ 1476
whether alone sufficient to convict	
respondent in divorce . . . . .	§ 2067, 2074
accused in general . . . . .	2070
bigamy, etc. . . . .	§ 2086
mentioning another crime . . . . .	2100
whole must be proved . . . . .	§ 2097, § 2100
may be proved . . . . .	§ 2115, § 2119
distinguished from self-crimination . . . . .	2266
to a priest, privilege for . . . . .	§ 2394
[Examine analysis of "Confessions of an Accused Person," Vol. I, pp. 918, 919.]	
<b>Confidential Communication</b> , confession not privileged as . . . . .	823, § 841
privileged kinds; see PRIVILEGE.	
<b>Confidential Relations</b> of grantee, presuming fraud from . . . . .	§ 2503
<b>Conflict of Laws</b> , rule of evidence applicable, in general . . . . .	§ 5
between Federal and State laws of evidence . . . . .	§ 6
stamped documents and certified copies . . . . .	§ 1680, § 1681, § 2184
Dominion and Provincial laws of evidence in Canada . . . . .	§ 6
Imperial and Canadian laws of evidence. . . . .	§ 6
<b>Conflict of Presumptions</b> . . . . .	2493
<b>Confrontation</b> , right of; see HEARSAY RULE, I.	
<b>Confusion of Issues</b> , by showing particular acts of bad character . . . . .	§ 194
general theory of . . . . .	1863, 1904
as applied to conduct to show character in issue . . . . .	202
in evidencing tendency, capacity or quality . . . . .	443
in admitting collateral facts to impeach witness . . . . .	1002, § 1007
in showing self-contradiction . . . . .	1019
may exclude experiment as real evidence . . . . .	§ 1154
as affecting order of evidence . . . . .	1863
in circumstantial evidence . . . . .	1904
<b>Congress</b> , privilege of member of . . . . .	§ 2375
see also LEGISLATURE.	
<b>Consciousness of Guilt</b> , as evidence, general theory . . . . .	173
conduct, as evidence of . . . . .	§ 265-293
see also KNOWLEDGE.	
<b>Consciousness of Innocence</b> , as evidence . . . . .	174, § 293
<b>Consent</b> , presumption of, to marriage . . . . .	§ 2505
see also CONTRACT; BILL OF LADING; AGE OF CONSENT.	
<b>Consideration</b> , words as <i>res gesta</i> , to show . . . . .	§ 1777
recital of, varied by parol . . . . .	§ 2433
presumption of . . . . .	§ 2520
<b>Consistent statements</b> by a witness; see WITNESS, III.	
<b>Conspirator</b> ; see CO-CONSPIRATOR.	
<b>Constitutional Rules</b> , in general . . . . .	§ 7
affecting legislative power to alter the law of evidence . . . . .	§ 7
forbidding <i>ex post facto</i> laws . . . . .	§ 7
requiring formalities for enacting a bill . . . . .	§ 1350, § 2592

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Constitutional Rules (<i>continued</i>).</b>	
whether testimony may be declared conclusive . . . . .	1353
sanctioning right of confrontation . . . . .	1397
use of certificate of marriage . . . . .	§ 1398
right of confrontation consistent with use of depositions . . . . .	§ 1398
dying declarations . . . . .	§ 1398
former testimony . . . . .	§ 1398
official statements . . . . .	§ 1398
reputation . . . . .	§ 1398
respecting right of confrontation may be waived . . . . .	§ 1398
requiring full faith and credit to State records . . . . .	§ 1681
for compulsory process . . . . .	§ 2191
does not include right to consult witness before trial . . . . .	<i>note two</i> § 2191
validity of admission of absent witness' testimony . . . . .	§ 2595
effect of waiver by judicial admission . . . . .	§ 2592
<b>Construction</b>	
of other machines, buildings, etc., as evidence of danger, etc. . . . .	§ 437, § 451, § 461
of a document; see PAROL EVIDENCE RULE, D.	
<b>Consul, privilege of</b> . . . . .	2372
certificate of . . . . .	§ 1674
<b>Contempt, for not obeying compulsory process</b>	
power of officer summoning . . . . .	§ 2195
excuse of witness . . . . .	§ 2204
refusal to disclose irrelevant matter . . . . .	§ 2210
exemption of Executive from process . . . . .	2369
proof beyond a reasonable doubt . . . . .	§ 2498
whether the 6th Amendment applies to proceedings for . . . . .	1398
<b>Contents, of a document; see WILL; DOCUMENT.</b>	
<b>Continuance, absent witness' testimony admitted to avoid</b> . . . . .	§ 2595
granted for unfair surprise . . . . .	1848
<b>Continuity, presumption of</b> . . . . .	§ 2530
presumption of, is founded on inference . . . . .	437
of ownership . . . . .	<i>note two</i> § 2530
possession . . . . .	<i>note two</i> § 2530
authority . . . . .	<i>note two</i> 2530
insanity . . . . .	<i>note two</i> § 2530
residence . . . . .	<i>note two</i> 2530
physical or external condition . . . . .	§ 225, § 437
<b>Contract, course of business as evidence of</b> . . . . .	94, 372, § 382
intention as evidence of . . . . .	§ 112
belief as evidence of . . . . .	272
other transactions, as evidence of terms of . . . . .	§ 377, 379
value of goods or services, as evidence of price agreed in . . . . .	§ 392
utterances of, as <i>res gestæ</i> . . . . .	§ 1770
opinion of damages by breach of . . . . .	<i>note one</i> § 1944
meaning of, by opinion evidence . . . . .	§ 1969, § 1971
understanding of the parties . . . . .	§ 1971
putting in the whole . . . . .	§ 2099, § 2105, § 2115
discharge by parol . . . . .	§ 2441, § 2455
alteration by parol . . . . .	<i>note one</i> § 2441
bogus or sham . . . . .	§ 2406
subsequent agreement not to sue . . . . .	2435, § 2444
condition precedent, shown by parol . . . . .	§ 2408, § 2410, § 2420
reformation of, in equity . . . . .	2417
completeness of, in ticket . . . . .	<i>note two</i> 2432
of warranty, shown by parol . . . . .	§ 2434
agreement in, not to be used as binding . . . . .	2435
transactions of friendship in . . . . .	2435
burden of proof in . . . . .	§ 2537

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Contract (*continued*).

- jury or judge to interpret . . . . . § 2556
- calling the attesting witness; see ATTESTING WITNESS.
- production of original; see ORIGINAL DOCUMENT.
- interpretation of; see PAROL EVIDENCE RULE, D.
- with deceased party; see DECEASED PERSON.

### Contradiction of a witness, to impeach him

- one's own witness . . . . . § 907
- general theory . . . . . 1000
- collateral facts excluded . . . . . 1001
  - test of collateralness . . . . . § 1003
  - material facts . . . . . 1004
  - facts of bias . . . . . § 1005
    - corruption . . . . . § 1005
    - intoxication . . . . . § 1005
    - moral character . . . . . § 1005
    - skill . . . . . § 1005
    - illness . . . . . § 1005
    - opportunity to observe . . . . . § 1005
    - recollection . . . . . § 1005
    - narration . . . . . § 1005
    - prior inconsistent statements . . . . . § 1005
  - particular acts of misconduct . . . . . § 1005
  - cross-examination . . . . . § 1006
  - supporting the witness . . . . . § 1007
- answers in, on direct examination . . . . . § 1007
- of an explanatory statement . . . . . § 952, 1046
- falsus in uno*, as a rule for rejecting testimony . . . . . 1008
  - falsity must be wilful and material . . . . . § 1013, § 1014
  - may be explained . . . . . 1972

### Contribution

- sued for by joint tortfeasor; testimony at first trial received . . . . . *note six* 1387

### Contributory Negligence, not presumed

§ 2507, § 2510

see also NEGLIGENCE.

### Conversation, by an interpreter, testimony to

668

- by telephone, testimony to . . . . . § 669
- authentication of, by telephone . . . . . § 2155
- meaning of, proved by opinion evidence . . . . . § 1969
- whole must be proved . . . . . § 2097, § 2099
- may be proved . . . . . § 2115, § 2119

### Conversion; see TROVER.

- words accompanying the taking, as *res gestæ* . . . . . § 1777

### Conveyance, of property, as evidence of a weak case

§ 282

- relationship as bearing on good faith in . . . . . § 391
- privilege for advice in drafting . . . . . § 2297
- record of; see RECORDED CONVEYANCE.

### Conviction of Crime

1. *Disqualification by*
2. *Impeachment by*
3. *Sundries*

1. *Disqualification by* . . . . . 519
  - general principles . . . . . 519
  - kind of crime . . . . . 520
  - judgment controls . . . . . § 521
  - conviction in another jurisdiction . . . . . § 522
  - removal of disqualification, by pardon, etc. . . . . § 523
  - statutory changes . . . . . § 524
  - proving by cross-examination without copy . . . . . § 1270
  - whole of the record . . . . . § 2110

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

### Conviction of Crime (*continued*).

Section

#### 2. *Impeachment by*

general principle . . . . .	§ 980, § 986, § 987
asking on cross-examination . . . . .	§ 980, § 1270
producing a record-copy . . . . .	§ 1270
restoring credit after . . . . .	1106, § 1116, § 1117
identifying by name . . . . .	§ 2529

#### 3. *Sundries*

imprisonment of attesting witness . . . . .	1315
infamy of an attesting witness . . . . .	§ 1316
of witness, excusing absence of a deponent . . . . .	1410
of principal, used against accessory . . . . .	§ 1079
of third person, to exonerate accused . . . . .	142
of accused, to increase sentence . . . . .	§ 196

### Copy of a Document

#### 1. *When must the original be produced*

#### 2. *Rules for proof of copy, when original's non-production is excused*

#### 3. *Official or certified copy*

#### 4. *Sundries*

#### 1. *When must the original be produced; see ORIGINAL DOCUMENT.*

#### 2. *Rules for proof of copy, when original's non-production is excused*

nature of copy-testimony . . . . .	1264
as distinguished from recollection . . . . .	1266
copy preferred to recollection of contents . . . . .	§ 1268-1271
party's admission . . . . .	1255
witness' admission . . . . .	§ 1259
public record . . . . .	§ 1269
record of conviction . . . . .	§ 1270
foreign statute . . . . .	§ 1271
duplicate, distinguished from copy . . . . .	1231
carbon, as original . . . . .	note four § 1234
kinds of recollection-witnesses . . . . .	§ 1272
examined and sworn copies . . . . .	§ 1273
certified copies . . . . .	§ 1273
copy preferred to abstract . . . . .	§ 1273
newspaper files . . . . .	note seven 1273
copy of a copy . . . . .	1274, § 1275
personal knowledge of correctness . . . . .	1278, 1279
cross-reading . . . . .	1279
press-copies, etc. . . . .	1280, 2019
photographic copies . . . . .	§ 797, 2019
calling the copyist . . . . .	§ 1281

#### 3. *Official or certified copy*

when admissible; see CERTIFIED COPY.

not preferred to sworn copy . . . . . § 1273

#### 4. *Sundries*

copy in general . . . . .	801
which party may make . . . . .	note fourteen 1859
distinction between different kinds of copies . . . . .	1655
copy of printed matter, as a sample to identify . . . . .	440
of paper, used to aid collection . . . . .	§ 749, § 760
preference for maker of copy to recollection-witness . . . . .	1338
of lost document judicially established. . . . .	§ 1347
erasure in, not fatal . . . . .	note twelve 1677
of lost ancient deed . . . . .	§ 2143
of printed decisions and statutes. . . . .	§ 1684
proving the whole of the original	
lost documents . . . . .	§ 2105-2107
public records . . . . .	2108, § 2109

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italica*) refer to supplement; § 1678 refer to both.]  
Section

### Copy of a Document (*continued*).

judicial records . . . . .	§ 2110
furnished on demand before trial; see DISCOVERY.	
authentication by seal or signature . . . . .	§ 2162
[Examine analyses of "Production of Documentary Originals," Vol. II, pp. 1383, 1384; and "Verbal Completeness," Vol. III, p. 2819.]	
<b>Copyright</b> , infringement of, other acts showing intent . . . . .	§ 371
master's report of evidence on infringement . . . . .	note two § 1161
summary of contents, to prove infringement . . . . .	§ 1230
<b>Coroner</b> , confession made on examination before . . . . .	§ 852
report of former examination of witness before,	
whether preferred . . . . .	§ 1326, § 1329, § 1349
whether admissible . . . . .	1667
former testimony before, without cross-examination . . . . .	§ 1374
inquest of death, as evidence . . . . .	§ 1671
verdict of, to show cause of death . . . . .	note eight § 1671
inquest of, is not a trial . . . . .	note seven 1834
satisfying before, as a waiver of privilege . . . . .	§ 2276
<b>Corporal Injury</b> , repairs of premises after, as evidence of negligence . . . . .	§ 283
appearance of a wound, as indicating distance of assailant . . . . .	§ 457
speculative testimony to . . . . .	663
physician's testimony as to possible developments in . . . . .	663
qualifications of witness to . . . . .	§ 688
insurance as discrediting defendant-witness in . . . . .	§ 969
exhibition to the jury, whether allowable . . . . .	§ 1157, § 1158
whether compellable . . . . .	§ 2194, § 2220, § 2265
expressions of pain caused by . . . . .	1718
<i>res gestæ</i> statements after . . . . .	1747
inspection of, before trial . . . . .	§ 1862
privilege against inspection of . . . . .	§ 2194, § 2220, § 2265
opinion of damages by . . . . .	note one § 1944
opinion testimony to . . . . .	§ 1975
inspection of, compellable . . . . .	§ 2194, § 2220, § 2265
privilege for communications to physician . . . . .	§ 2380
presumption of negligence from . . . . .	§ 2507-2510
see also NEGLIGENCE; ILLNESS; DAMAGES.	
<b>Corporation</b> , disqualification of opponent as witness to a transaction with a	
deceased officer of . . . . .	§ 578
books and records of, as admissions . . . . .	§ 1074, § 1076
as official records . . . . .	1661
distinction between . . . . .	1661
as regular entries . . . . .	§ 1542, 1547
original books not produced . . . . .	§ 1223
conclusive proof of proceedings . . . . .	1346, § 2451
inspection before trial . . . . .	§ 1858
copy of whole required . . . . .	§ 2109, § 2116
proved by certified copy . . . . .	§ 1683, § 1710
certificate or charter of incorporation, proved by certified copy . . . . .	§ 1680
records of, proved by certified copy . . . . .	§ 1683
existence of, proved by reputation . . . . .	§ 1625
seal, presumed genuine . . . . .	§ 2169
privilege against self-crimination . . . . .	§ 2259
distinguished from official's personal privilege note two	2259
officer liable to subpoena <i>duces tecum</i> . . . . .	§ 2200
special form of process to secure books of . . . . .	2200
discovery from . . . . .	§ 2218
immunity from disclosure; see IMMUNITY.	
incriminated by facts obtained from third person . . . . .	2281
negotiable instrument signed by officer of . . . . .	§ 2444

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Corporation (<i>continued</i>).</b>	
acts of, under parol evidence rule	§ 2451
officer or employee of, examined as adverse party impeachable by the exam- iner	916
<b>Corpse</b> , exhumation of, to obtain evidence	1862, 2194, 2220
<b>Corpse-touching</b> as evidence	§ 9
<b>Corpus Delicti</b> , as negatived by survival of the alleged deceased	138
proof required, to corroborate confession	2070
definition of	§ 2072
identification of deceased not part of	note three § 2072
age of defendant may be part of	note five 2072
order and sufficiency of evidence of	§ 2073
proved by circumstantial evidence	§ 2081
direct testimony required by statute	§ 2081
<b>Correspondence</b> , acquaintance with, as qualifying a witness to handwriting	§ 702
putting in the whole	§ 2104, § 2120
reply-letter presumed genuine	2153
<b>Corroboration</b> , what is	2062
<b>Corroboration of a Witness</b>	
1. <i>Modes of supporting an Impeached Witness; see WITNESS, IV, Restoring Credit.</i>	
2. <i>Kinds of witnesses required to be Corroborated though unimpeached</i>	
treason	§ 2036
perjury	2040
sundry crimes	§ 2044
divorce	§ 2046
chancery	§ 2047
wills	§ 2048-2052
usage or custom	§ 2053
sundry civil cases	§ 2054
accomplice	§ 2056
complainant in rape	§ 2061
bastardy	§ 2061
seduction	§ 2061
enticement	§ 2061
breach of marriage-promise	§ 2061
parent bastardizing issue	§ 2063
surviving claimant	§ 2065
children	§ 2066
Chinese	§ 2066
detectives	§ 2066
prostitutes, etc.	§ 2066
confessions	
divorce respondent	§ 2067
accused	2070
3. <i>Sundries</i>	
confession, corroborated by subsequent facts	856
utterances identifying a time or place	416
[Examine analysis of "Number of Witnesses Required," Vol. III, p. 2692:]	
<b>Corruption of a witness</b> , as impeaching him	§ 956-964
of one's own witness	§ 901
willingness or offer to testify falsely	957, 958
confession of false testimony	959
attempt at subornation	960, 962
receipt of money	§ 961
sundry corrupt conduct	§ 963
preliminary inquiry to witness	964
contradiction by other witnesses	§ 1005, § 1022
<b>Counsel</b> , comment of, on failure to produce evidence	285-291
cross-examination by more than one	§ 783

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Counsel (*continued*).

statements by, as admissions . . . . .	§ 1063, § 1066
notes of testimony taken by . . . . .	§ 1669
reading scientific books to jury . . . . .	§ 1700
stating facts in argument . . . . .	1806
improper statements by, in argument . . . . .	1806, § 1807
in offering evidence or questioning witness . . . . .	§ 1808
using emotional language to excite prejudices of jury . . . . .	<i>note four</i> § 1807
illustrating argument by referring to literature . . . . .	<i>note three</i> 1807
taking the stand as witness . . . . .	§ 1911
claiming privilege for witness . . . . .	§ 2270
authority to make judicial admissions . . . . .	2594

see also ATTORNEY AND CLIENT; ATTORNEY.

**Counter-claim, agreement of, shown by parol . . . . .** 2436

**Counterfeiting, possession of materials, as evidence of . . . . .** § 153, § 238

other crimes, as evidence of intent . . . . . 309

forms of offence connected with . . . . . 309

**Counterpart, as equivalent to original . . . . .** § 1232

**County ordinance, boundary, etc., judicial notice of . . . . .** § 2575

**Course of business, as evidence of an act done . . . . .** 92

**Court, record of; see JUDICIAL RECORD.**

adjournment of, as affecting publicity . . . . . 1835

exclusion of witnesses from . . . . . § 1837

seal of, presumed genuine . . . . . § 2164

officers and rules of, judicially noticed . . . . . § 2578

see also VIEW; TRIAL; JUDGE.

**Coverture, presumption of coercion during . . . . .** § 2514

as evidence of prior or subsequent condition . . . . . § 382

see also MARRIAGE.

**Credibility of a witness; see IMPEACHMENT; WEIGHT; WITNESS, IV, *Restoring Credit*.**

**Credit, knowledge of falsity of representations as to, evidenced by repute . . . . .** § 256

of witness affected by his demeanor . . . . . § 946

restoring credit of accomplice . . . . . § 1128

of biased witness . . . . . § 1128

of impeached witness . . . . . § 1106, § 1116, § 1117, § 1131

utterances showing to whom, was given . . . . . § 1777

**Creditor, of partnership, repute as evidence of knowledge of . . . . .** § 255

of an insolvent; transfers as evidence of intent to defraud . . . . . 333

debtor's admissions used against . . . . . § 1081, § 1082, § 1086

indorsement of payment by, as statement against interest . . . . . § 1460, § 1466

utterances showing to whom credit was given . . . . . § 1777

possessor's utterances, used against . . . . . § 1779

presumptions applicable to sale in fraud of . . . . . § 2504

presumption of intent to defraud, in transfer to wife . . . . . § 2526

**Crime, by a third person, as exonerating an accused . . . . .** § 68, § 139-142, § 1726

evidence admissible, though it involves . . . . . 215

threats to commit a . . . . . § 105

other crimes, as evidence of intent, knowledge, or design . . . . . § 300-367

constitutionality of statute defining . . . . . § 1354

privilege not to disclose; see SELF-CRIMINATION.

confession of, by a third person . . . . . § 1476

by foreign law not privileged . . . . . § 2258

request to commit, not privileged . . . . . *note two* 2385

presumption of capacity to commit . . . . . § 2514

marriage disqualifying spouse as witness; see MARITAL RELATIONSHIP.

see also CONVICTION OF CRIME; CRIMINAL TRIAL; INTENT; DEFENDANT.

**Criminal Conversation, character of plaintiff as mitigating damages § 75, *note one* § 76**

conduct of plaintiff as mitigating damages . . . . . 210

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]  
Section

### **Criminal Conversation** (*continued*).

character of both husband and wife in issue in . . . . .	§ 211
conduct of defendant at other times, to show motive . . . . .	§ 398
expressions of husband or wife showing feelings . . . . .	§ 1730
reputation evidence of marriage insufficient to prove . . . . .	§ 1604
eye-witness of marriage required . . . . .	§ 2085
marriage celebrant's certificate not preferred to eye-witness . . . . .	§ 2088
marital privilege in . . . . .	§ 2239, § 2338

### **Criminal Intent**; see **INTENT**.

<b>Criminal Trial</b> , rules of evidence in, the same as in civil trial . . . . .	§ 4
in Federal courts, rules applicable in . . . . .	§ 6
injured person's admissions in . . . . .	§ 1076
exhibition of weapons or wounds to jury . . . . .	§ 1157, § 1158
history of rule for original documents in . . . . .	§ 1177
notice to produce original in . . . . .	1205
right of confrontation in . . . . .	1397
list of witnesses to the accused in . . . . .	§ 1850
list of grand jury witnesses . . . . .	§ 1852
known to prosecuting attorney . . . . .	§ 1853
list of all prospective witnesses . . . . .	§ 1854
unlisted witnesses excluded by statute . . . . .	§ 1855
eye-witnesses of crime required . . . . .	2078
eye-witness to marriage in . . . . .	note nine § 2086
marriage celebrant's certificate not preferred to eye-witness . . . . .	§ 2088
proof of <i>corpus delicti</i> . . . . .	2070, § 2081
tender of witness' expenses in . . . . .	§ 2201
marital privilege in . . . . .	§ 2239
patient's privilege in . . . . .	§ 2335
proof beyond a reasonable doubt in . . . . .	§ 2497
inference from failure to produce evidence in . . . . .	§ 2273
burden of proof in general . . . . .	§ 2511-2514

see also **DEFENDANT**; **CHARACTER**; **CRIME**.

### **Cross-examination**

- I. *Right to a Cross-examination*
- II. *Mode of Interrogation*
- III. *Order of Topics and Witnesses (Cross and Direct)*
- IV. *Methods of Using for Impeachment*
- V. *Sundries*

#### **I. Right to a Cross-examination**

theory and art of . . . . .	1362, 1365, § 1367, § 1368
adding to cross-examiner's own case . . . . .	§ 1368
bringing out undesirable facts on . . . . .	§ 1368
opportunity for, equivalent to actual . . . . .	§ 1371
tribunal not employing, bars admissibility elsewhere . . . . .	§ 1373
constitutional guarantee of . . . . .	1397
issues and parties affecting opportunity of . . . . .	§ 1386-1389
exclusion of testimony or deposition not subjected to cross-examination; see <b>HEARSAY RULE</b> , I.	
admission of testimony or deposition of absent person already cross-ex- amined; see <b>HEARSAY RULE</b> , I.	
exceptional admission of hearsay statements made out of court; see <b>HEAR-     SAY RULE</b> , II, III.	
testimony excluded for insufficiency of . . . . .	§ 1390-1393
adequacy of, in foreign language . . . . .	§ 1393
failure of, through witness' death or illness . . . . .	§ 1390
through refusal to answer . . . . .	§ 1391
refusal to answer on, as to privileged subject . . . . .	note two § 1391
hampered by organic defect of senses . . . . .	§ 1393
testimony excluded for non-responsive answers . . . . .	§ 1392

## INDEX OF TOPICS

(Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.)

	Section
<b>Cross-examination</b> ( <i>continued</i> ).	
right to cross-examine to admissibility of a confession . . . . .	§ 861
showing document to opponent before . . . . .	§ 1861
what witnesses may be subjected to	
witness sworn by mistake . . . . .	1893
called but not sworn . . . . .	§ 1893
sworn but not questioned . . . . .	§ 1893
producing or proving a document . . . . .	§ 1893, 1894
one's own witness . . . . .	§ 914
party opponent treated as if on . . . . .	<i>note one 1894</i>
<i>voir dire</i> . . . . .	§ 1384
of a deposition, excluded	
if direct answers are excluded . . . . .	§ 1893
or not offered . . . . .	§ 1893
of non-taker using the whole . . . . .	§ 1893
<b>II. Mode of Interrogation</b>	
theory and art of . . . . .	§ 1367, § 1368
putting hypothetical questions on . . . . .	684
specifying grounds of recollection on . . . . .	730
use of a memorandum of recollection on . . . . .	753, § 762, 764
use of a deposition to refresh recollection . . . . .	§ 761
leading questions on . . . . .	§ 773, 915
misleading questions on . . . . .	§ 780
derogatory and untrue insinuations in questions on . . . . .	§ 780
intimidation by cross-examiner . . . . .	§ 781, § 786
intimidating and annoying questions on . . . . .	§ 781
repetition of questions on . . . . .	§ 782
multiple cross-examiners . . . . .	§ 783
length of . . . . .	§ 783
non-responsive answers on . . . . .	§ 785
improper offer of evidence on . . . . .	§ 1808
see also QUESTION TO A WITNESS.	
<b>III. Order of Topics and Witnesses (Cross and Direct)</b>	
order and time of examination . . . . .	§ 1867
postponement and waiver . . . . .	§ 1884
offering documents . . . . .	§ 1884
putting in one's own case . . . . .	§ 1885-1891
who may be cross-examined; see <i>supra</i> , I.	
stating the purpose of a question on . . . . .	§ 1871
re-cross-examination . . . . .	1897
recall for re-cross-examination . . . . .	§ 1899
see also EXAMINATION.	
<b>IV. Methods of Using for Impeachment</b>	
to impeach rape-complainant as to chastity . . . . .	§ 200
to impeach a witness	
general theory . . . . .	878
one's own witness . . . . .	§ 914
broadness of scope . . . . .	§ 944
bias or quarrels . . . . .	§ 951
conviction of crime . . . . .	§ 980, § 1270
may ask about previous convictions, but not prosecutions . . . . .	<i>note one 987</i>
other misconduct . . . . .	§ 981-983
rumors of misconduct . . . . .	§ 988
testing a witness' grounds of knowledge . . . . .	994
testing a witness' recollection . . . . .	§ 995
manner of questioning . . . . .	§ 780, § 781
leading questions . . . . .	§ 773
repetition of questions . . . . .	§ 782
collateral facts . . . . .	§ 1006

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Cross-examination</b> ( <i>continued</i> ).	
self-contradictions . . . . .	§ 1023
by preliminary warning . . . . .	1025
expert witness, in general . . . . .	§ 991
to value . . . . .	§ 463
to handwriting . . . . .	§ 2015
to scientific books . . . . .	§ 1700
restoring credit after . . . . .	1106, § 1117, § 1131
see also WITNESS IV, <i>Restoring Credit</i> .	
privilege not to criminate . . . . .	§ 2268, § 2277
to impeach a party as witness	
accused . . . . .	889, § 2277
civil opponent . . . . .	§ 916
by account-books . . . . .	§ 1554
<b>V. Sundries</b>	
distinction between, and extrinsic testimony . . . . .	878
to contents of a document . . . . .	1255, § 1259
prior deposition . . . . .	§ 1262
showing document to opponent before . . . . .	§ 1861
witness on . . . . .	1185
to testimony before a committing magistrate . . . . .	§ 1375
preliminary warning to guard against unfair surprise . . . . .	1025
[Examine analyses of "By Cross-examination," Vol. II, p. 1697; and	
"Testimonial Narration or Communication," Vol. I, p. 858.]	
<b>Crossing of railway; see HIGHWAY; NEGLIGENCE; REPAIRS.</b>	
<b>Cross-reading of a document copied . . . . .</b>	1279
<b>Cruelty, other persons' conduct, as a standard of . . . . .</b>	§ 461
other like methods to show, to animals . . . . .	§ 461
by husband to wife; see HOMICIDE.	
<b>Cumulative witnesses excluded . . . . .</b>	§ 1907
<b>Curative admissibility . . . . .</b>	§ 15
<b>Custodian's certified copy; see CERTIFIED COPY.</b>	
<b>Custom, as evidence of doing an act . . . . .</b>	92
other instances, as evidence of tenor . . . . .	§ 376, 379
evidence of land rights founded on . . . . .	380
in other factories, etc., as evidence of safety, etc. . . . .	§ 461
witness' experience in . . . . .	565
concerning land-rights; see REPUTATION.	
proved by opinion . . . . .	1954
by one witness . . . . .	§ 2053
of a trade or locality to vary terms of written contract . . . . .	§ 2440
judicially noticed . . . . .	§ 2580
see also HABIT; USAGE.	
<b>Customers, names of, as privileged . . . . .</b>	§ 2212
<b>Customs Dues; see IMPORTATION.</b>	

## D

<b>Dactyloscopy, as affording evidence of identity . . . . .</b>	149, 413
<b>Damages, character of plaintiff in mitigation of . . . . .</b>	§ 75-80
conduct, to prove character in mitigation of . . . . .	§ 209-213
opinion testimony to . . . . .	1942, <i>note one</i> § 1944
impeaching a verdict determined by average . . . . .	§ 2354
amount of, as evidenced by other transactions; see CONTRACTS; VALUE.	
other defamatory utterances, to increase; see DEFAMATION.	
<b>Danger, of machine or place, evidence of owner's knowledge of . . . . .</b>	§ 252
construction of other machines, buildings, etc., as evidence of . . . . .	§ 437, § 451, § 461
other instances of injury, etc., as evidence of . . . . .	§ 451-461
opinion as to . . . . .	1949
risk of fire; see INSURANCE.	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

Section

<b>Date;</b> see <b>TIME</b> .	
<b>Daughter;</b> see <b>SEDUCTION</b> .	
<b>Daybook</b> of regular entries . . . . .	§ 1548, § 1558
<b>Deadly Weapon</b> , knowledge principle as applied to use of . . . . .	§ 363
malice presumed from use of . . . . .	<i>note four</i> § 2511
<b>Deaf-mute</b> may be a witness . . . . .	§ 498
interpreter's qualifications . . . . .	§ 571
necessity of interpreter . . . . .	§ 811, 1393
impeachment of . . . . .	§ 934
<b>Death</b> , as evidenced by failure of search . . . . .	158, 667
by lack of news . . . . .	§ 158
explaining away lack of news of . . . . .	§ 158
of opponent, not necessary for using admissions . . . . .	§ 1049
of attesting witness . . . . .	§ 1311
of declarant of facts against interest . . . . .	§ 1456
of pedigree-declarant . . . . .	§ 1481
of maker of regular entries . . . . .	§ 1521, § 1561
statement of time or place of; see <b>FAMILY HISTORY</b> .	
reputation of . . . . .	§ 1605
register of; see <b>REGISTER OF MARRIAGE, BIRTH, AND DEATH</b> .	
as excusing lack of cross-examination . . . . .	§ 1390
as allowing use of deposition . . . . .	1403
provable by coroner's inquisition . . . . .	§ 1671
as affecting marital privilege . . . . .	§ 2237, § 2341
patient's privilege . . . . .	2387, § 2391
client's privilege . . . . .	2323, § 2329
presumed, to validate a later marriage . . . . .	§ 2506
negligence presumed from . . . . .	§ 2510
absence raises presumption of . . . . .	§ 2531
<b>De bene esse;</b> see <b>DEPOSITION</b> .	
<b>Debt</b> , prior indebtedness, as evidence . . . . .	§ 382
pecuniary relations to show bias of a witness . . . . .	<i>note three</i> 949
as evidence of motive . . . . .	§ 392
see also <b>PAYMENT; CONTRACT; CREDITOR</b> .	
<b>Debtor</b> , indorsement of payment by, as statement against interest . . . . .	§ 1460, § 1466
admissions of, used against creditor . . . . .	§ 1081, § 1082, § 1086
declarations of, to show motive in conveyance . . . . .	§ 1083, § 1086
utterances in possession, used against creditor . . . . .	§ 1779
see also <b>CREDITOR</b> .	
<b>Deceased Declarant;</b> see <b>DYING DECLARATION</b> .	
<b>Deceased by Homicide</b> , character of, to evidence self-defence . . . . .	§ 63, § 246
threats of, to evidence self-defence . . . . .	110, § 247
survival of, to negative <i>corpus delicti</i> . . . . .	138
suicidal plans of, to evidence an accused's innocence . . . . .	143, § 1725, § 1726
acts of violence by, to evidence self-defence . . . . .	§ 198, § 248
details of prior quarrels to show hostility by . . . . .	<i>note three</i> 396
<b>Deceased Person</b> , in general, testimony of, based on personal observation . . . . .	670
disqualification of surviving opponent as witness . . . . .	§ 578, § 1576, § 2065
of wife of . . . . .	§ 610
Maryland rule requiring proof of contract with . . . . .	<i>note five</i> 2065
admissions of . . . . .	§ 1081
oral, not sufficient to establish claim against estate of . . . . .	<i>note four</i> 2064
character of, to prove negligence . . . . .	§ 65
use of account-books for or against . . . . .	§ 1554
hearsay statements of, admissible	
dying declaration; see <b>DYING DECLARATION</b> .	
facts against interest; see <b>AGAINST INTEREST</b> .	
pedigree; see <b>FAMILY HISTORY</b> .	
attesting witness; see <b>ATTESTING WITNESS</b> .	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Deceased Person, in general (*continued*).

regular entries; see REGULAR ENTRIES.

private boundaries; see BOUNDARIES.

ancient deed-recitals; see RECITALS.

deceased persons in general . . . . . § 1576

statutory exception for all statements of . . . . . § 578, § 1576

see also DEATH; SURVIVOR.

### Deceased Witness, former testimony of; see FORMER TESTIMONY.

### Decision; see JUDICIAL DECISION.

Declarant, of facts against interest, absence of . . . . . § 1456

absence of pedigree . . . . . § 1481

disqualification of, under exceptions to Hearsay rule . . . . . 1751

Declaration, of intent, used to interpret a document . . . . . § 2471

after possession ended, as admission . . . . . note two 1778

during possession, as verbal act . . . . . § 1777, § 1778

of deceased person; see DECEASED PERSON.

chauffeur's, of own responsibility for collision . . . . . note two 1041

Dedication, words accompanying, as *res gestæ* . . . . . § 1777

opinion evidence of intent of . . . . . § 1967

### Dedimus Potestatem; see DEPOSITION.

Deed, execution or delivery of, as evidenced by possession of it . . . . . § 157

mode of proving forgery of; see FORGERY.

impeaching one's own . . . . . 529

possession under, as evidence of boundaries . . . . . 378

original must be produced; see ORIGINAL DOCUMENT.

calling the attesting witness; see ATTESTING WITNESS.

recitals in, as admissible; see RECITALS.

land-grant of government . . . . . § 1225, § 1239

certificate of acknowledgment of, whether conclusive . . . . . § 1347, § 1352

registration of, whether conclusive . . . . . § 1352

contents of lost deed, recited in another . . . . . § 1573

discrimination between uses of recitals in . . . . . 1574

as showing reputation of boundary . . . . . 1592

admission of execution of recorded . . . . . § 1653

execution of, proved by certificate of acknowledgment . . . . . § 1676

abstract of title, as hearsay . . . . . § 1705

words accompanying gift by . . . . . § 1777

location of description in, by opinion . . . . . 1965

substance of contents of lost . . . . . § 1957, § 2105

existence of seal on recorded . . . . . note one § 2105

dispensing with proofs of prior . . . . . note three 2132

see also COMMON SOURCE OF TITLE.

thirty years old, presumed genuine . . . . . § 2137-2146

proof of agent's authority to execute ancient . . . . . 2144

filed in official records, presumed genuine . . . . . § 2159

privilege for title-deeds . . . . . 2211

recital of consideration in, varied by parol . . . . . § 2433

condition precedent, shown by parol . . . . . § 2408, § 2420

distinction between, and will . . . . . note fifteen § 2408

recording not necessarily final act of . . . . . note fourteen § 2408

absolute in form, shown by parol to be security only . . . . . § 2437

collateral agreements to a . . . . . note one § 2442

see also COLLATERAL AGREEMENTS.

interpretation of . . . . . 2458

erroneous description in a . . . . . note one § 2477

burden of proof of capacity of grantor . . . . . § 2500

presumption from confidential relations . . . . . § 2503

presumption of delivery, date, seal, etc. . . . . § 2520

of lost grant . . . . . § 2522

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

### Deed (*continued*).

	Section
of alteration before execution . . . . .	§ 2525
of identity of grantor or grantee . . . . .	§ 2529
reservation in, burden of proof . . . . .	<i>note one</i> § 2537
see also DOCUMENT; EXECUTION; HANDWRITING; RECORDED CONVEY- ANCE; ABSTRACT OF TITLE-DEEDS; COLOR OF TITLE.	

<b>De facto officer, document made by . . . . .</b>	<b>§ 1633</b>
celebrant of marriage . . . . .	§ 2505
appointment presumed . . . . .	§ 2535

### Defamation

character of plaintiff, to evidence innocence . . . . .	66
to mitigate damages . . . . .	§ 70-74
mitigation of damages in, as affected by the pleadings . . . . .	71, § 73
general character or particular traits in mitigation of damages in . . . . .	72, § 73
reputation founded on rumor as mitigating damages in . . . . .	§ 74
conduct of plaintiff as affecting defendant's ground for suspecting in . . . . .	§ 74
defendant not originator of charges in . . . . .	§ 74
good character as affecting damages in . . . . .	<i>note one</i> § 76
acts of plaintiff, to justify or to mitigate damages . . . . .	§ 207, § 209
unfair surprise in justifying acts in . . . . .	§ 207
other acts, to evidence intent . . . . .	§ 367
other utterances, to evidence malice . . . . .	§ 403-406
other persons' libels, as a standard of criticism . . . . .	§ 461
meaning of, by opinion evidence . . . . .	§ 1971
whole of an utterance to be proved . . . . .	§ 2097, § 2115, § 2119
proof of charge beyond reasonable doubt . . . . .	§ 2498
testimony before grand jury, not privileged . . . . .	§ 2363
official reports, privileged . . . . .	§ 2375
proving publication of the original document containing . . . . .	§ 1232-1257
<b>Defect, presumption of, from accident . . . . .</b>	<b>§ 2059</b>
see also NEGLIGENCE.	

### Defendant

character of accused, as evidence . . . . .	§ 55-57
time of character . . . . .	60
kind of character . . . . .	§ 57-59
accused as witness . . . . .	61, § 196
character of a civil defendant . . . . .	§ 64-67
threats of accused, to prove crime . . . . .	§ 105
mode of evidencing character by conduct . . . . .	§ 192-196
of accused . . . . .	§ 199
of civil party negligent . . . . .	§ 198
of deceased in homicide . . . . .	202
of character in issue . . . . .	§ 209
of character to mitigate damages . . . . .	§ 220, § 221
mode of evidencing skill or strength . . . . .	§ 228, § 231
sanity . . . . .	§ 228
mental capacity . . . . .	knowledge or belief; see KNOWLEDGE.
consciousness of guilt; see CONSCIOUSNESS OF GUILT.	
history of accused's disqualification as witness . . . . .	§ 575
statutory abolition of the same . . . . .	§ 579
co-defendants as witnesses . . . . .	§ 580
wife of, as witness . . . . .	§ 609
testifying to his own intent . . . . .	§ 581, 1965
confessions of; see CONFESSIONS.	
admissions of; see ADMISSIONS.	
impeachable like other witnesses, when called for himself . . . . .	890
when called for the opponent . . . . .	§ 916
may impeach a co-defendant . . . . .	§ 916

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Defendant</b> ( <i>continued</i> ).	
admissions of a co-defendant . . . . .	§ 1076
incompetency of evidence cannot be waived by infant . . . . .	<i>note one</i> 1063
statements when found with stolen goods . . . . .	§ 1777, § 1781
silence of, as an admission . . . . .	292, 1052, § 1071, § 1072
prejudice to, by exhibition of wounds, etc. . . . .	§ 1157
consistent statements of, in vindication . . . . .	1144
magistrate's report of examination of . . . . .	§ 1326, § 1349
bystander's testimony on report of examination of illiterate . . . . .	<i>note one</i> 1278
expressions of intent or motive . . . . .	§ 1732
expressions negating intent . . . . .	§ 1732
right to be present at a view . . . . .	1803
opinion testimony to capacity of . . . . .	§ 1958
confession of accused, sufficiency of . . . . .	2070
examination of accused before magistrate; see DEPOSITION; FORMER TESTIMONY.	
privilege against self-crimination . . . . .	§ 2276
see also CO-INDICTEE.	
<b>Definition</b> , of evidence . . . . .	1
of Preferential rules . . . . .	1172
of Analytic rules . . . . .	1172
of Prophylactic rules . . . . .	1172
of Simplificative rules . . . . .	1172
of Quantitative rules . . . . .	1172
<b>Degree</b> of probative value required for relevancy of evidence; see BEST EVIDENCE; COPY.	§ 38
<b>Delay</b> , in complaining or suing, as evidence . . . . .	§ 284
<b>Delivery</b> by mail, express, or telegraph . . . . .	§ 95
of a deed, as evidenced by possession of it . . . . .	§ 157
words accompanying, of a chattel . . . . .	§ 1777
of a document, proved without production . . . . .	1248
of negotiable instrument in escrow . . . . .	§ 2409, § 2420
of a deed, shown conditional by parol evidence . . . . .	§ 2408, § 2420
grantee's possession as evidence of . . . . .	§ 2520
date of, presumed from date of document . . . . .	§ 2520
registration as evidence of . . . . .	§ 2520
see also PAROL EVIDENCE RULE; DEED.	
<b>Delusion</b> , as affecting competency . . . . .	32
<b>Demand</b> for a document; see NOTICE TO PRODUCE.	
<b>Demeanor</b> , of accused, as evidence of guilt . . . . .	§ 273, 274
under the right of confrontation . . . . .	1395, 1399
of a witness, as affecting credibility . . . . .	§ 946
<b>Demurrer</b> to evidence . . . . .	§ 2495, 2589
to claim barred by statute of limitations . . . . .	§ 2538
<b>Dentist</b> , privileged communication to . . . . .	§ 2382
<b>Deponent</b> , absence of . . . . .	§ 1404
<b>Deposition</b>	
I. <i>Right of Cross-examination of Deponent</i>	
II. <i>Right of Confrontation of Deponent</i>	
III. <i>Sundries</i>	
(a) <i>taking</i>	
(b) <i>transcribing</i>	
(c) <i>use by proponent</i>	
(d) <i>use by opponent</i>	
(e) <i>miscellaneous</i>	
I. <i>Right of Cross-examination of Deponent</i>	
personal attendance must be shown impracticable . . . . .	1376
notice required . . . . .	§ 1377-1383
plural depositions . . . . .	§ 1379

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

### Deposition (continued).

Section

<i>in perpetuum memoriam</i> , is notice required . . . . .	§ 1378, 1383
interval of time after notice . . . . .	§ 1378
attendance cures defective notice . . . . .	§ 1378
<i>in perpetuum</i> , recording may be necessary . . . . .	1383
issues and parties the same . . . . .	§ 1386-1388
either party may use . . . . .	§ 1389
opponent using suppressed deposition . . . . .	§ 1389
non-responsive answers . . . . .	§ 1392
sweeping interrogatories . . . . .	§ 1392
<b>II. Right of Confrontation of Deponent</b>	
constitutional guarantee . . . . .	1397
witness-rule of number, satisfied by . . . . .	1305
spurious distinctions between <i>de bene esse</i> and <i>in perpetuum memoriam</i> . . . . .	1401
between civil and criminal cases . . . . .	1401
excuses for non-attendance (death, illness, non-residence, imprisonment, etc.) . . . . .	§ 1402-1413
proof of the excuse . . . . .	§ 1414
witness present in court . . . . .	note ten 18, § 1415
not usable if witness available . . . . .	§ 1415
except to impeach . . . . .	§ 1416
opponent's deposition . . . . .	§ 1416
opponent's deposition . . . . .	§ 1416
deposition used to impeach deponent . . . . .	§ 1416
malicious prosecution . . . . .	§ 1416
chancery depositions . . . . .	§ 1417
probate and bastardy examinations . . . . .	§ 1417
chancery and <i>dedimus potestatem</i> . . . . .	§ 1381, § 1417
<i>perpetuum memoriam</i> . . . . .	§ 1378, § 1412, § 1417
statutes affecting, in <i>perpetuum memoriam</i> . . . . .	§ 1412
<i>de bene esse</i> . . . . .	§ 1411
<b>III. Sundries</b>	
(a) <i>taking</i>	
mode of taking . . . . .	1376, § 1380, 1401
objection to, time of making . . . . .	§ 18, 486
must be taken by one authorized . . . . .	1376
mode of interrogation in; see QUESTION TO A WITNESS.	
prepared beforehand to suggest answers . . . . .	787
officer taking, not to be party's agent or kinsman . . . . .	§ 803
taking an attesting witness' deposition . . . . .	§ 1312
power of officer to compel answer . . . . .	§ 2195
persons privileged to testify by . . . . .	2205, 2206
attendance from a distance not required . . . . .	§ 2207
(b) <i>transcribing</i>	
transcription of answers to be literal and immediate . . . . .	804
reading over and signing . . . . .	805
(c) <i>use by proponent</i>	
used to refresh the recollection of one's own witness . . . . .	904
used to aid recollection . . . . .	§ 761, 764
<i>prima facie</i> effect of, by attesting witness . . . . .	note two § 2500
(d) <i>use by opponent</i>	
used by opponent, as preventing impeachment . . . . .	§ 912, § 913
discrediting its mode of preparation . . . . .	996
impeachment by self-contradiction . . . . .	§ 1031
in another trial, used or referred to . . . . .	§ 1075
cross-examination on a prior deposition . . . . .	§ 1262
(e) <i>miscellaneous</i>	
in general . . . . .	802
magistrate's report of examination preferred . . . . .	§ 1326, § 1349

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Deposition</b> , perjury in, inadmissible . . . . .	<i>note twelve</i> 1349
written deposition required to be used . . . . .	§ 1331
of ambassador . . . . .	§ 1384, 1407
statement in, to evidence pedigree . . . . .	1495
certificate of taking of . . . . .	§ 1676
certified copy of; see <b>CERTIFIED COPY</b> .	
liability of deponent for perjury . . . . .	§ 1832
cross-answers excluded	
when direct answers are . . . . .	§ 1893
when taker does not offer . . . . .	§ 1893
non-taker using may not impeach . . . . .	§ 1893
putting in the whole . . . . .	§ 2103, 2111, § 2115
documents referred to in . . . . .	§ 2104
is no part of record . . . . .	2111
annexing a copy of a document to . . . . .	1185
producing original . . . . .	§ 1215
under Federal statute; conflicting laws . . . . .	<i>note five</i> 6
see also <b>DISCOVERY</b> ; <b>EXAMINATION</b> .	
[Examine analyses of "By Cross-examination," Vol. II, p. 1697; and	
"By Confrontation," Vol. II, p. 1749.]	
<b>Deputy Officer</b> , document made by . . . . .	§ 1633
<b>Description</b> , in deed, interpretation of; see <b>PAROL EVIDENCE RULE, D</b> .	
location of, in deeds, maps, etc. . . . .	§ 1956
<b>Design</b> , as evidence of an act done . . . . .	§ 102-113
definition of . . . . .	300
distinguished from intent or motive . . . . .	103, 237
distinguished from intention . . . . .	103
relevancy of, distinguished from hearsay expressions of	103
conduct, preparation, etc., as evidence of . . . . .	§ 237-240
other crimes, as evidence of . . . . .	§ 300-367
statements of . . . . .	§ 1725, 1735
<b>Destruction</b> of evidence, as indicating guilt . . . . .	§ 278
of document, as evidence of contents . . . . .	§ 291
as excusing production . . . . .	§ 1193
of other property, as evidence of a nuisance . . . . .	§ 451
<b>Detective</b> , impeached by his interest or bias . . . . .	§ 949, § 969
testimony of, to be corroborated . . . . .	§ 2066
confession made to; see <b>CONFESSION</b> .	
<b>De ventre inspiciendo</b> , writ of . . . . .	§ 2220
<b>Devisee</b> , admissions of . . . . .	§ 1081
see also <b>WILL</b> ; <b>EXECUTOR</b> .	
<b>Diagram</b> , as a mode of testifying . . . . .	790
verification of . . . . .	793
<b>Dictagraph</b> as a basis for testimony to a conversation overheard . . . . .	669
<b>Dictionaries</b> , used in evidence . . . . .	1699
judicially noticed . . . . .	§ 2582
<b>Difficulty</b> , of work, etc., as shown by instances . . . . .	§ 460
<b>Diligence</b> in search for lost document . . . . .	§ 1194
in search for attesting witness . . . . .	§ 1313
<b>Diplomatic Officer</b> ; see <b>AMBASSADOR</b> ; <b>CONSUL</b> .	
<b>Direct Evidence</b> , defined . . . . .	25
<b>Direct Examination</b>	
specifying grounds of knowledge on . . . . .	§ 655
specifying grounds of recollection on . . . . .	730
leading questions on; see <b>QUESTION</b> .	
contradicting answers made on . . . . .	§ 1007
struck out, if cross-examination is not had . . . . .	§ 1390
order of topics on . . . . .	1883
putting in documents on . . . . .	1883

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Direct Examination</b> ( <i>continued</i> ).	
party opponent on, treated as if on cross-examination . . . . .	note one 1884
irrelevant matters, conditionally received on . . . . .	§ 1871
what constitutes calling a witness on . . . . .	1892
cross-examination to facts asked for on . . . . .	§ 1885-1891
see also EXAMINATION; CROSS-EXAMINATION.	
<b>Directing a verdict</b> . . . . .	§ 2495
<b>Disbarment</b> , proof beyond reasonable doubt . . . . .	§ 2498
<b>Discharge of contract</b> , shown by parol . . . . .	§ 2441, § 2455
charge and discharge entries . . . . .	2117
<b>Discovery</b>	
general principle as to discovery	
- common law . . . . .	1845, § 1858
unfair surprise as grounds for . . . . .	1845
chancery . . . . .	1846
policy of the rule . . . . .	1847
exceptions to the rule	
list of witness in criminal cases . . . . .	1874, § 1850-1855
list of witnesses in criminal cases . . . . .	1874, § 1850-1855
discovery in chancery . . . . .	§ 1856, § 1857
from officer of corporation . . . . .	note eight § 1856
in Federal courts under State statute . . . . .	note ten § 1856
under Federal statutes . . . . .	note ten § 1856
statutory interrogatories to opponent . . . . .	1847, § 1856
discrediting opponent's character by his own interrogatories . . . . .	note eight § 1856
names of witnesses in civil cases . . . . .	§ 1856
documents inspected before trial . . . . .	1847, § 1857-1860
corporate and manorial records . . . . .	§ 1858
documents subject to common interest or trusteeship . . . . .	§ 1858
stockholder's remedy mandamus or discovery . . . . .	note four § 1858
of insurance documents . . . . .	§ 1858
which party may make copy of document . . . . .	note fourteen 1859
against third person not a party . . . . .	§ 1859
of sundry documents . . . . .	§ 1859
failure by affidavit to deny execution of document . . . . .	§ 1860
shown on cross-examination . . . . .	§ 1861
inspection makes evidence . . . . .	§ 1861
exclusion for failure to allow inspection . . . . .	§ 1210
premises, chattels, and body, inspected before trial . . . . .	1847, § 1862
from opponent in chancery at the trial . . . . .	§ 2218
under statutes . . . . .	§ 2218
under client's privilege . . . . .	2318
see also CHANCERY.	
[Examine analysis of " Preliminary Notice, or Discovery, to the Opponent," Vol. III, p. 2398.]	
<b>Discretion of the trial court</b> ; see JUDICIAL DISCRETION.	
<b>Disease</b> , specific tendency of, shown by symptoms . . . . .	§ 457
subsequent, to evidence prior . . . . .	168
see also ILLNESS.	
<b>Disgracing Answers</b> , privilege against . . . . .	§ 984-987, 2216, 2255
<b>Disinheritance</b> , as evidence of testator's insanity . . . . .	§ 229
parol evidence of intent . . . . .	§ 2475
<b>Disorderly house</b> ; see HOUSE OF ILL-FAME	
<b>Disqualification</b> , by reason of interest . . . . .	
mode of ascertaining . . . . .	583
time of interest to cause . . . . .	583
burden of proving . . . . .	§ 584
mode of proving . . . . .	585
time of objecting to . . . . .	§ 586

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both ]  
Section

### **Disqualification (*continued*).**

judge determines . . . . . 587  
of party charged in same indictment . . . . . § 580  
of survivor against deceased . . . . . § 578  
of declarant, under exceptions to Hearsay rule . . . . . 1751  
of wife by marriage subsequent to crime . . . . . *note four* 605  
by conviction of crime; see CONVICTION OF CRIME.

**Distance**, of a weapon, as shown by effects . . . . . § 457  
of a person, sound, sight, etc., as shown by instances . . . . . § 460  
as excusing absence of an attesting witness . . . . . § 1312  
of a deponent . . . . . 1407  
opinion testimony to . . . . . § 1977  
of witness' residence exempting from attendance . . . . . § 2207  
judicially noticed . . . . . § 2581

**Divorce**, as qualifying wife as witness . . . . . § 610  
evidence of adultery of co-respondent in . . . . . § 68  
connivance with co-respondent in . . . . . § 391  
as affecting marital privilege . . . . . § 2237, § 2341  
one witness to a charge . . . . . § 2046  
corroboration required of detective's and prostitute's testimony in . . . . . § 2066  
confession of respondent . . . . . § 2067  
eye-witness of marriage . . . . . § 2085, § 2086  
marriage celebrant's certificate not preferred to eye-witness . . . . . § 2088  
inspection of party, on charge of impotency . . . . . § 2220  
presumed, to validate a later marriage . . . . . § 2506

**Docket**, original's production required . . . . . § 1215, 1217  
certified copy allowed . . . . . § 1681  
conclusive . . . . . § 2450  
is not a record . . . . . *note seven* 2450

**Document**, misuse of motion to "strike out" . . . . . *note seventeen* 18  
possession of, as evidence of payment . . . . . 156  
execution or delivery, as evidenced by possession of it . . . . . § 157  
possession of, as evidence of knowledge . . . . . § 260  
failure to object to admission of, admits genuineness and authority to  
execute . . . . . *note twenty seven* 18

failure to produce, as evidence of contents . . . . . § 291  
as inference of non-existence . . . . . § 291

concealment of . . . . . § 291, § 1198, 1199  
destruction of, as evidence of contents . . . . . § 291

alteration of, as avoiding . . . . . 1198  
marks on, as evidence of identity . . . . . 415

impeaching one's own . . . . . 529  
requirement of two impeaching witnesses in Pennsylvania . . . . . § 2054

execution of, witness' personal observation of . . . . . 666  
proof of genuineness by handwriting; see HANDWRITING.

of predecessor, as qualifying a witness to handwriting . . . . . § 704  
third person, as party's admission . . . . . § 1073

used to aid recollection; see RECOLLECTION.  
showing to opponent before cross-examination . . . . . § 1861

to witness on cross-examination . . . . . 1185  
right to require proponent to show, to opponent . . . . . § 1861

original must be produced; see ORIGINAL DOCUMENT.  
dying declaration reduced to writing . . . . . § 1445, § 1450

kinds of copy allowed or preferred; see COPY; CERTIFIED COPY.  
execution proved by attesting witness; see ATTESTING WITNESS.

by other methods; see EXECUTION.  
putting in on direct or cross-examination . . . . . 1883, § 1884

impeachment of witness who proves . . . . . § 1893  
discovery of, before trial; see DISCOVERY.

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]  
Section

## Document (continued).

taken to jury-room . . . . .	§ 1802, 1913
expert testimony to	
alterations . . . . .	2027
date . . . . .	2027
decipherment . . . . .	2025
erasures . . . . .	2027
forgeries . . . . .	§ 2026
imitations . . . . .	§ 2026
ink . . . . .	§ 2024
paper . . . . .	§ 2024
spelling . . . . .	§ 2024
putting in the whole	
sundry instances . . . . .	§ 2102, § 2116
depositions . . . . .	§ 2103, 2111, § 2115
separate documents . . . . .	§ 2104, § 2120
lost deeds, etc.; abstracts . . . . .	§ 2105
lost wills . . . . .	§ 2106
public records . . . . .	2107
judicial records . . . . .	§ 2110
bill and answer in chancery . . . . .	2111
account-books . . . . .	§ 2118
chancery answer, responsive parts . . . . .	2121
presumed genuine in official files . . . . .	§ 2158
answers to interrogatories . . . . .	§ 2124
document inspected by opponent . . . . .	2125
authentication of . . . . .	2129
authenticated by circumstantial evidence . . . . .	§ 2131
authentication unnecessary . . . . .	§ 2132
put in by cross-examiner . . . . .	note five 2125
discrimination between principles affecting execution of signature to, not always necessary to charge execution . . . . .	2133 § 2134
self-criminating, illegally seized . . . . .	§ 2183
obtained by illegal search . . . . .	§ 2183
lacking revenue-stamp . . . . .	§ 2184
privilege for title-deeds . . . . .	2211
documents held under a lien . . . . .	§ 2211
trade secrets . . . . .	§ 2212
production by opponent at trial . . . . .	§ 2219
by witness . . . . .	§ 2193, § 2200
by one who has control of . . . . .	§ 2200
by corporation . . . . .	§ 2200
under self-crimination privilege . . . . .	§ 2264
inference from withholding . . . . .	§ 2264
under client's privilege . . . . .	§ 2307-2309, 2318
opponent not entitled to see, until admitted . . . . .	§ 2200
ambiguity in . . . . .	§ 2472
parol evidence rule binds parties only . . . . .	§ 2446
burden of producing, under parol evidence rule . . . . .	2447
parol evidence to vary terms; see PAROL EVIDENCE RULE.	
delivery of, having a blank . . . . .	§ 2410, 2419
possession of, as presuming payment . . . . .	§ 2518
spoliation of, as creating a presumption . . . . .	2624
admission of execution of . . . . .	§ 2132, § 2596
presumption of alteration . . . . .	§ 2525
consideration . . . . .	§ 2520
date . . . . .	§ 2520
delivery . . . . .	§ 2520
execution . . . . .	2519

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Document (*continued*).

loss . . . . .	§ 2522
signature . . . . .	§ 2520
liability on alteration of . . . . .	2419
interpretation of	
by expert testimony to technical words . . . . .	§ 1955, § 1956
for the court . . . . .	§ 2556
by parol evidence; see PAROL EVIDENCE RULE, D.	
affidavit denying genuineness of . . . . .	§ 2596
see also CONTRACT; DEED; EXECUTION OF DOCUMENT; JUDICIAL RECORD; ORIGINAL DOCUMENT; PUBLIC DOCUMENT; RECORDED CONVEYANCE; WILL. [Examine analyses of "Verbal Completeness," Vol. III, p. 2819; and "Parol Evidence Rule," Vol. IV, p. 3367.]	
Dog, character of, as evidence . . . . .	§ 68
recognition by . . . . .	<i>note two</i> 177
conduct of, in tracing an accused . . . . .	§ 177
as evidencing disposition . . . . .	§ 201
see also ANIMAL; BLOODHOUND.	
Domain, inquisition of . . . . .	§ 1670
Domicil, declarations of, by a voter . . . . .	§ 1712
by other persons . . . . .	§ 1727, § 1784
presumed to continue . . . . .	§ 2530
Doubt, proof beyond a reasonable . . . . .	§ 2497
Dramatic expression by a witness . . . . .	§ 789
modes of testifying . . . . .	<i>note three</i> 1167
see also EXHIBITION.	
Drawee, parol agreement collateral to instrument . . . . .	2443
see also BILL OF EXCHANGE.	
Drawing, used to illustrate testimony . . . . .	790
Drinking; see INTOXICATION; INTEMPERANCE; LIQUOR; LIQUOR-SELLING.	
Driving a vehicle; see VEHICLE; NEGLIGENCE.	
Drug, specific tendency of a . . . . .	§ 457
see also POISON; PHARMACIST; OPIUM.	
Drunkness; see INTOXICATION; INTEMPERANCE; LIQUOR; LIQUOR-SELLING.	
Duces tecum; see SUBPENA.	
Dumb person; see DEAF-MUTE.	
Duplicate original document, production of . . . . .	§ 1232
distinguished from copy . . . . .	1231
Duress making acts voidable . . . . .	§ 2423
admissions under . . . . .	1050
see also CONFESSION.	
Dying Declaration	
constitutionality of admitting . . . . .	§ 1398
history and principle . . . . .	1430, 1431
restricted to certain criminal cases . . . . .	§ 1432
of woman in abortion . . . . .	§ 1432
death must be declarant's . . . . .	§ 1433
subject of declaration . . . . .	§ 1434-1435
necessity principle does not limit use of, to absence of other evidence . . . . .	§ 1436
consciousness of speedy and certain death . . . . .	§ 1438-1442
subsequent confirmation of incompetent . . . . .	§ 1439
certainty of death, not possible or probable death . . . . .	§ 1440
actual period of survival immaterial . . . . .	§ 1441
theological belief . . . . .	1443
manifested revengeful feelings in . . . . .	1443
recollection, leading questions, etc. . . . .	§ 1445
declarant must be competent as witness . . . . .	§ 1445
may be communicated in any manner . . . . .	§ 1445

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

### **Dying Declaration** (*continued*).

	Section
impeachment . . . . .	§ 1033, § 1446
opinion rule . . . . .	§ 1447
cut short by death or intruder . . . . .	§ 1448
producing the whole . . . . .	§ 1448, § 2099
the original . . . . .	1449
written statement not preferred . . . . .	1332, § 1450
written report of magistrate . . . . .	§ 1450
reducing to writing . . . . .	§ 1445, § 1450
judge and jury . . . . .	§ 1451
accused may use . . . . .	§ 1452

[Examine analysis of "Dying Declarations," Vol. II, p. 1798.]

## E

<b>Ecclesiastical Courts</b> , rules of evidence in . . . . .	§ 2032, 2045, § 2067, § 2250
<b>Effect of a machine</b> , place, weapon, experiment, etc., as evidencing the cause or origin . . . . .	§ 437-461
<b>Ejectment</b> ; see DEED; TITLE; POSSESSION; COMMON SOURCE OF TITLE.	
<b>Election</b> , offences against, other acts evidencing intent . . . . .	§ 367
certificate of, conclusive . . . . .	§ 1351
books of, as evidence . . . . .	§ 1640
results of, judicially noticed . . . . .	§ 2577
see also VOTE; BALLOT.	
<b>Electric Wires</b> ; see NEGLIGENCE; MACHINE; HIGHWAY.	
<b>Elevator</b> , former instances of injury or negligence . . . . .	§ 252
defective; see NEGLIGENCE; OWNER; MACHINE.	
<b>Embezzlement</b> , possession of money, as evidence of . . . . .	§ 154
other embezzlements, as evidence of intent . . . . .	329
motive for . . . . .	§ 392
<b>Embracery</b> ; see BRIBERY.	
<b>Eminent Domain</b> , view by jury in . . . . .	§ 1168
<b>Employee</b> , character of, to evidence negligence . . . . .	§ 65
character of, as affecting employer's liability . . . . .	§ 80, § 249
intemperance of, as constituting incompetence . . . . .	96, § 203
acts of negligence, to evidence character . . . . .	§ 199, § 208
to evidence employer's knowledge . . . . .	§ 250
unfair surprise in showing negligent acts of . . . . .	§ 208
on vehicles, bridges, etc., standard of conduct of . . . . .	§ 461
as a biased witness . . . . .	§ 949, § 969
appearance of, as indicating competence . . . . .	§ 1154
presumption of negligent injury to . . . . .	§ 2509
<b>Employer's Liability</b> , character of employee as affecting . . . . .	§ 80, § 249
<b>Engine</b> ; see SPARKS; MACHINE; SPEED.	
<b>Enlistment</b> , register of, as evidence . . . . .	§ 1641
<b>Enrolment</b> , of a statute, whether conclusive . . . . .	§ 1350
of a deed; see RECORDED CONVEYANCE.	
of a judicial proceeding; see JUDICIAL RECORD.	
<b>Enticement</b> for prostitution, character of complainant to show consent . . . . .	§ 62
other offences as evidence of intent . . . . .	349, 360
<b>Entry</b> , in a book, to aid recollection; see RECOLLECTION.	
made by a public officer; see PUBLIC DOCUMENT.	
in docket or minutes; see JUDICIAL RECORD.	
as a statement of facts against interest; see AGAINST INTEREST.	
made in the course of business; see REGULAR ENTRIES.	
<b>Equivocation</b> in a document . . . . .	§ 2472
<b>Equity</b> , rebutted by declarations of intent . . . . .	§ 2475
procedure in; see CHANCERY.	
rules in, distinguished from rules at law . . . . .	§ 4

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Erasure</b> , expert testimony to . . . . .	2027
<b>Error</b> , impeaching a witness; see <b>CONTRADICTION</b> .	
of ruling, as ground for new trial . . . . .	§ 21
<b>Escape</b> , as evidence of guilt . . . . .	§ 276
refusal to, as evidence of innocence . . . . .	§ 293
<b>Escheat</b> , inquisition of . . . . .	§ 1670
<b>Escrow</b> , shown by parol evidence . . . . .	§ 2408, § 2420
<b>Estoppel</b> , distinguished from an ordinary admission . . . . .	§ 1056, § 1058
from a judicial admission . . . . .	2589
<b>Evidence</b> , defined . . . . .	1
distinguished from argument . . . . .	1
from substantive law, and pleading . . . . .	2
rules of, whether alterable by the Legislature . . . . .	§ 7
admissible for one purpose but not for another . . . . .	13
conditionally on other facts being shown . . . . .	14
even after jury has retired . . . . .	§ 1880
explaining away . . . . .	32-35, 239
inadmissible, when received, is not to justify other inadmissible evidence . . . . .	§ 15
offer of and objection to, mode of making . . . . .	§ 17, § 18
misuse of motion to "strike out" . . . . .	note seventeen 18
ruling upon an objection to . . . . .	§ 19
erroneous exclusion cured by subsequent admission . . . . .	note three 19
circumstantial and testimonial, distinguished . . . . .	25
circumstantial may be proved by circumstantial . . . . .	41
presence of articles as corroborating . . . . .	§ 149
what is "corroborative" . . . . .	2062
fabrication of, as indicating guilt . . . . .	§ 278
to be weighed by probability, not possibility . . . . .	note two 235
failure to produce, as indicating a weak case . . . . .	§ 285-291
as indicating unfavorable tenor . . . . .	§ 285
distinction between impeaching and rehabilitating . . . . .	880
length no ground for exclusion . . . . .	1864
incompetency of, cannot be waived for infant defendant . . . . .	note one 1063
order of presentation changed by court . . . . .	§ 1867
in rebuttal, advanced by anticipation . . . . .	§ 1869
manufacturing . . . . .	§ 1732
"best evidence" rule . . . . .	1173
primary and secondary . . . . .	1175
secondary, are there degrees of . . . . .	§ 1268
<i>prima facie</i> . . . . .	§ 2494
sufficient for jury . . . . .	§ 2494
motion to exclude all . . . . .	note three 2495
preponderance of . . . . .	§ 2498
procured by illegal search or seizure . . . . .	§ 2264
demurrer to . . . . .	§ 2495
judge's right to determine sufficiency and admissibility . . . . .	§ 2550
order of, in general . . . . .	1866
between co-defendants . . . . .	note one 1872
illegally obtained . . . . .	§ 2183
justifiable trespass in securing . . . . .	note one 2221
order of topics of, in trials; see <b>EXAMINATION</b> .	
primary; see <b>BEST EVIDENCE</b> ; <b>ORIGINAL DOCUMENT</b> .	
conclusive; see <b>CONCLUSIVENESS</b> .	
weight of; see <b>WEIGHT</b> .	
circumstantial; see <b>CIRCUMSTANTIAL</b> .	
see also <b>OFFER</b> .	
<b>Examination of Premises</b> , chattels, etc.; see <b>DISCOVERY</b> ; <b>PARTY'S PRIVILEGE</b> ;	
<b>REAL EVIDENCE</b> .	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Examination of Witness

- I. *Before a Magistrate*
- II. *Right of Cross-examination*
- III. *Order of Examination at Trial*
  - (a) *in general*
  - (b) *putting in the case at large*
  - (c) *after case closed*
  - (d) *examination of a witness on the original call*
  - (e) *recall*
- IV. *Sundries*
- I. *Before a Magistrate*
  - magistrate's report of former testimony, whether required § 1326 *et seq.*, § 1349
  - whether admissible . . . . . 1667
  - former testimony before, without cross-examination . . . . . § 1375
  - dying declaration under oath . . . . . § 1450
  - testimony proved
    - by magistrate's report . . . . . 1667
    - by stenographer's notes . . . . . § 1669
    - see also DEPOSITION.
- II. *Right of Cross-examination; see CROSS-EXAMINATION, I.*
- III. *Order of Examination at Trial*
  - (a) *in general*
    - trial court's discretion controls . . . . . § 1867
    - length of time immaterial . . . . . 1864
  - (b) *putting in the case at large*
    - case of proponent in chief
      - order of topics . . . . . 1870
      - party testifying first . . . . . § 1870
      - facts conditionally relevant . . . . . § 1871
      - matter without *prima facie* relevancy . . . . . § 1871
      - rejected matter later relevant . . . . . *note two* § 1871
      - irrelevant questions on cross-examination . . . . . § 1871
      - reading documents . . . . . 1883
    - case of opponent in reply . . . . . § 1872
    - calling witness during proponent's case . . . . . § 1872
    - case in rebuttal, in general . . . . . § 1873
      - before opponent closes . . . . . § 1872
    - limitations on evidence in rebuttal . . . . . § 1873
    - anticipation of case in rebuttal . . . . . § 1873
    - case in surrebuttal . . . . . § 1874
    - later stages . . . . . 1875
  - (c) *after case closed*
    - one case closed . . . . . § 1876
    - evidence admitted after case closed . . . . . § 1876
    - both cases closed . . . . . § 1877
    - argument begun . . . . . § 1878
    - charge given . . . . . § 1879
    - jury retired . . . . . § 1880
    - verdict rendered . . . . . 1881
  - (d) *examination of a witness on the original call*
    - direct examination . . . . . 1883
      - putting in documents . . . . . 1883
    - cross-examination . . . . . § 1884
      - postponement . . . . . § 1884
      - two or more opponents . . . . . § 1884
      - offering documents . . . . . § 1884
      - putting in one's own case . . . . . § 1885-1891
      - see also CROSS-EXAMINATION.
    - whose is the witness . . . . . 1892

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Examination of Witness (<i>continued</i>).</b>	
re-direct examination . . . . .	§ 1986
re-cross-examination . . . . .	1897
later stages . . . . .	1897
(e) <i>recall</i>	
for re-direct examination . . . . .	1898
for re-cross-examination . . . . .	§ 1899
<b>IV. <i>Sundries</i></b>	
effect of death or illness preventing cross-examination . . . . .	§ 1390
refusal to answer on cross-examination . . . . .	§ 1391
non-responsive answer . . . . .	§ 1392
of opponent or witness before trial; see <b>DISCOVERY</b> .	
at a former trial, used to aid recollection; see <b>RECOLLECTION</b> .	
mode of putting questions on; see <b>QUESTION TO A WITNESS; CROSS-EXAMINATION</b> .	
see also <b>DIRECT EXAMINATION</b> .	
specific topics on direct examination; see <b>DIRECT EXAMINATION</b> .	
specific topics on cross-examination; see <b>CROSS-EXAMINATION</b> .	
confession made under oath on; see <b>CONFESSION</b> .	
of a party as witness; see <b>WITNESS</b> .	
admissibility of prior examination; see <b>DEPOSITION; FORMER TESTIMONY</b> .	
[Examine analysis of "Order of Evidence," Vol. III, p. 2459.]	
<b>Examined Copy; see COPY.</b>	
<b>Exception to a ruling upon evidence, mode of taking . . . . .</b>	<b>§ 20</b>
bill of, must exhibit grounds of objection . . . . .	§ 17, 18
purpose of an . . . . .	§ 20
distinction between objection and . . . . .	§ 20
must be in writing . . . . .	§ 20
must be immediately after ruling . . . . .	§ 20
what formal statement of, must contain . . . . .	§ 20
bill of, as evidence of testimony . . . . .	1668
<b>Excitement; see MENTAL CONDITION, DECLARATIONS OF; SPONTANEOUS EXCLAMATIONS.</b>	
<b>Exclamations of pain or suffering . . . . .</b>	<b>§ 1719</b>
as <i>res gestæ</i> of violent injury . . . . .	1745
<b>Execution of Document</b>	
<i>In general</i>	
I. <i>Modes of proving Execution</i>	
(a) <i>by age</i>	
(b) <i>by contents</i>	
(c) <i>by official custody</i>	
(d) <i>by seal</i>	
(e) <i>by other modes</i>	
II. <i>Sundry Rules</i>	
<i>In general</i>	
general principle . . . . .	§ 2129-2139
proof not needed when execution admitted . . . . .	§ 2131
whether signature or contents is involved . . . . .	§ 2134
rule of presumption . . . . .	2135
I. <i>Modes of proving Execution</i>	
(a) <i>by age</i>	
general principle . . . . .	2137
thirty years old . . . . .	§ 2138
periods between which age is reckoned . . . . .	§ 2138
natural custody . . . . .	§ 2139
unsuspicious appearance . . . . .	§ 2140
possession of the land . . . . .	§ 2141, 2142
recorded deeds and old copies . . . . .	§ 2143
authority to execute . . . . .	2144

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

### Execution of Document (*continued*).

	Section
kinds of documents . . . . .	§ 2145
presumption; statutory denial . . . . .	§ 2146
attesting witness dispensed with . . . . .	§ 1311
(b) <i>by contents</i>	
in general . . . . .	§ 2148
illiterate's letter; typewriting . . . . .	§ 2149
printed matter . . . . .	2150, 2151
postmark; brand . . . . .	§ 2152
reply-letter by mail . . . . .	§ 2153
reply-telegram . . . . .	§ 2154
reply-telephone . . . . .	§ 2155
identity of name . . . . .	2156, § 2529
(c) <i>by official custody</i>	
judicial records and files . . . . .	§ 2158
sundry official records . . . . .	§ 2150
(d) <i>by seal</i>	
general principle . . . . .	2161
statutory regulation . . . . .	§ 2162
seal of State . . . . .	2163
seal of court or clerk . . . . .	§ 2164
seal of notary . . . . .	§ 2165
sundry official seals . . . . .	2166
official signatures . . . . .	§ 2167
official title . . . . .	§ 2168
corporate seal . . . . .	§ 2169
(e) <i>by other modes</i>	
by handwriting; see HANDWRITING.	
by possession . . . . .	§ 157
by parties' belief . . . . .	271, 272
by opponent's admission . . . . .	§ 2132, § 2596
by spoliation . . . . .	§ 2132
by sundry circumstantial evidence . . . . .	§ 2131
by presumption . . . . .	§ 2135
by attesting witness; see ATTESTING WITNESS.	
by certificate of acknowledgment; see CERTIFICATE.	
by certified record-copy; see CERTIFIED COPY; RECORDED CONVEYANCE.	
of a will, by testator's belief . . . . .	271
by testator's expressions . . . . .	1734
by record of probate . . . . .	§ 1658, § 1681

### II. *Sundry rules*

production required, even though execution is presumed . . . . .	1187
execution must be proved, though original is lost . . . . .	1188
execution provable, without producing original . . . . .	1248
order of proof as between execution and loss . . . . .	1189
calling the attesting witness; see ATTESTING WITNESS.	
writer not a preferred witness . . . . .	§ 1339
written statements against interest . . . . .	1472
pedigree entries . . . . .	§ 1496
showing document to opponent before cross-examination . . . . .	§ 1861

[Examine analysis of "Authentication of Documents," Vol. III, p. 2887.]

### Execution of Judgment; see JUDICIAL RECORD; SHERIFF.

<b>Executive, acts of, proved by certified copy . . . . .</b>	<b>§ 1680</b>
by printed copy . . . . .	§ 1684
privilege of, in substantive law . . . . .	2368
as witness . . . . .	2370
not to attend court . . . . .	2371
<b>Executive officer, conclusiveness of certificate of . . . . .</b>	<b>§ 1354</b>
<b>Executor, admissions of . . . . .</b>	<b>§ 1076, § 1081</b>

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Executor, rebutting intention of gift to</b> . . . . .	§ 2475
waiver of client's privilege by . . . . .	§ 2329
of patient's privilege by . . . . .	§ 2391
<b>Exhibition of weapons, bloody clothes, etc., to jury</b> . . . . .	§ 1157
of corporal injuries in civil cases . . . . .	§ 1158
of indecencies . . . . .	§ 1159
<b>Exhumation of corpse, to obtain evidence</b> . . . . .	1862, 2194, 2220
<b>Existence of whole inferred from part</b> . . . . .	§ 348
concurrent . . . . .	§ 438
<b>Ex parte proceedings, rules in, distinguished</b> . . . . .	§ 4
see also AFFIDAVIT; DEPOSITION.	
<b>Expectancy of life; see LIFE.</b>	
<b>Expediente; see DEED.</b>	
<b>Expenses of witness, tender of</b> . . . . .	§ 2201
amount of . . . . .	2202
expert witness . . . . .	§ 2203
<b>Experience, capacity of</b> . . . . .	§ 555-571
opinion rule distinguished . . . . .	557
observation and knowledge distinguished . . . . .	558, 650, 651
grade of, necessary . . . . .	§ 559-561
determined by judge . . . . .	§ 561
how established . . . . .	§ 562
expert testifying to another's competency . . . . .	§ 562
method of securing unbiased experts . . . . .	§ 562
qualification of, on value . . . . .	§ 711-721
special training or occupation unnecessary to estimate value . . . . .	712
impeaching of witness for lack of . . . . .	938
[Examine analysis of "Experiential Capacity," Vol. I, p. 667.]	
<b>Experiment, as evidence of planning crime</b> . . . . .	§ 238
distinguished from observation . . . . .	445
of the quality or condition of a thing . . . . .	445, § 660
to test a witness' knowledge or skill . . . . .	993
as allowable in court . . . . .	§ 1154, § 1160
<b>Expert Capacity, distinguished from opinion rule</b> . . . . .	557
<b>Expert Witness</b>	
1. <i>Qualifications</i>	
2. <i>Impeachment</i>	
3. <i>Sundries</i>	
1. <i>Qualifications</i>	
general requirements . . . . .	§ 555-561, 1923
stating the grounds of opinion . . . . .	§ 562, § 655
foreign law . . . . .	564, 566, § 690
custom and usage . . . . .	565
value . . . . .	567, 711
medical matters (sanity, blood, etc.) . . . . .	§ 568, § 687
handwriting and paper money . . . . .	§ 570, § 693, 705, § 1991-2027
to alteration . . . . .	§ 570, 2027
sundry topics of testimony . . . . .	§ 571
mode of securing unbiased experts . . . . .	§ 562
reputation to prove qualifications . . . . .	§ 1621
see also KNOWLEDGE; PHYSICIAN.	
2. <i>Impeachment</i>	
by another expert . . . . .	§ 562, § 1984
by cross-examination to instances of unskilfulness . . . . .	§ 991
by contradiction on particular facts . . . . .	§ 1005, § 1022
by reputation . . . . .	§ 1621
see also IMPEACHMENT; CROSS-EXAMINATION, IV.	
3. <i>Sundries</i>	
failure to call, as evidence of a weak case . . . . .	§ 290

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Expert Witness (continued).</b>	
cross-examination to other sales as evidence of value . . . . .	§ 463
improbabilities in scientific testimony . . . . .	§ 662
intrusion of the court on . . . . .	§ 662
comparison of handwriting by . . . . .	709
proving voluminous records by summary . . . . .	§ 1230
testimony to forgery of bank-note . . . . .	§ 1339
<i>ex parte</i> investigations out of court . . . . .	§ 1385
may testify from both observation and hypothetical questions . . . . .	678
hypothetical questions to; see <b>HYPOTHETICAL QUESTION.</b>	
testimony by quotation of scientific books . . . . .	§ 1700
tested on cross-examination . . . . .	§ 1700
opinion of, as to cause of condition . . . . .	§ 1976
on alterations . . . . .	2027
date . . . . .	2027
decipherment . . . . .	2025
erasures . . . . .	2027
forgeries . . . . .	§ 2026
imitation . . . . .	§ 2026
ink . . . . .	§ 2024
paper . . . . .	§ 2024
spelling . . . . .	§ 2024
inspection of injured person by . . . . .	§ 2220
limitation of number of . . . . .	1908
proposed reforms in the mode of using expert testimony . . . . .	§ 562
amount of fee demandable by . . . . .	§ 2203
see also <b>OPINION RULE; FEES.</b>	
[Examine analyses of "Experiential Capacity," Vol. I, p. 667; and	
"Opinion Rule, as Applied to Handwriting," Vol. III, p. 2647.]	
<b>Explanation, logical principle of . . . . .</b>	<b>32</b>
of traces of blood . . . . .	34, § 149
of presence of incriminating articles . . . . .	§ 149
of flight as evidence of guilt . . . . .	277, 281
of suspicious conduct . . . . .	281
of possession of stolen goods . . . . .	1143
<b>Explosion, cause of, as evidenced by its effects . . . . .</b>	<b>§ 437-461</b>
<b>Ex post facto law, prohibition of, as affecting rules of evidence . . . . .</b>	<b>§ 7</b>
<b>Exposure, other offences of indecent, to prove intent . . . . .</b>	<b>360</b>
<b>Express package, delivery of, as evidenced by course of business . . . . .</b>	<b>§ 95</b>
<b>Extortion, other offences as evidence of intent . . . . .</b>	<b>352</b>
<b>Extrinsic Testimony, rule for, as distinguished from cross-examination . . . . .</b>	<b>878</b>
to prove bias of a witness. . . . .	943
to prove crimes or other misconduct of a witness . . . . .	979
to impeach witness . . . . .	977, note one § 987
to prove errors . . . . .	1001
to prove self-contradiction . . . . .	1020
<b>Eye-witness, called by the State, may be impeached . . . . .</b>	<b>§ 918</b>
of a crime, required to be called . . . . .	2078
preferred in various instances . . . . .	§ 1339
required in bigamy . . . . .	§ 1604, § 2085
in criminal conversation . . . . .	§ 2085
not required when proof is by admissions of marriage . . . . .	§ 2086
not required in civil cases . . . . .	§ 2086
marriage celebrant's certificate not preferred to . . . . .	§ 2088

## F

<b>Fabrication of evidence, as indicating guilt . . . . .</b>	<b>§ 278</b>
<b>Fact, law distinguished from . . . . .</b>	<b>1</b>

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Fact</b> , not in issue, distinguished from facts not admissible . . . . .	2
certain questions of, determined by judge . . . . .	§ 21
meaning of "collateral" . . . . .	39
external, as evidence . . . . .	191
a feeling is a . . . . .	1715
presumption of . . . . .	§ 2491
jury or judge to determine . . . . .	2549
<b>Factory</b> ; see EMPLOYEE; NEGLIGENCE; PREMISES; MACHINE.	
<b>Factum probandum</b> , distinguished from <i>factum probans</i> . . . . .	2
<b>Failure</b> to prosecute or complain . . . . .	§ 284
to produce evidence, . . . . .	§ 285-291
to object to evidence . . . . .	§ 18
to speak or claim, as a self-contradiction . . . . .	§ 1042
as an admission . . . . .	§ 1071
to reply to a letter, as an admission . . . . .	§ 1073
<b>Falsa demonstratio non nocet</b> . . . . .	2476
<b>False Arrest</b> ; see ARREST.	
<b>False Claim</b> , of cause of action, mode of evidencing intent . . . . .	§ 340
as impeaching a witness . . . . .	§ 963
<b>False Pretences</b> ; see FALSE REPRESENTATIONS.	
<b>False Representations</b> , repudiate as evidence of knowledge . . . . .	§ 256
other false representations as evidence of intent . . . . .	320
<b>Falsehood</b> , as evidence of guilt . . . . .	§ 278
as impeaching a witness . . . . .	§ 963, 1008
<b>Falsity</b> , by party in course of litigation . . . . .	§ 278
knowledge of, in similar acts . . . . .	317, 320
in value of importations . . . . .	§ 341
of statement not admissible to show statement not made . . . . .	§ 391
of representations as to credit . . . . .	§ 256
as impeaching a witness; see CONTRADICTION; FALSUS IN UNO; PERJURY; SELF-CONTRADICTION.	
<b>Falsus in uno</b> , general principle . . . . .	1008
falsity must be wilful and material . . . . .	§ 1013, § 1014
<b>Family</b> , insanity of, as evidence . . . . .	§ 232
<b>Family History</b> , statements about, exception to the Hearsay rule . . . . .	1480
death of declarant . . . . .	§ 1481
<i>ante litem motam</i> . . . . .	§ 1483
personal knowledge of the facts by declarant not necessary . . . . .	note one § 1486
exactness in detail not necessary . . . . .	note one § 1486
declarations by non-relatives . . . . .	1487
by neighborhood-reputation . . . . .	1488
by different sorts of relatives . . . . .	§ 1489
proof of relationship . . . . .	§ 1490, § 1491
illegitimate child . . . . .	§ 1492
own age . . . . .	note two 1481, § 1493
identification by . . . . .	§ 270, § 413, 1494
form of declaration (Bible, will, etc.) . . . . .	1495
proving the writing . . . . .	§ 1496, 1497
place of birth, death, etc. . . . .	1500
issue of pedigree . . . . .	§ 1503
age, other modes of proving; see AGE.	
ancient deed's recital of pedigree . . . . .	§ 1573
<b>Family Relationship</b> , as biasing a witness . . . . .	§ 949
as raising presumption of gratuity . . . . .	§ 2526
<b>Father</b> , reputation of, as mitigating damages in seduction . . . . .	§ 75, 210
presumed instead of son, from identity of name . . . . .	§ 2529
statements of, to evidence pedigree; see FAMILY HISTORY.	
testimony to bastardy . . . . .	§ 2063
see also BASTARDY; LEGITIMACY; MOTHER.	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Federal Law</b> , conflict between State law and . . . . .	§ 6
judicially noticed . . . . .	§ 2573
requiring full faith and credit . . . . .	§ 1681
<b>Federal Record-copy</b> , sufficiency of . . . . .	note thirteen 1681
<b>Feelings</b> , expressions of . . . . .	1718, § 1730
are facts . . . . .	1715
see also <b>BIAS</b> .	
<b>Fees of witness</b> , tender in advance . . . . .	§ 2201
amount of . . . . .	2202
expert witness . . . . .	§ 2203
under Scotch law . . . . .	note one 2203
<b>Fellow-servant</b> ; see <b>EMPLOYEE</b> .	
<b>Felony</b> , as disqualifying or impeaching a witness; see <b>CONVICTION OF CRIME</b> .	
<b>Fence</b> , erection or removal of, intent shown by utterances . . . . .	§ 1777
<b>Fence Viewers</b> , findings of a jury of . . . . .	§ 1672
<b>Fictitious Person</b> , evidenced by failure of search . . . . .	158, 667
<b>Fifth Amendment</b> ; see <b>FOURTH AMENDMENT</b> .	
<b>Files</b> ; see <b>JUDICIAL RECORDS</b> ; <b>PUBLIC DOCUMENTS</b> .	
<b>Finger-prints</b> as evidence of identity . . . . .	149, 415
<b>Fire</b> ; see <b>ARSON</b> ; <b>SPARKS</b> ; <b>PREMISES</b> .	
<b>Fire Insurance</b> ; see <b>INSURANCE</b> .	
<b>Fleet Marriage Register</b> , history of . . . . .	§ 1644
<b>Flight</b> , as evidence of guilt . . . . .	32, § 276, 281, note four § 2511
<b>Flowage</b> of water, other instances as evidence . . . . .	§ 451
<b>Food</b> , effect of, as indicating nature or quantity . . . . .	§ 457, § 460
<b>Footprint</b> , as evidence of identity . . . . .	§ 413
compelling defendant to make . . . . .	§ 2265
<b>Foreign Language</b> ; see <b>INTERPRETER</b> ; <b>ALIEN</b> .	
<b>Foreign Law</b> , when applicable in its rules of evidence . . . . .	§ 5
distinguished from <i>lex fori</i> . . . . .	§ 5
proved by expert witness . . . . .	564, 566, § 690, § 1953
knowledge of, as based on study alone . . . . .	§ 690
proved by treatises . . . . .	§ 1697
production of statute by expert witness . . . . .	note four 1697
experience necessary to testify to . . . . .	note four 1697
statute proved without copy . . . . .	§ 1271
copy preferred to recollection . . . . .	§ 1271
proved by official printed copy . . . . .	§ 1684
crime by, not privileged . . . . .	§ 2258
similarity of, presumed . . . . .	§ 2536
judge or jury to determine . . . . .	§ 2558
not judicially noticed . . . . .	§ 2573
<b>Foreign Officer</b> , document made by . . . . .	§ 1633
<b>Foreman</b> , entries of, to aid recollection; see <b>RECOLLECTION</b> .	
character and conduct of, as employee; see <b>EMPLOYEE</b> .	
<b>Forfeiture</b> , privilege not to disclose . . . . .	§ 2256
<b>Forgery</b> , of a will, character of a third person as evidence of . . . . .	§ 68
skill in handwriting, as evidence of . . . . .	§ 87
possession of materials, as evidence of . . . . .	§ 153, § 238
of evidence, as indicating guilt . . . . .	§ 278
other forgeries, as evidence of intent . . . . .	309
forms of offence connected with . . . . .	309
evidence of a motive for . . . . .	§ 392
of identity . . . . .	§ 413
proof of, without producing document . . . . .	§ 1249
notice to produce original document . . . . .	1205
testimony of person whose name is forged, not required . . . . .	§ 1339
proved by expert . . . . .	§ 1339
of bank-notes, evidence of intent . . . . .	§ 318

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Forgery</b> ( <i>continued</i> ).	
incorporation proved by repute . . . . .	§ 1625
affidavit of bank-officer . . . . .	§ 1710
expert testimony to handwriting in . . . . .	§ 2026
presumed from uttering . . . . .	<i>note two</i> 2520
<b>Former Testimony</b> offered in impeachment, as a self-contradiction . . . . .	1030, § 1032
failure to mention facts in, as contradiction of present testimony . . . . .	<i>note twelve</i> 1072
death, absence, etc., as allowing the use of . . . . .	§ 1403-1418
used as an admission . . . . .	§ 1075
magistrate's report preferred . . . . .	§ 1330, § 1349
issues and parties the same . . . . .	1386
mode of proving . . . . .	
judge's notes . . . . .	1666
magistrate's report . . . . .	§ 1330, § 1349, 1667
bill of exceptions . . . . .	1668
stenographer's notes . . . . .	§ 1669
juror's notes . . . . .	§ 1669
attorney's notes . . . . .	§ 1669
printed report . . . . .	1703
answering by referring to, of another . . . . .	787
memorandum to aid recollection; see RECOLLECTION.	
whole must be proved . . . . .	§ 2098, § 2099, § 2103
may be proved . . . . .	§ 2115
statutes affecting . . . . .	§ 1413
<b>Fornication</b> , under age of consent . . . . .	<i>note one</i> 357, 402
prior and subsequent conduct in . . . . .	§ 398
see also ADULTERY; CRIMINAL CONVERSATION; PROSTITUTION.	
<b>Foundation</b> , laying a, for impeaching by self-contradiction; see IMPEACHMENT.	
for using a copy of a document; see ORIGINAL DOCUMENT.	
in general . . . . .	§ 654
waiver of laying . . . . .	§ 654
must show knowledge founded on personal observation by the senses . . . . .	§ 657
<b>Fourth Amendment</b>	
does not prevent use of documents and chattels obtained by search warrant . . . . .	§ 2264
as affected by Fifth Amendment, on admission of documents . . . . .	§ 2264
<b>Fraud</b> , by a party or agent, as evidence of a weak case . . . . .	§ 280
transfers as evidence of . . . . .	333
as evidence of intent . . . . .	§ 341-344
similar acts of . . . . .	§ 340
confession obtained by . . . . .	§ 841
as impeaching a witness . . . . .	§ 963
privilege against self-crimination in . . . . .	§ 2257
not all civil fraud is criminal . . . . .	<i>note eight</i> § 2257
making acts voidable . . . . .	§ 2423
under the parol evidence rule . . . . .	§ 2432, § 2439
Pennsylvania rule in varying terms of document . . . . .	2431, <i>note one</i> 2442
degree of proof of . . . . .	§ 2498
presumed from grantee's confidential relations . . . . .	§ 2503
in concealment by husband in an ante-nuptial agreement . . . . .	§ 2526
in insurance; see INSURANCE.	
<b>Frauds</b> , statute of; see STATUTE OF FRAUDS.	
<b>Fraudulent Transfers</b> , other transactions as evidence of intent . . . . .	333
indicated by various circumstances . . . . .	335
admissions of debtor or creditor . . . . .	§ 1082-1087
opinion evidence of intent . . . . .	§ 1967
presumptions applicable to . . . . .	§ 2504
<b>Fright of horses</b> , as evidence of dangerous object . . . . .	§ 461

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

### G

Section

<b>Gaming</b> , other acts as evidence of intent . . . . .	§ 367
advertisement, or possession of apparatus or license as evidence of plan . . . . .	§ 238
premises leased for, proved by repute of house . . . . .	254
conclusive evidence of, under statute . . . . .	§ 1354
<b>Gas</b> ; see <b>NUISANCE</b> ; <b>EXPERT WITNESS</b> .	
<b>Genealogy</b> proved by family hearsay; see <b>FAMILY HISTORY</b> .	
proved by reputation of community; see <b>REPUTATION</b> .	
<b>General Character</b> ; see <b>CHARACTER</b> .	
<b>General Interest</b> , matters of; see <b>REPUTATION</b> .	
<b>Genuineness</b> , of a document; see <b>DOCUMENT</b> .	
<b>Gestation</b> , intercourse within the time of, in bastardy . . . . .	§ 133
in adultery . . . . .	note three 2587
<b>Gesture</b> , as a mode of expression for a witness . . . . .	§ 789
<b>Gift</b> , plans, as evidence of . . . . .	§ 112
declarations of intent to evidence a . . . . .	note three 1725
words accompanying . . . . .	§ 1777
presumption of . . . . .	§ 2526
see also <b>DEED</b> .	
<b>Girl</b> ; see <b>CHILD</b> ; <b>RAPE</b> ; <b>SEDUCTION</b> .	
<b>Good Faith</b> ; see <b>KNOWLEDGE</b> ; <b>MOTIVE</b> ; <b>INTENT</b> .	
<b>Goods</b> ; see <b>CHATTELS</b> ; <b>BUSINESS</b> ; <b>VALUE</b> .	
<b>Government</b> , land-grant of; see <b>DEED</b> .	
records of; see <b>PUBLIC DOCUMENT</b> .	
privilege for communications to . . . . .	§ 2374
<b>Grand Jury</b> , witnesses before, indorsed on indictment . . . . .	§ 1850
right to compel answers . . . . .	§ 2252
testifying before, as a waiver of privilege . . . . .	§ 2276
privilege for vote and opinion . . . . .	§ 2360
for witness' testimony . . . . .	2362
cessation of privilege . . . . .	2362
admissions before, not privileged . . . . .	§ 2363
not to impeach indictment . . . . .	§ 2364
<b>Grant</b> , presumption of lost . . . . .	§ 2522
of land, from government . . . . .	§ 1225, § 1239
see also <b>DEED</b> ; <b>GRANTOR</b> ; <b>GRANTEE</b> .	
<b>Grantee</b>	
from an insolvent, lunatic, thief, etc., repute as evidencing knowledge of . . . . .	§ 253-255
grantor's admissions, used against . . . . .	§ 1082
producing original deed of . . . . .	1224
utterances in possession, used against creditor . . . . .	§ 1779
assent of, as necessary to pass title . . . . .	note four § 2408
deed delivered in escrow to . . . . .	§ 2408, § 2420
presuming fraud from confidential relations of . . . . .	§ 2500
presuming identity from name . . . . .	§ 2529
<b>Grantor</b> , admissions of . . . . .	§ 1082
declarations of, to show intent . . . . .	note three 1725
opinion testimony to capacity of . . . . .	§ 1958
burden of proof of sanity of . . . . .	§ 2500
see also <b>GRANTEE</b> .	
<b>Guardian</b> , admissions of . . . . .	§ 1076
personal liability of one who signs as . . . . .	§ 2444
<b>Guardian ad litem</b> , authority of counsel for . . . . .	1063
<b>Guilt</b> , failure to prove an alibi as evidence of . . . . .	§ 279
conduct when under arrest to show . . . . .	§ 273, § 276, § 1072
evidenced by concealment . . . . .	§ 276
by bribery . . . . .	§ 278

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]  
Section

### **Guilt (continued).**

by fabrication of evidence . . . . .	§ 278
by destruction of evidence . . . . .	§ 278
by flight . . . . .	277, 281
by escape . . . . .	§ 276
negated by refusal to escape . . . . .	§ 293
see also DEFENDANT; CONSCIOUSNESS OF GUILT.	
<b>Guilty</b> , plea of, as admission in civil case . . . . .	§ 815
<b>Gun</b> ; see WEAPON.	

## H

<b>Habeas Corpus ad testificandum</b> . . . . .	§ 2199
<b>Habit</b> , as evidence of doing an act . . . . .	92
distinguished from character . . . . .	92
of private person . . . . .	§ 95
of commercial house . . . . .	§ 95
of express carrier . . . . .	§ 95
of telegraph company . . . . .	§ 95
as evidence of <i>not</i> doing an act . . . . .	97
of recording . . . . .	97
carefulness of . . . . .	note one § 93
particular instances to evidence careful or careless . . . . .	§ 199, § 376
as evidence of marriage . . . . .	268
of other persons, as evidence of care . . . . .	§ 461
as a source of aiding recollection of a witness . . . . .	§ 747
see also CUSTOM.	
<b>Habitual Criminal</b> , prior convictions as increasing sentence . . . . .	§ 196
<b>Handwriting</b>	

### I. *Style of*

### II. *Qualifications of Witness to*

- (a) *in general*
- (b) *by seeing the person write*
- (c) *by seeing known genuine documents*
- (d) *by expert comparison of hands*
- (e) *expert testimony*

### III. *Sundry Topics*

### I. *Style of*, to evidence authorship of a document

general theory . . . . .	99, 383
traits of, as evidencing authorship . . . . .	99
jury's perusal of specimens	
kinds of documents . . . . .	§ 2016-2018
press-copies . . . . .	2019
photographic reproductions . . . . .	§ 797, 2010, 2019
mode of proving genuine . . . . .	§ 2020, § 2021
see also TYPEWRITING.	

### II. *Qualifications of witness to*

(a) <i>in general</i>	
by experience . . . . .	§ 570
identifying an illiterate's mark . . . . .	note two § 693
(b) <i>by seeing the person write</i> . . . . .	§ 694-697
number of times . . . . .	§ 694
how long beforehand . . . . .	695
quantity of writing . . . . .	696, § 707
specimens written after suit begun . . . . .	697, § 707
after-acquired knowledge . . . . .	697
impression or belief . . . . .	698
opinion must be based solely on the writing . . . . .	698

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

### Handwriting (*continued*).

Section

(c) <i>by seeing known genuine documents</i> . . . . .	§ 699-708
express or implied admissions . . . . .	700, § 701
acting on the document . . . . .	§ 270
correspondence seen . . . . .	§ 702
clerks seeing accounts, etc. . . . .	703
custodian seeing records, etc. . . . .	§ 704
signatures used to frank letters . . . . .	<i>note one</i> 704
bank-notes and paper money . . . . .	705
number and time of specimens seen . . . . .	707
(d) <i>by expert comparison of hands</i> . . . . .	
general principle . . . . .	709
evidencing genuineness of specimens . . . . .	709
history . . . . .	1991-1994
lay witness excluded . . . . .	1997, § 2004
exception for act of writing seen . . . . .	2005
for ancient documents . . . . .	2006
refreshing the memory . . . . .	2007
(e) <i>expert testimony, whether admissible</i> . . . . .	§ 2008
selection of specimens . . . . .	2009, § 2018
specimen conceded genuine . . . . .	1999, 2000
genuineness left to court . . . . .	2000
specimens limited to documents in case . . . . .	1999, 2000
photographic copies . . . . .	§ 797, 2010
studying the specimens . . . . .	2011
kind of skill required . . . . .	§ 2012
mode of proving specimens . . . . .	2013
giving the grounds of belief . . . . .	2014
testing on cross-examination . . . . .	§ 2015
<b>III. Sundry Topics</b>	
proof of, by admissions . . . . .	2013, § 2021
ink, paper, spelling, etc. . . . .	§ 2024
deciphering illegible writing . . . . .	2025
imitations, forgeries . . . . .	§ 2026
normal or disguised . . . . .	<i>note three</i> 2026
erasures . . . . .	2027
alterations . . . . .	2027
time of writing . . . . .	2027
instrument used . . . . .	2027
defendant's skill in imitating, as evidence of forgery . . . . .	§ 87
reference to, in aid of recollection; see RECOLLECTION.	
effect of proving attesting witness' or maker's hand; see ATTESTING	
WITNESS	
[Examine analyses of "Testimonial Knowledge, 4," Vol. I, p. 745; and	
"Opinion Rule, as Applied to Handwriting," Vol. III, p. 2647.]	
<b>Health, as evidenced by appearance</b> . . . . .	§ 223
prior condition of . . . . .	§ 225
witness' experience as qualifying him . . . . .	§ 568
<b>Hearing a sound, instances of</b> . . . . .	§ 460
<b>Hearsay, as the basis of a witness' knowledge</b> . . . . .	§ 567, § 688
knowledge founded on, exceptionally admitted . . . . .	§ 665-670
official records . . . . .	§ 665
scientific instruments and tables . . . . .	§ 665
execution and contents of documents not personally observed . . . . .	666
testifying to own age, or another's name . . . . .	§ 667
conversation through interpreter . . . . .	668
information over telephone . . . . .	§ 669
testimony of deceased or absent persons . . . . .	670
nature of . . . . .	1361

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

Section

### Hearsay Rule

#### I. General Principle

(a) *cross-examination*

(b) *confrontation*

#### II. Exceptions to the Rule

#### III. Rule not applicable (*Res Gestæ*)

(a) *words a part of the issue*

(b) *words a verbal part of an act*

(c) *words used as circumstantial evidence*

(d) *res gestæ*

#### IV. Rule applied to Court Officers

I. General Principle	1361-1363
history	1364
(a) <i>cross-examination, right of</i>	
theory and art	§ 1367, § 1368
opportunity, equivalent to actual cross-examination	§ 1371
sundry tribunals	§ 1373
coroner	§ 1374
committing magistrate	§ 1375
deposition	§ 1376-1383
notice	§ 1378
plural taking	§ 1379
statutes	§ 1380-1383
affidavit	§ 1384
<i>ex parte</i> investigations, etc.	§ 1385
issues and parties the same	§ 1386-1388
either party may use deposition	§ 1389
insufficiency of cross-examination	§ 1390-1393
witness' death or illness	§ 1390
witness' refusal or party's default	§ 1391
non-responsive answer	§ 1392
sundries	§ 1393
(b) <i>confrontation, right of</i>	
absent witness' testimony, in general	1395
constitutional requirement	1397
witness unavailable in court	§ 1401-1418
deceased	1403
out of jurisdiction	§ 1404
not found	§ 1405
ill	1406
imprisoned	1407
privileged	1407
beyond statutory distance	1407
insane	1408
disqualified	§ 1409
statutes	1410-1413
proving the excuse	§ 1414
witness present in court	§ 1415
rule not applicable	§ 1416
exceptions to the rule of confrontation	§ 1417
II. <i>Exceptions to the Rule, general principle of</i>	1420-1426
declarant must have usual testimonial qualifications	1751
disqualification of declarant; see DECLARANT.	
of spouse; see MARITAL RELATIONSHIP.	
of oath capacity; see OATH.	
dying declarations; see DYING DECLARATIONS.	
facts against interest; see AGAINST INTEREST.	
pedigree statements; see FAMILY HISTORY.	
attesting witness; see ATTESTING WITNESS.	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

Section

### Hearsay Rule (*continued*).

- entries in the course of business; see **REGULAR ENTRIES**.
- private boundaries; see **BOUNDARIES**.
- ancient deed-recitals; see **RECITALS**.
- deceased persons in general; see **DECEASED PERSONS**.
- reputation; see **REPUTATION**.
- public documents, official statements; see **PUBLIC DOCUMENTS**.
- scientific books; see **LEARNED TREATISES**.
- price-lists, directories, etc.; see **COMMERCIAL LISTS**.
- affidavits; see **AFFIDAVIT**.
- voter's statements; see **VOTER**.
- mental condition, physical pain; see **MENTAL CONDITION**.
- res gestæ*; see **RES GESTÆ**.
- III. *Rule not applicable (Res Gestæ)* . . . . . § 1786-1797
- fact of utterance in issue, rule not applicable . . . . . 1768
- truth of utterance in issue, rule applicable . . . . . 1768
- (a) *words a part of the issue*
- contract, libel, etc. . . . . § 1770
- (b) *words a verbal part of an act* . . . . . § 1772-1786
- general principle . . . . . 1772-1776
- acceptance . . . . . § 1777
- advancement . . . . . § 1777
- agency . . . . . § 1777
- consideration . . . . . § 1777
- conversion . . . . . § 1777
- dedication . . . . . § 1777
- delivery . . . . . § 1777
- entry . . . . . § 1777
- gift . . . . . § 1777
- larceny . . . . . § 1777
- loan . . . . . § 1777
- payment . . . . . § 1777
- sale . . . . . § 1777
- sundries . . . . . § 1777
- possession, in prescriptive title . . . . . § 1777
- in presumption of ownership . . . . . § 1086, § 1779
- accused found with stolen goods . . . . . § 1781
- testator revoking a will . . . . . § 1738
- bankrupt evading creditors . . . . . 1782
- domicil . . . . . § 1784
- accused's intent . . . . . 1785
- (c) *words used as circumstantial evidence* . . . . . 1788-1792
- in proving search for lost document . . . . . § 1196
- third person's knowledge . . . . . 1789
- belief . . . . . 1789
- diligence . . . . . 1789
- good faith . . . . . 1789
- insolvency . . . . . 1789
- motive . . . . . 1789
- reasonableness . . . . . 1789
- sanity . . . . . 1789
- viciousness, etc. . . . . 1789
- speaker's state of mind . . . . . 1790
- identifying a time, place, or person . . . . . 1791
- impeaching a witness by self-contradiction . . . . . § 1018, 1792
- (d) *res gestæ* . . . . . § 1795-1797
- history and meaning of the term . . . . . § 1795
- agent's and conspirator's admissions . . . . . 1797
- IV. *Rule applied to Court Officers*: see **JUROR**; **JUDGE**; **COUNSEL**; **INTERPRETER**.

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Hearsay Rule (*continued*).

[Examine analyses of "By Cross-examination," Vol. II, p. 1697; "By Confrontation," Vol. II, p. 1749; and "Hearsay Rule and Applicable," Vol. III, p. 2274.]

<b>Height</b> , as evidenced by other conditions or effects . . . . .	§ 438, § 451, § 461
<b>Heir</b> , admissions used against . . . . .	§ 1081
<b>Heredity</b> of illness, as evidence . . . . .	§ 223
of insanity . . . . .	§ 232
inference from . . . . .	<i>note one</i> § 84
<b>Highway</b> , evidencing owner's knowledge of danger of . . . . .	§ 252
injury on cross-walk . . . . .	<i>note one</i> § 252, <i>note six</i> § 252
injury on bridge, to show notice of condition . . . . .	<i>note six</i> § 252
on sidewalk, to show notice . . . . .	<i>note six</i> § 252
repairs, as evidence of negligence . . . . .	§ 283
condition at another time or place, as evidence of defect . . . . .	§ 437
injuries of other persons, as evidence of defect . . . . .	§ 458
similar precautions, as evidence of safety . . . . .	§ 461
see also DEDICATION.	
<b>History</b> of the rules of evidence in general . . . . .	8
of interest as a disqualification . . . . .	§ 575
of rule for confessions . . . . .	817, 865
of rule for producing documentary originals . . . . .	§ 1177
of attesting-witness rule . . . . .	1287
of hearsay rule . . . . .	1364
of dying declarations . . . . .	1430
of statements against interest . . . . .	§ 1476
of statement of pedigree . . . . .	1480
of regular entries . . . . .	1518
of statements about boundaries . . . . .	1563
of use of record-copy of deed . . . . .	§ 1650
books of, used in evidence . . . . .	1597, 1690, 1699
of <i>res gestæ</i> phrase . . . . .	§ 1795
of the oath . . . . .	§ 1815
of separation of witnesses . . . . .	§ 1837
of opinion rule . . . . .	1917
of handwriting testimony . . . . .	1991-1994
of rules of number . . . . .	§ 2032
of compulsory process . . . . .	§ 2190
of party opponent's privilege . . . . .	2217
of marital privilege . . . . .	2227, 2333
of privilege against self-extermination . . . . .	§ 2250
of confidential communications . . . . .	2285
of client's privilege . . . . .	2290
of patient's privilege . . . . .	§ 2380
of penitent's privilege . . . . .	§ 2394
of parol evidence rule . . . . .	
intent and mistake . . . . .	2405
varying the terms . . . . .	2426
interpretation . . . . .	§ 2462, 2470
<b>History, Books of</b> , used in evidence . . . . .	
as representing reputation . . . . .	1597
as scientific treatises . . . . .	§ 1693, 1699
judicially noticed . . . . .	§ 2580
<b>Homicide</b> , character of deceased in, to evidence self-defence . . . . .	§ 63, § 246
moral character of deceased in . . . . .	§ 1983
accused's threats, as evidence of . . . . .	§ 102-105
deceased's threats, as evidence of aggression . . . . .	110, § 247
refuting conclusion from finding knife near body in . . . . .	34
survival of alleged deceased, as negating <i>corpus delicti</i> . . . . .	138

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

### Homicide (*continued*).

	Section
threats of a third person, as evidencing innocence of the accused . . . . .	§ 140
suicidal plans of deceased, as evidencing innocence of the accused . . . . .	143
possession of booty or tools, as evidence of . . . . .	§ 153, § 154, § 238
traces of blood, etc., as evidence of . . . . .	§ 149
acts of violence, on an issue of self-defence . . . . .	§ 198, § 248
conduct as evidence of accused's sanity . . . . .	§ 228
other acts of violence, to show defendant's intent . . . . .	§ 363
intrigue of wife-murderer with paramour as showing motive for . . . . .	§ 118
circumstances showing a motive . . . . .	§ 390
conduct as evidence of malice . . . . .	§ 396, § 397
weapon, clothing, etc., as evidence of identity . . . . .	§ 413
dying declarations in . . . . .	§ 1432
marital privilege in . . . . .	§ 2239
burden of proof of self-defence in . . . . .	§ 2512
<b>Horse</b> , character of, as evidence of behavior . . . . .	§ 68
fright of, as evidence of dangerous object . . . . .	<i>note six</i> § 252, § 461
pedigree of . . . . .	§ 1706
cribbing of, as unsoundness . . . . .	<i>note nine</i> 1700
see also ANIMAL.	
<b>Hospital</b> records, as memoranda . . . . .	§ 751
as regular entries . . . . .	§ 1530
<b>Hostility</b> of deceased shown by details of prior quarrels . . . . .	<i>note three</i> 396
former, of witness; see IMPRACHMENT (g).	
see also DECEASED by HOMICIDE.	
<b>House</b> ; see PREMISES; PROPERTY.	
<b>House of Ill-fame</b> , character of . . . . .	§ 78
character of inmates of . . . . .	§ 78
other acts, as evidencing character . . . . .	204
as evidencing intent . . . . .	§ 367
provable by reputation . . . . .	§ 1620
<b>Husband</b> , testimony of, as disqualified or privileged; see MARITAL RELATIONSHIP.	
notice to, as evidence of wife's knowledge . . . . .	§ 261
admissions of, against wife . . . . .	§ 1078, § 1086, § 2232
statements of, to evidence pedigree; see FAMILY HISTORY.	
expressions of affection or dislike . . . . .	§ 1730
motive or desire of, to get rid of wife . . . . .	191
communications by or to, as privileged; see MARITAL RELATIONSHIP.	
presumption of coercion by . . . . .	§ 2514
see also CRIMINAL CONVERSATION; HOMICIDE.	
<b>Hypnotism</b> , showing influence of, on witness . . . . .	<i>note one</i> 934
<b>Hypothetical Question</b>	
general theory. . . . .	672, 1927
as "usurping province of jury" . . . . .	673
Observation and Hypothetical Presentation discriminated . . . . .	§ 674-678
when allowed or required . . . . .	§ 674-680
may be put only to expert . . . . .	§ 679
answer to, fails if premises are not sustained . . . . .	§ 680
form and scope . . . . .	§ 681-683
abuse of . . . . .	§ 682
all undisputed facts need not be included in . . . . .	§ 682
on cross-examination . . . . .	684
to physician involving privileged facts, is not privileged . . . . .	<i>note five</i> 2382
mode of objection to inadequate offer of . . . . .	18
<b>Hysterical</b> person as claimant . . . . .	963

## I

**Ice**, as a highway defect; see HIGHWAY; NEGLIGENCE.

**Identity**, mistaken, as evidence . . . . . 142

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

## Identity (*continued*).

as evidenced by traces, of accused or other party . . . . .	148, § 149
by other crimes . . . . .	§ 218, 414
by family history or hearsay . . . . .	§ 270, 1494
by voice . . . . .	§ 660
over telephone . . . . .	2155
by stature . . . . .	§ 660
condition of light as affecting . . . . .	§ 460
by appearance . . . . .	§ 660, § 1154
by witness' former recognition . . . . .	744, § 1130
by photograph . . . . .	§ 660, 790, 1156
by finger-prints . . . . .	149, 411
by footprints . . . . .	note three 2265
by placing hat on accused's head . . . . .	note three 2265
of voice, as shown by utterance . . . . .	222
of person, place, chattel, etc., in general . . . . .	§ 410-416
by clothing . . . . .	§ 413, § 660
of brand or mark on stock or timber . . . . .	§ 150
of maker of attested document . . . . .	1513
of a time or place, as shown by utterances . . . . .	1791
opinion testimony to . . . . .	§ 1977
of document, shown by ink, paper, etc. . . . .	§ 2024
original required . . . . .	§ 1244
presumption of, from identity of name . . . . .	§ 2529
from traces, tools, etc. . . . .	148, § 2529
of grantor or grantee . . . . .	§ 2529
of signer of affidavit in chancery . . . . .	§ 2529
of one convicted of crime . . . . .	§ 2529
of party to marriage . . . . .	§ 2529
of names in tracing title . . . . .	§ 2529
Idiot; see SANITY; INTERPRETER; WITNESS; OATH. . . . .	
Illegality in obtaining evidence, not to exclude it . . . . .	§ 2183
Illegible Document, production of original . . . . .	1229
expert testimony to . . . . .	2025
verbal precision in . . . . .	note one § 2105
Illegitimacy, character of third person as evidence . . . . .	§ 68
adultery, as evidence of . . . . .	134, 165
non-access, as evidence of . . . . .	137
as evidenced by family hearsay; see FAMILY HISTORY. . . . .	
by neighborhood-reputation . . . . .	§ 1605
see also LEGITIMACY; BASTARDY. . . . .	
Ill-fame, house of; see HOUSE OF ILL-FAME. . . . .	
Illiterate, signature by mark, whether identifiable . . . . .	§ 693
as attesting witness . . . . .	§ 1512, 1292
Illness, test when evidence is offered of, as result of eating certain food . . . . .	33
explaining away evidence that arsenical wall paper caused . . . . .	35
as evidenced by appearance . . . . .	§ 223, § 437, 441
prior and subsequent condition of . . . . .	§ 225, § 437, 441
insured's knowledge of, as evidenced by declarations . . . . .	§ 266
symptoms, as indicating cause of . . . . .	441, § 457
witness' experience in, as qualifying him . . . . .	§ 568, § 687
as impeaching a witness . . . . .	§ 934, § 1005
as excusing absence of attesting witness . . . . .	1315
of deponent . . . . .	1406
of declarant of facts against interest . . . . .	§ 1456
of maker of regular entries . . . . .	§ 1521
of witness summoned . . . . .	2205
as excusing lack of cross-examination . . . . .	§ 1390
expressions of suffering in . . . . .	1718

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

### Illness (*continued*).

Section

privilege for communications to physician . . . . . § 2380  
 see also PHYSICIAN; POISON; HEALTH.

### Imbecile; see IDIOT.

**Immaterial**, distinguished from incompetent and irrelevant . . . note eighteen § 18

**Immateriality** of evidence, cured by other immaterial evidence . . . . . § 15

see also IRRELEVANCY.

**Immunity**, of corporation from disclosure . . . . . note two 2259

to witness, destroys privilege against self-crimination . . . . . 2281

what disclosures entitle a witness to, under statute . . . . . 2281

mode of obtaining, under statute . . . . . 2281 a

before judicial officer . . . . . 2281 a

before administrative officer . . . . . 2281 a

testimony before grand jury . . . . . note three 2363

of witness, from arrest . . . . . § 2195

**Impeaching** one's own instrument, forbidden . . . . . 529

### Impeachment of a Witness

(a) *general principles*

(b) *persons impeachable*

(c) *moral character*

(d) *insanity*

(e) *experience*

(f) *bias, interest, and corruption*

(g) *bias*

(h) *corruption*

(i) *interest*

(j) *moral character*

(k) *skill, memory, knowledge*

(l) *contradiction by other witnesses*

(m) *falsus in uno, falsus in omnibus*

(n) *self-contradiction*

(o) *sundry modes*

(p) *absent witness*

(a) *general principles* . . . . . § 875-881

point where party becomes witness for impeachment . . . . . § 1893

discriminations in proving defective qualifications . . . . . § 876

(b) *persons impeachable* . . . . . § 884-918

hearsay witnesses (dying declarant, attesting-witness, etc.) 884-888, § 1446, 1514

attesting witness . . . . . 886, 917, § 1033, 1514

accused as witness . . . . . 889-892

impeaching an impeaching witness . . . . . § 894, § 1111

one's own witness . . . . . § 896-918

general principles . . . . . § 896-899

by immoral character . . . . . § 900

by bias, interest, or corruption . . . . . § 901

by bribery . . . . . § 901

by prior self-contradiction . . . . . § 902-906

by contradiction with other witnesses . . . . . § 907, 908

who is one's own witness . . . . . § 909-918

distinguished from discrediting opponent on discovery . . . note eight 1856

relevant answer necessary to create protection . . . . . 910

unused deposition . . . . . 910, § 912, § 913

witness called by judge . . . . . 910, § 918

opposing party as witness . . . . . § 916

co-party witness against co-party . . . . . § 916

necessary witness . . . . . 917, § 918

using opponent's deposition . . . . . § 913

book of regular entries by clerk or party . . . . . 1531, § 1557

expert witness and scientific books . . . . . § 1700

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]  
Section

### Impeachment of a Witness (*continued*).

(c) <i>moral character</i> in general . . . . .	§ 920-941
general principles . . . . .	920, 920
kind of character . . . . .	§ 922-926
specific traits . . . . .	924
witness and party distinguished . . . . .	§ 925
prior conviction . . . . .	926
time of character . . . . .	§ 927-929
after suit begun . . . . .	929
place of character . . . . .	930
(d) <i>insanity, etc.</i> . . . . .	§ 931-936
insanity . . . . .	932
intoxication . . . . .	§ 933
use of cocaine . . . . .	<i>note one</i> 934
disease . . . . .	§ 934
age . . . . .	§ 934
morphine habit . . . . .	§ 934
defect of speech . . . . .	§ 934
religious belief . . . . .	§ 935
race . . . . .	936
(e) <i>experience</i> . . . . .	938
(f) <i>bias, interest, and corruption, modes of evidencing</i> . . . . .	§ 943-969
general principles . . . . .	943
cross-examination . . . . .	§ 944
demeanor as evidence . . . . .	§ 946
(g) <i>bias from circumstances and conduct</i> . . . . .	§ 948-950
from former hostility . . . . .	938
relationship as evidencing bias . . . . .	§ 949
relationship invoked by counsel, disregarded by jury . . . . .	<i>note two</i> § 949
pecuniary relations to show bias . . . . .	<i>note three</i> 949
details of a quarrel . . . . .	§ 951, § 952
preliminary inquiry to witness . . . . .	§ 953
opinion as to another's bias . . . . .	§ 963
see also <i>BIAS</i> . . . . .	
(h) <i>corruption</i> . . . . .	§ 956-964
willingness or offer to swear falsely . . . . .	§ 957, § 958
confession of false testimony . . . . .	§ 959
attempt at subornation or bribery . . . . .	960, 962
receipt of money . . . . .	§ 961
sundry corrupt conduct . . . . .	§ 963
preliminary inquiry to witness . . . . .	964
see also <i>CORRUPTION</i> . . . . .	
(i) <i>interest</i> in civil cases . . . . .	§ 966
in criminal cases . . . . .	§ 967, § 968
bonds, rewards, detective-employment, insurance, etc. . . . .	§ 969
see also <i>INTEREST</i> . . . . .	
(j) <i>moral character, evidenced by misconduct</i> . . . . .	§ 977-988
general principles . . . . .	977, 978
relevancy and auxiliary policy distinguished . . . . .	978
extrinsic testimony . . . . .	979, § 987
particular acts of misconduct . . . . .	979
record of conviction . . . . .	§ 980, § 1270
arrest or indictment as affecting credibility . . . . .	§ 980, 982
pardon as affecting credibility . . . . .	§ 980
cross-examination . . . . .	§ 981-983, § 987
relevant questions excluded for policy . . . . .	§ 983
privilege against disgracing answers . . . . .	984
rumors, on cross-examination . . . . .	§ 981
by reputation . . . . .	§ 1608-1628

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italic) refer to supplement; § 1678 refer to both.]

	Section
<b>Impeachment of a Witness (continued).</b>	
by personal opinion . . . . .	1980
belief on oath . . . . .	§ 1985
see also CHARACTER.	
(k) <i>skill, memory, knowledge</i> , as tested on cross-examination . . . . .	730, § 990-991
incapacity evidenced by particular errors . . . . .	§ 996
grounds of expert opinion . . . . .	992
testing capacity to observe . . . . .	993
opportunity to observe . . . . .	994
by testing capacity of memory . . . . .	§ 995
expert to handwriting . . . . .	§ 2015
(l) <i>contradiction by other witnesses</i> . . . . .	§ 1000-1015
collateral matters . . . . .	§ 1000-1007
unfair surprise in . . . . .	1002, § 1007
test of collateralness . . . . .	§ 1003
collateral questions on cross-examination . . . . .	§ 1006
supporting contradicted witness on direct examination . . . . .	§ 1007
bias, corruption, skill, knowledge, memory . . . . .	§ 1005
(m) <i>falsus in uno</i> . . . . .	§ 1008-1015
of an explanatory statement . . . . .	1046
(n) <i>self-contradiction</i> . . . . .	§ 1017-1046
general principles . . . . .	1017
rules for avoiding Unfair Surprise and Confusion of Issues . . . . .	1019
collateral matters . . . . .	§ 1020-1023
test of collateralness . . . . .	1020
facts not collateral . . . . .	§ 1021, § 1022
bias, corruption, skill, knowledge . . . . .	§ 1022
preliminary warning necessary . . . . .	§ 1025-1039
reason of the rule . . . . .	1025
history of the rule . . . . .	1026
objections to the rule . . . . .	1027
specifications necessary in warning question . . . . .	§ 1029
absent or deceased witness . . . . .	1030, § 1032
depositions . . . . .	§ 1031
testimony at a former trial . . . . .	§ 1032
dying declarations . . . . .	§ 1033
attesting witness . . . . .	§ 1033
testimony admitted by stipulation . . . . .	§ 1034
contained in other sworn testimony . . . . .	1035
recall to put the question . . . . .	§ 1036
recall made impossible by act of party first producing witness	
	<i>note one</i> § 1036
recall of accused taking stand voluntarily . . . . .	<i>note one</i> , § 1036, § 2276
contradiction admissible . . . . .	§ 1037
contradiction must be independent of present answer . . . . .	§ 1038
preliminary question unnecessary in certain cases . . . . .	§ 1039
what is a self-contradiction . . . . .	§ 1040-1043
admissions as contradictory utterances . . . . .	§ 1040
joint statement . . . . .	§ 1040
conduct . . . . .	§ 1040
opinion . . . . .	§ 1041
silence, omission to claim or speak . . . . .	§ 1042, § 1043
explaining the contradiction . . . . .	§ 1044
putting in the whole . . . . .	§ 1045, § 2098
joining issue . . . . .	1046
showing the writing to the witness . . . . .	§ 1259-1263
distinguished from admissions . . . . .	§ 1051
party's admissions; see ADMISSIONS.	
testimony before grand jury, not privileged . . . . .	§ 2363

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Impeachment of a Witness (*continued*).

- (o) *sundry modes*
  - of witness who proves document . . . . . § 1093
  - of attesting witness . . . . . 1514
  - by annoying questions . . . . . § 781
  - by repetition of questions . . . . . § 782
  - by conviction of crime; see CONVICTION OF CRIME.
  - for restoring credit; see WITNESS, IV.
- (p) *absent witness*, impeached like others . . . . . 888, § 1034
  - see also CONTRADICTION; CROSS-EXAMINATION, IV; Demeanor; DYING  
 DECLARATION; EXPERT WITNESS, II; QUESTIONS TO A WITNESS.
  - [Examine analysis of "Testimonial Impeachment," Vol. I, pp. xxv-xxviii.]
- Implied admissions . . . . . § 1060
  - self-contradictions . . . . . § 1042
- Importation, other transactions as evidence of fraud in . . . . . § 341
- Impotency, inspection in divorce . . . . . § 2220
- Impression, as distinguished from knowledge . . . . . 658
  - from type, as evidence of another . . . . . 440
  - as sufficient for a handwriting-witness . . . . . 698
  - as sufficient in point of memory . . . . . 726
  - as opinion testimony . . . . . § 1969
  - excluded if founded on guess or rumor . . . . . 1970
- Imprisonment, as excusing absence of an attesting witness . . . . . 1315
  - of a deponent . . . . . 1407
  - see also CONVICTION OF CRIME.
- Inadmissible evidence, as justifying other inadmissible evidence . . . . . § 15
- Incest, other offences, as evidence of intent or motive . . . . . 360, § 398
  - sexual desire as evidencing . . . . . 400
  - who is accomplice in . . . . . § 2060
  - eye-witness of marriage . . . . . § 2085, § 2086
- Incompetent evidence; see ADMISSIBILITY; IRRELEVANCY.
  - employee; see EMPLOYEE.
  - physician; see PHYSICIAN.
  - persons in general; see SKILL; NEGLIGENCE.
- Inconsistency, as impeaching a witness; see SELF-CONTRADICTION.
- Incorporation, reputation to prove . . . . . § 1625
  - presumed . . . . . § 2535
- Indecency, of exhibition to jury . . . . . § 1159
  - as ground for exclusion . . . . . 2180
  - in presence of spouse is confidential . . . . . *note two* § 2337
- Indecent Assault, plaintiff's character, as mitigating damages . . . . . § 75, 212
  - see also RAPE.
- Indecent Exposure, other offences, as evidence of intent . . . . . 360
- Indemnity against self-crimination . . . . . § 2281
- Indians, as witnesses; see RACE.
- Indictment, as disqualifying a co-indictee . . . . . § 580
  - as impeaching a witness . . . . . § 949, § 980, § 982, § 987
  - list of witnesses indorsed on . . . . . § 1850
  - quashing, for improper compulsion to give evidence *note six* § 2270, *note thirteen* 2281
  - privilege for grounds of . . . . . § 2364
    - for assent of grand jurors to . . . . . § 2364
- Indorsement, of witnesses on the indictment . . . . . § 1850
  - presumption of payment from, on note . . . . . *note one* 2134
  - on bond, as statement against interest . . . . . § 1460, § 1466
  - "without recourse" as waiver of genuineness . . . . . *note three* 2445
  - in blank, when invalid . . . . . § 2445
  - of bill of exchange; see BILL OF EXCHANGE.
- Indorser, parol agreement collateral to instrument . . . . . 2443
  - see also BILL OF EXCHANGE.

## INDEX OF TOPICS

(Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Inducement to a confession; see CONFESSION.</b>	
<b>Inductive form of inference</b> . . . . .	30
<b>Industry, facts of, judicially noticed</b> . . . . .	§ 2580
<b>Infamy, disqualifying a witness</b> . . . . .	519
under exception to the Hearsay rule . . . . .	1751
excusing absence of attesting witness . . . . .	§ 1316
privileged from disclosure . . . . .	984, 2216, 2255
see also CONVICTION OF CRIME.	
<b>Infant, disqualification as a witness</b> . . . . .	505
under exception to the Hearsay rule . . . . .	1751
admissions of . . . . .	§ 1053
dying declarations of . . . . .	§ 1445
opinion to capacity of . . . . .	note two 1958
presumption of incapacity for crime . . . . .	§ 2514
waiver by counsel for . . . . .	1063
see also AGE; CHILD.	
<b>Inference, modes of</b> . . . . .	30, 476
from failure to produce evidence . . . . .	§ 285-291, § 2273
of witness must be based on adequate data . . . . .	§ 659
of non-occurrence by reason of failure to see or hear . . . . .	§ 664
<b>Infidel; see RELIGIOUS BELIEF.</b>	
<b>Information, list of witnesses indorsed on</b> . . . . .	§ 1850
received by a person; see KNOWLEDGE.	
<b>Informant, privilege for communications by</b> . . . . .	§ 2374
<b>Infringement; see COPYRIGHT; PATENT.</b>	
<b>Inheritance, proof of; see FAMILY HISTORY.</b>	
character of third persons, to prove illegitimacy in . . . . .	§ 68
<b>Initials, document signed with</b> . . . . .	§ 2168
<b>Injury, repairs after, as evidence of negligence</b> . . . . .	§ 283
cause of, as evidenced by its effects . . . . .	§ 437-461
refuting evidence of, to house by sewer gas . . . . .	33
caused by vibration of bridge . . . . .	34, 35
similar injury to other persons from same cause . . . . .	§ 458
see also CORPORAL INJURY; ILLNESS; NEGLIGENCE; HIGHWAY; MA- CHINE; PREMISES.	
<b>Ink, expert witness to nature of</b> . . . . .	§ 570
identification of document by . . . . .	note two 415, § 2024
<b>Innocence, consciousness of, as evidence</b> . . . . .	174, § 293
failure to protest one's . . . . .	§ 273, § 284, 1144
presumption of . . . . .	§ 2511
not evidence in favor of accused . . . . .	note three § 2511
applied to bigamy . . . . .	§ 2506
see also DEFENDANT.	
<b>Inquiries, as evidence of design to commit crime</b> . . . . .	§ 238
<b>Inquisition of domain, by the homage</b> . . . . .	§ 1670
of escheat, by the crown . . . . .	§ 1670
of title, by the sheriff . . . . .	§ 1670
of pedigree, by the heralds . . . . .	§ 1670
of lunacy, by commission . . . . .	note one § 233, § 1671
of death, by the coroner . . . . .	§ 1671
of population, by the census . . . . .	§ 1671
in Europe, history of . . . . .	§ 2250
<b>Insane Belief, as shown by facts told to the party</b> . . . . .	262
disproof of communications exciting . . . . .	263
<b>Insanity, mode of evidencing</b> . . . . .	§ 227-233, 993
prior or subsequent condition to prove . . . . .	190, § 233
disinheritance as evidence of . . . . .	§ 229
as evidenced by environment . . . . .	§ 231
collateral or ancestral . . . . .	§ 232

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Insanity (<i>continued</i>).</b>	
hereditary . . . . .	§ 232
discrimination between various principles to prove . . . . .	234
of transferor to show notice by transferee . . . . .	253
qualifications of witness to prove . . . . .	§ 568, § 689
as disqualifying a witness . . . . .	§ 492, 932
under exceptions to the Hearsay rule . . . . .	1751
evidenced by inspection in court . . . . .	§ 1160
excusing absence of attesting witness . . . . .	§ 1316
inquisition or adjudication upon . . . . .	§ 1671
utterances of person to prove . . . . .	1734
opinion rule to testimony to . . . . .	1933
observation of, by prescribing physician . . . . .	§ 2384
see also SANITY; LUNACY; LUNATIC; MENTAL CONDITION; INSANE BELIEF.	
<b>Insolvency</b> , as evidence of non-payment . . . . .	§ 89, 224
purchaser's knowledge of, evidenced by repute . . . . .	253
Arkansas rule requiring corroboration of wife's testimony of consideration in transfer in . . . . .	2054
evidenced by prior condition of . . . . .	§ 382
as a motive for crime or fraud . . . . .	§ 392
debtor's admissions . . . . .	§ 1081, § 1082, § 1086
opinion testimony to . . . . .	1959
<i>prima facie</i> evidence of banker's knowledge of . . . . .	§ 1354
as evidenced by reputation . . . . .	§ 1621
see also FRAUDULENT TRANSFERS.	
<b>Inspection</b> , of memorandum used to aid recollection . . . . .	753, § 762
of corporal injury, by jury or witness . . . . .	§ 1862, § 2194, § 2220, § 2265
of real evidence, mode and place of . . . . .	§ 1152
of corporation books before trial . . . . .	§ 1858
right of citizen to, of public record . . . . .	<i>note two</i> 1858
of document of opponent, as making it evidence . . . . .	2125
at trial, not privileged . . . . .	§ 2193, § 2219, § 2264
of chattels or premises, not privileged . . . . .	§ 2194, 2221, § 2264
trial by . . . . .	§ 2555
of document, premises, chattels, as permissible; see REAL EVIDENCE.	
of documents, premises, chattels of opponent before trial; see DISCOVERY.	
see also PREMISES.	
<b>Instruction</b> to the jury, where a fact is in part inadmissible . . . . .	13
to disregard evidence; see STRIKE OUT.	
on witness' bias . . . . .	<i>note one</i> 940
on considering whole of an utterance . . . . .	<i>note four</i> 2094
directing a verdict . . . . .	§ 2495
<b>Instrument</b> ; see DOCUMENT.	
<b>Insurance</b> , lack of money to negative large stock of goods in loss by fire . . . . .	<i>note one</i> 89
fraudulent, of life during illness . . . . .	<i>note one</i> 225, <i>note four</i> 266
insured's declarations, to show knowledge of illness . . . . .	§ 266
as evidence of motive for negligence . . . . .	§ 282, § 392
of bias or interest . . . . .	§ 949, § 969
taking of policy, as evidence of ownership . . . . .	<i>note four</i> 282
against accident, as evidence of negligence . . . . .	§ 282, § 393, § 949, § 969
other fraudulent acts as evidence of intent . . . . .	§ 340
proofs of loss in, as an admission . . . . .	§ 1073
as <i>res gestæ</i> . . . . .	§ 1770
as coroner's official statement . . . . .	§ 1671
admissions of insured against beneficiary . . . . .	§ 1081
inspection of policy before trial . . . . .	§ 1858
materiality of risk or representations . . . . .	1946, § 1947
privilege for communications to physician . . . . .	§ 2389, § 2390
waiver of privilege in policy . . . . .	<i>note six</i> § 2388

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Insurance</b> ( <i>continued</i> ).	
application signed by mistake . . . . .	§ 2415
collateral parol agreement to provide . . . . .	<i>note one</i> § 2442
burden of proof of conditions in policy of . . . . .	§ 2537
policy in a single document . . . . .	§ 2452
warranty of . . . . .	§ 2434
proof of arson beyond reasonable doubt . . . . .	§ 2498
presumption of accident, from death . . . . .	§ 2510
see also ARSON; INSURER.	
<b>Insurer</b> , waiver by, in sending blank form for proof of claim to insured . . . . .	1056
admissions of, as real plaintiff . . . . .	<i>note six</i> 1810
<b>Intemperance</b> , as evidence of misconduct . . . . .	96, § 203
as impeaching a witness . . . . .	§ 934
proved by reputation . . . . .	§ 1621
see also INTOXICATION; LIQUOR-SELLING; NEGLIGENCE.	
<b>Intent</b> , criminal, general theory of . . . . .	242, 302
definition of . . . . .	300
to evidence anonymous crimes . . . . .	303
distinguished from design, etc. . . . .	103, 300
knowledge or design . . . . .	300
motive, design, character, etc. . . . .	386
other crimes, as evidence of . . . . .	§ 309-367
abortion . . . . .	§ 359
adultery . . . . .	360
arson . . . . .	§ 354
bigamy . . . . .	360
burglary . . . . .	§ 351
embezzlement . . . . .	329
entice ment . . . . .	360
extortion . . . . .	§ 351
false pretences . . . . .	320
forgery and counterfeiting . . . . .	309
fraudulent transfers . . . . .	333
homicide and assault . . . . .	§ 363
incest . . . . .	360
indecent exposure . . . . .	360
larceny and kidnapping . . . . .	346
possession of stolen goods . . . . .	324
rape . . . . .	§ 357, 358
robbery . . . . .	§ 351
seduction . . . . .	360
sodomy . . . . .	360
sundry frauds . . . . .	§ 340
miscellaneous offences . . . . .	§ 367
civil cases . . . . .	370
declarations, as hearsay evidence of; see MENTAL CONDITION, DECLARATIONS OF.	
testifying to one's own intent . . . . .	§ 581, 1965
testifying to another person's intent . . . . .	§ 581, § 661, 1964
expressions of, or motive by defendant . . . . .	§ 1732
opinion evidence of, in dedication . . . . .	§ 1967
controlled by substantive law . . . . .	§ 1967
declarations of; Hearsay rule and Verbal Acts distinguished . . . . .	1968
in slander and libel . . . . .	§ 1971
declarations of, used to interpret a document . . . . .	§ 2471
parol evidence of, to disinherit . . . . .	§ 2475
presumption of, in criminal cases . . . . .	§ 2511
jury to determine, in libel . . . . .	2557
of party to a document; see PAROL EVIDENCE RULE.	
proof of, by parol evidence; see PAROL EVIDENCE RULE.	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]  
Section

**Intent, information or notice, as evidence of; see KNOWLEDGE.**

see also **MOTIVE; INTENTION.**

[Examine analysis of "Other Offences or Similar Acts, as Evidence  
of Knowledge, Design, or Intent," Vol. I, p. 386.]

<b>Intention, testamentary or contractual . . . . .</b>	<b>§ 112</b>
opinion of another's intention . . . . .	1964
one's own intention . . . . .	1965
distinguished from "meaning" . . . . .	2459
to go to certain place, to evidence going . . . . .	<i>note one</i> 1725
to commit suicide . . . . .	<i>note one</i> § 1725
see also <b>DESIGN; INTENT; MOTIVE.</b>	

**Intercourse; see BASTARDY; RAPE; SEDUCTION; INCEST; PREGNANCY.**

**Interest**

(a) <i>as disqualifying a witness</i>	
(b) <i>as impeaching a witness</i>	
(c) <i>as excusing absence of a witness</i>	
(d) <i>as money profit</i>	
(a) <i>as disqualifying a witness</i>	
history . . . . .	§ 575
general principle . . . . .	32, § 576
civil parties . . . . .	577
survivors . . . . .	§ 578
accused . . . . .	§ 579
co-indictees . . . . .	§ 580
testimony to one's own intent . . . . .	§ 581
attesting witness of a will . . . . .	§ 582
<i>voir dire</i> . . . . .	583
mode of proving interest . . . . .	§ 584-587
burden of proving . . . . .	§ 584
time of making objection to . . . . .	§ 586
judge determines . . . . .	587
time of interest . . . . .	583
husband and wife; see <b>MARITAL RELATIONSHIP.</b>	
husband or wife of co-defendant . . . . .	§ 609
dying declarant . . . . .	§ 1445
(b) <i>as impeaching a witness</i>	
one's own witness . . . . .	§ 901
parties and others in civil cases . . . . .	§ 906
accomplices and co-indictees . . . . .	§ 967
accused . . . . .	§ 968
bonds . . . . .	§ 969
detective-employment . . . . .	§ 969
insurance . . . . .	§ 969
rewards . . . . .	§ 969
real party injured . . . . .	§ 969
restoring credit by consistent statements . . . . .	§ 1128
knowledge of equitable, or other, by purchaser . . . . .	§ 254
(c) <i>as excusing absence of a witness</i>	
of an attesting witness . . . . .	§ 1316
of a deponent . . . . .	§ 1409
of a deceased declarant . . . . .	§ 1456
(d) <i>as money profit</i>	
reduced by subsequent oral agreement . . . . .	<i>note one</i> 2441

**Interest, statements against**

  party's admissions; see **ADMISSIONS.**

  hearsay exception; see **AGAINST INTEREST.**

**Interlocutory proceedings, rules in, distinguished . . . . .** § 4

**International affairs, privileged against disclosure . . . . .** § 2375

  not judicially noticed . . . . . § 2574

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Interpretation, judge's function</b> . . . . .	§ 2556
opinion rule	
expert interpretation of technical words . . . . .	§ 1955
location of deed-descriptions . . . . .	§ 1956
by parol evidence; see PAROL EVIDENCE RULE, D.	
<b>Interpreter, qualifications of</b> . . . . .	§ 571
testimony to conversation with . . . . .	668
not necessarily called to contradict interpreted testimony . . . . .	1810
proof of former testimony given through . . . . .	§ 751
necessity for . . . . .	§ 811
adequacy of cross-examination without . . . . .	§ 1393
admissions of, as agent . . . . .	668, § 1077
sworn translation of deposition . . . . .	§ 1710
translation as hearsay . . . . .	§ 1810
must be sworn . . . . .	§ 1810, 1824
form of oath for . . . . .	§ 1818
juror as . . . . .	note one 1910
communication between attorney and client, through, is privileged . . . . .	note two 2317
<b>Interrogation, mode of; see QUESTION TO A WITNESS; EXAMINATION.</b>	
<b>Interrogatory, mode of framing; see QUESTION TO A WITNESS.</b>	
to opponent before trial; see DISCOVERY.	
notice of deposition; see DEPOSITION.	
order of topics; see ORDER OF EXAMINATION.	
non-responsive answer to . . . . .	§ 785, § 1392
sweeping interrogatory . . . . .	§ 1392
discrediting opponent by his own answer to . . . . .	note eight § 1856
answers to statutory . . . . .	§ 2124
statutes allowing judgment to be taken for refusal to answer . . . . .	note six 2218
<b>Intimation of crime about to occur, as showing guilt</b> . . . . .	§ 238
<b>Intimidation of witness, as evidence of guilt</b> . . . . .	§ 278
on cross-examination, forbidden . . . . .	§ 781
<b>Intoxication, as evidence of an act done</b> . . . . .	§ 85, 96
as affecting ability to do an act . . . . .	§ 85
modes of evidencing . . . . .	§ 235
evidenced by conduct . . . . .	§ 235
by predisposing circumstances . . . . .	§ 235
by prior or subsequent condition . . . . .	§ 235
by appearance . . . . .	§ 235, § 660, § 1154
uses of condition of, as evidence, distinguished . . . . .	note three § 235
other instances, as evidencing a common drunkard . . . . .	§ 203
as disqualifying a witness . . . . .	§ 499
qualifications of witness testifying to . . . . .	§ 571, § 660
spouse testifying to, as confidential fact . . . . .	note one 2336, note two 2337
confession made during . . . . .	§ 841
of a witness, in impeachment . . . . .	§ 933, 993, § 1005
presumption of incapacity for crime during . . . . .	§ 2514
see also INTEMPERANCE; LIQUOR-SELLING; NEGLIGENCE.	
<b>Invalidating one's own instrument, forbidden</b> . . . . .	529
<b>Invention, privilege against disclosure of</b> . . . . .	§ 2374
see also PATENT; TRADE SECRET.	
<b>Irrelevancy of evidence, cured by offering other irrelevant evidence</b> . . . . .	§ 15
distinguished from multifariousness . . . . .	§ 42
not the subject of privilege . . . . .	§ 2210
<b>Irrelevant matters conditionally received</b> . . . . .	§ 1871
<b>Issue, facts not in, distinguished from facts not admissible</b> . . . . .	2
parent's bastardizing of . . . . .	§ 2063, 2064
<b>Issues, offering former testimony on the same</b> . . . . .	1386
of pedigree, to admit family hearsay . . . . .	§ 1503
proving character in; see CHARACTER; CONFUSION OF ISSUES.	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### J

**Jail**; see CONVICTION OF CRIME; IMPRISONMENT; CONFESSION.

**Joint-Defendant, etc.**; see CO-DEFENDANT, ETC.

**Journal**; see BOOKS OF ACCOUNT; LEGISLATIVE JOURNAL; NEWSPAPER.

**Judge to determine qualifications of witness** . . . . . 487, § 497, 587  
     has no duty to examine on *voir dire* . . . . . note three 497  
     not a mere umpire . . . . . § 21, § 983  
     to determine admissibility of a confession . . . . . § 861  
     questions to a witness by a judge . . . . . § 784  
     witness called by, may be impeached . . . . . 910, § 918  
     decree in another cause, as reputation . . . . . 1594  
     testimony by a . . . . . 1805, § 1909  
         privilege for . . . . . 2372  
     notes of testimony taken by . . . . . 1666  
     evidence offered after charge given by . . . . . § 1879  
     power to determine privilege-claim . . . . . § 2271, 2322, 2376  
         admissibility of evidence . . . . . § 2550  
         negligence . . . . . 2552  
         reasonableness . . . . . 2553  
         malicious prosecution . . . . . 2554  
         construction of documents . . . . . § 2556  
         criminal intent . . . . . 2557  
         foreign law . . . . . § 2558  
         *nul tiel record* . . . . . § 2555  
     may seek evidence . . . . . § 2484, 2569  
     may not use private knowledge . . . . . 2569  
     may take judicial notice; see JUDICIAL NOTICE.  
     see also JUDICIAL DISCRETION; MAGISTRATE.

**Judgment of conviction of crime, as affecting a witness**; see CONVICTION OF CRIME.

    offer to confess, as an admission . . . . . § 1061  
     theory of conclusiveness . . . . . § 1347  
     of conviction of crime, used against accessory . . . . . § 1389  
     sheriff's recital of contents . . . . . § 1664  
     full faith and credit to be given to . . . . . § 1681  
     proving the whole . . . . . § 2110  
     statutes allowing, for refusal to answer interrogatories . . . . . note six 2218

    see also JUDICIAL RECORD.

**Judicial Admission, as affecting inference from failure to produce evidence** . . . . . § 291  
     distinguished from other admissions . . . . . 1057, 2588, 2589  
     of contents of a document . . . . . § 1257  
     of execution of a document . . . . . § 2132, § 2595  
     effect as conclusive upon the party making . . . . . § 2590  
     exclusive of evidence by the party benefiting . . . . . § 2591  
     validity as a waiver of unconstitutionality or other illegality . . . . . § 2592  
     effect on subsequent trials . . . . . § 2593  
     form and tenor of the admission; who is authorized . . . . . 2594  
     by attorney . . . . . 2594  
     testimony of an absent witness, admitted to avoid a continuance . . . . . § 2595  
     of genuineness of document . . . . . § 2596

**Judicial Decision**

    report of, proved by official printed copy . . . . . § 1684  
         by private printed copy . . . . . 1703

    judicially noticed . . . . . § 2579

**Judicial Discretion, scope of** . . . . . § 16  
     abuse of . . . . . § 16  
     distinguished from unappealable rulings . . . . . § 16  
     ruling upon objections . . . . . § 18  
     admitting experiments, etc. . . . . 444

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Judicial Discretion, determining a witness' qualifications</b>	§ 496, § 507, § 561, § 660
allowing leading questions	§ 770, 776
admitting a confession	§ 862
controlling the scope of cross-examination	§ 944, § 983
search for a lost document	§ 1194
admitting testimony after the proper time	§ 1867
limiting the number of witnesses	1908
relieving from stipulation	§ 2593
<b>Judicial Estoppel, distinguished from pleading</b>	1066
<b>Judicial Notice, general theory</b>	2565
anomalous meanings	2566
mode of proceeding	2567-2569
taken by jury	1801, § 2570
is not conclusive	2567
must be requested	2568
judge's private knowledge	2569
judge may inform himself	2569
specific facts noticed	
domestic and foreign law	§ 2572, § 2573
charter of city	§ 2572
State law, by Federal courts	§ 2573
affected by sub-division or amalgamation	§ 2573
international affairs; seal of State	§ 2574
official and judicial seals	§ 2161-2169
almanac	2566
foreign judgments	§ 2574
public divisions of land; boundaries, capitals, counties, etc.	§ 2575
official authority and identity	2576
elections	§ 2577
census, etc.	§ 2577
proceedings of legislature, Executive proclamation	§ 2577
officers and rules of court	§ 2578
jurisdiction and terms of court	§ 2578
judicial proceedings	§ 2579
commerce, industry, history, science, etc.	§ 2580
times, distances	§ 2581
meaning of words	§ 2582
intoxicating liquors	§ 2582
dictionaries	§ 2582
[Examine analysis of "Judicial Notice," Vol. IV, p. 3598.]	
<b>Judicial Record, what constitutes</b>	§ 2450
original admissible instead of a copy	§ 1186
custody presumes genuineness	§ 2158
original need not be produced	§ 1215, § 1249
<i>nul tiel record</i> , perjury	1216, § 2555
dockets	1217
copy of, preferred to recollection	§ 1267, § 1268, § 1269
certified copy	§ 1273
copy of a copy	1274
sealed attestation of copy	§ 2162
conclusive proof of the facts adjudged	1346, § 1347, § 2450
of contents of lost document re-established	§ 1275, § 1347, § 1660, § 1681
of preliminary probate not evidence on appeal	1658
full faith and credit required of	§ 1681
answer in chancery; see ANSWER.	
provable by certified copy	§ 1681
by inspection	§ 2555
whole must be proved	§ 2110, § 2116
see also CERTIFIED COPY.	

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Jurat</b> , as evidence of oath taken . . . . .	§ 1676
see also <b>CERTIFICATE OF OATH</b> ; <b>PUBLIC DOCUMENT</b> ; <b>NOTARY</b> .	
<b>Jurisdiction</b> , conviction of crime in another; see <b>CONVICTION OF CRIME</b> .	
absence from, as presuming death . . . . .	§ 2531
document out of . . . . .	§ 1213
attesting witness out of . . . . .	§ 1312
subpoena to witness out of . . . . .	§ 2207
<b>Juror</b> , having knowledge must testify . . . . .	§ 1800
incompetency of . . . . .	1801
not to receive evidence out of court . . . . .	§ 1802
disclosing at subsequent trial, knowledge obtained at view on former	<i>note one 1910, 2346</i>
objections to, as witness . . . . .	§ 1910
as interpreter . . . . .	<i>note one 1910</i>
personal knowledge of . . . . .	§ 2354
<b>Jurors</b> , communications by and to . . . . .	2345
motives, beliefs, misunderstandings, etc. . . . .	§ 2349
impeaching a verdict . . . . .	§ 2349
testimony supporting a verdict . . . . .	§ 2349
<i>voir dire</i> of, as to interest in employer's-liability insurance . . . . .	282, 969
<b>Jury</b> , fraud in packing, evidence of intent . . . . .	§ 367
determination of witness' qualifications . . . . .	§ 497, 587, 1187
memorandum of recollection shown to . . . . .	§ 754, § 763
determination of admissibility of confession . . . . .	§ 861
determination of admissibility of dying declaration . . . . .	§ 1451
withdrawal during arguments of admissibility . . . . .	§ 861, § 1808
corporal injury exhibited to . . . . .	§ 1157, § 1158, § 2220
clothing exhibited to . . . . .	§ 1157
animal produced before . . . . .	§ 1154, § 1161
improper sampling of liquor by . . . . .	§ 1159
reading scientific books to . . . . .	§ 1700
verdict admitted as reputation, in another cause . . . . .	1593
as "verbal act," to prove boundary . . . . .	1593, § 1778
not to be impeached by juror . . . . .	2348
deliberations of . . . . .	2348
failure to observe formalities of conduct . . . . .	2348
correction of mistake in verdict . . . . .	2348
notes of former testimony taken by . . . . .	§ 1669
judicial notice by jury . . . . .	1801
view by, evidence not to be received at . . . . .	§ 1802
defendant's presence at . . . . .	1803
general rules for . . . . .	§ 1162-1168
in eminent domain . . . . .	§ 1168
information acquired at view by, is not evidence . . . . .	1802
evidence not ordinarily to be offered to, after retirement . . . . .	§ 1880
to be offered to, after verdict . . . . .	1881
documents taken to jury-room . . . . .	§ 1802, 1913
experiment with gun in jury room . . . . .	<i>note one 460, note one 1160</i>
juror may be witness . . . . .	§ 1910
must be sworn . . . . .	§ 1800
charge given . . . . .	§ 1879
retirement of . . . . .	§ 1880
showing specimens of writing to . . . . .	2001, § 2016
privilege for communications between . . . . .	§ 2346
examining the jury before discharge . . . . .	2350
misconduct of party or court-officer toward . . . . .	§ 2354
verdict of, given to unintended party . . . . .	§ 2355
manner of, and right in polling . . . . .	<i>note one 2355</i>
sufficient evidence for . . . . .	§ 2494

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Jury (*continued*).

right to determine law . . . . .	§ 2558, 2559
to construe documents . . . . .	§ 2556
to determine intent . . . . .	2557
negligence . . . . .	2552
reasonableness . . . . .	2553
admissibility of evidence . . . . .	§ 861, § 1451, § 2550
right to use general knowledge . . . . .	§ 2570
see also JUROR; JURORS; BRIBERY; GRAND JURY; JUDGE; VERDICT.	

### Justice of the Peace

docket of, original required . . . . .	§ 1215, 1217
certified copy allowed . . . . .	§ 1681
seal not presumed genuine . . . . .	§ 2164
examination of accused or witness; see EXAMINATION.	
record conclusive . . . . .	§ 2450
office judicially noticed . . . . .	§ 2578
see also PUBLIC OFFICER; JUDGE.	

## K

<b>Kidnapping</b> , other offences as evidence of intent . . . . .	349
<b>King</b> , testimony of, admitted without calling . . . . .	1384, 1674
without being sworn . . . . .	1825
privilege of . . . . .	2368-2372
<b>Knife</b> ; see WEAPON.	
<b>Knowledge</b> , technical, as showing ability to do an act . . . . .	§ 87
of poisons . . . . .	§ 87
of skill in imitating handwriting . . . . .	§ 87
and experience in drafting wills . . . . .	§ 87
evidenced by newspaper advertisement . . . . .	§ 255
relative weight of negative . . . . .	664

### Knowledge, or Belief

(a) <i>In general</i>	
(b) <i>Circumstances or Reputation, as evidence of</i>	
(c) <i>Conduct, as evidence of</i>	
(d) <i>Declarations, as evidence of</i>	
(e) <i>Other crimes, as evidence of</i>	
(f) <i>Testimony to a third person's</i>	
(g) <i>Qualifications of a witness as to</i>	
(h) <i>Impeachment of a witness as to</i>	
(a) <i>In general</i>	
distinction between knowledge and belief . . . . .	658
distinguished from Design and Intent . . . . .	300
distinguished from experience, observation . . . . .	558, 650, 651
(b) <i>Circumstances or Reputation, as evidence of</i>	
of accused, as to deceased's aggression . . . . .	245
as to deceased's character . . . . .	§ 246-258
of employer, as to employee's incompetence . . . . .	§ 249
of owner, as to animal's vice . . . . .	§ 251
precautions taken with animals to show, of vice . . . . .	§ 282
personal, to evidence disposition of animal . . . . .	<i>note four</i> 1984
of owner, as to defect of place or machine . . . . .	§ 252
of purchaser, as to seller's insolvency . . . . .	253
of possessor, as to stolen goods . . . . .	§ 254, 259
of creditor or debtor, as to partnership . . . . .	§ 255
of maker of representations, as to falsity . . . . .	§ 256
of liquor-seller, as to buyer's condition . . . . .	§ 257
of prosecutor or arrester, as to probable cause . . . . .	§ 258
of utterer, as to forged paper . . . . .	259

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Knowledge, or Belief (*continued*).

of possessor, as to contents . . . . .	§ 260
about a document, production unnecessary . . . . .	§ 1243
of sundry persons . . . . .	§ 261
specifying grounds of, on direct examination . . . . .	§ 655
information or reputation, as <i>res gestæ</i> . . . . .	1789
(c) <i>Conduct, as evidence of</i>	
of sundry facts known or believed . . . . .	§ 266, 267
of consciousness of guilt . . . . .	§ 273-291
of innocence . . . . .	§ 293
<i>prima facie</i> evidence defined by statute . . . . .	§ 1354
(d) <i>Declarations, as evidence of; see MENTAL CONDITION, DECLARATIONS OF.</i>	
(e) <i>Other crimes, as evidence of</i>	
general theory . . . . .	301
sundry crimes (forgery, embezzlement, etc.) . . . . .	§ 309-367
see also INTENT.	
definition of . . . . .	300
observation, opportunity to observe and knowledge distinguished . . . . .	650
distinction between experience and . . . . .	651
may rest on a hypothetical basis . . . . .	652
often both general and specific . . . . .	653
burden of proof of, qualification . . . . .	§ 654
questioning witness as to ground of . . . . .	§ 655
degree, quality and source of . . . . .	§ 656-664
judicial phrasing of principles of . . . . .	656
must not be founded on hearsay . . . . .	§ 657
need not be positive or absolute . . . . .	658
inference of identity from appearance . . . . .	§ 660
testimony to another's state of mind . . . . .	§ 661
improbabilities in scientific testimony . . . . .	§ 662
speculative testimony to values or personal injuries . . . . .	663
testimony of non-occurrence from absence of sensual knowledge . . . . .	§ 664
(f) <i>Testimony to a third person's</i> . . . . .	§ 661
(g) <i>Qualifications of a witness as to; see WITNESS, I, Qualifications.</i>	
(h) <i>Impeachment of a witness as to; see IMPEACHMENT.</i>	
[Examine analyses of "Evidence to prove Knowledge, Belief, or Consciousness," Vol. I, p. 303; "Other Offences or Similar Acts, as Evidence of Knowledge, Design, or Intent," Vol. I, p. 386; and "Testimonial Knowledge," Vol. I, p. 744.]	

## L

<b>Land</b> , words during possession or entry, as <i>res gestæ</i> . . . . .	§ 1777, § 1778
public divisions of, judicially noticed . . . . .	§ 2575
explaining away evidence that flowage damaged . . . . .	35
possession of, as evidenced in various ways; see POSSESSION.	
contracts or customs concerning; see CONTRACTS; CUSTOM.	
declarations or reputation about boundaries of or title to; see BOUNDARIES.	
parties' admissions of title to; see ADMISSIONS.	
testimony to value of; see VALUE.	
see also PROPERTY; PREMISES.	
<b>Land-grant</b> of government; see DEED; LAND-OFFICE.	
<b>Landlord</b> , tenant disputing title of . . . . .	1473
<b>Landmark</b> ; see BOUNDARIES.	
<b>Land-office</b> , producing original of documents in . . . . .	§ 1239
conclusiveness of rulings of . . . . .	§ 1347
records of, in general . . . . .	§ 1656
register of, to prove a deed's execution . . . . .	§ 1651

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Land-office (<i>continued</i>).</b>	
certificates of . . . . .	§ 1674, § 1678
reports of title . . . . .	§ 1672
surveys of . . . . .	§ 1665
copy of whole required . . . . .	§ 2109
<b>Language; see INTERPRETER; INTERPRETATION.</b>	
<b>Lapse of Time, as presuming loss of document . . . . .</b>	<b>§ 1196</b>
as presuming payment . . . . .	159, § 2517
<b>Larceny, possession of stolen goods as evidence of . . . . .</b>	<b>152, § 2513</b>
possession of money, as evidence of . . . . .	32, § 154
other crimes as evidence of intent . . . . .	346
motive for . . . . .	§ 391, § 392
evidence of identity of goods . . . . .	§ 413
owner's complaint after . . . . .	1142
accused's explanations after . . . . .	1143
notice to produce original document in . . . . .	1205
proof of, without producing document stolen . . . . .	§ 1249
words accompanying the taking, as <i>res gestæ</i> . . . . .	§ 1777, § 1781
testimony of owner to non-consent . . . . .	§ 2089
presumption from possession of goods . . . . .	§ 2513
judgment of conviction of principal in, used against accessory . . . . .	1388
<b>Latent Ambiguity in a document . . . . .</b>	<b>§ 2472</b>
<b>Law, distinguished from fact . . . . .</b>	<b>1, 2549</b>
rules of, distinguished from rules of pleading and evidence . . . . .	2
laymen testifying as experts on . . . . .	564
foreign statute proved without copy . . . . .	§ 1271
by expert . . . . .	564, § 690, § 1953
<i>prima facie</i> evidence of, under statute . . . . .	§ 1354
proved by official printed copy . . . . .	§ 1684
by private printed copy . . . . .	1703
by treatises . . . . .	§ 1697
presumption of . . . . .	§ 2491
judicially noticed . . . . .	§ 2572, § 2573
judge or jury to determine . . . . .	2549, § 2558, 2559
<b>Laws, conflict of; see CONFLICT OF LAWS.</b>	
<b>Lawsuit; disqualifying as witness former party to a . . . . .</b>	<b>32</b>
see also LITIGATION.	
<b>Leading Questions, what are . . . . .</b>	<b>769</b>
admissibility of answers to . . . . .	32
allowable only in discretion . . . . .	§ 770, 776
kinds of questions that are leading . . . . .	771
assuming a disputed fact as true . . . . .	771
admitting of "yes" or "no" answer . . . . .	§ 772
answer of witness to . . . . .	§ 772
exceptions to the rule . . . . .	776
on cross-examination . . . . .	§ 773, 915
for bias shown, may be forbidden in cross-examination . . . . .	§ 773
own witness hostile, biassed, or unwilling . . . . .	§ 774
facts preliminary to matters in issue . . . . .	775
an extraordinary occasion . . . . .	776
when witness' recollection is exhausted . . . . .	777
when witness has immature or weak mind . . . . .	§ 778
misleading on cross-examination . . . . .	§ 780
judge may ask . . . . .	§ 784
impeaching one's own witness . . . . .	915
in dying declarations . . . . .	§ 1445
see also QUESTION TO A WITNESS.	
[Examine analysis of "Testimonial Narration or Communication,"	
Vol. I, p. 858.]	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Learned Treatises</b> , used in evidence . . . . .	§ 1690-1700
author's standing as authority . . . . .	1694
counsel reading from . . . . .	1694, <i>note one</i> 1697, § 1700
<b>Lease</b> , course of business as evidencing terms of . . . . .	94, 372, § 377
ancient, to show seisin . . . . .	§ 157
production required, in proving tenancy . . . . .	§ 1246
collateral parol agreement qualifying . . . . .	<i>note one</i> § 2442
see also DEED; POSSESSION.	
<b>Ledger</b> , as a book of regular entries . . . . .	§ 1548, § 1558
<b>Left-handed</b> , evidence of accused being . . . . .	<i>note three</i> 413
<b>Legatee</b> , admissions of . . . . .	§ 1081
<b>Legislative Journal</b> , whether original's production is required . . . . .	§ 1219
whether receivable to overthrow enrolment of statute . . . . .	§ 1350
admissible to prove facts recorded . . . . .	§ 1662
provable by printed copy . . . . .	§ 1684
judicially noticed . . . . .	§ 2577
<b>Legislature</b> , power of, to alter rules of evidence . . . . .	§ 7, 1353
power to compel answer from witness . . . . .	§ 2195, § 2252
privilege of member of . . . . .	§ 2375
see also STATUTE; LEGISLATIVE JOURNAL; CONSTITUTIONAL RULES.	
<b>Legitimacy</b> , birth during marriage, as evidence of . . . . .	164
resemblance of child, as evidence of . . . . .	§ 166
as evidenced by parents' conduct . . . . .	§ 269
by parents' statements; see FAMILY HISTORY.	
as evidenced by reputation . . . . .	§ 1605
valid marriage presumed, to assist . . . . .	25
presumption of . . . . .	§ 2527
see also BASTARDY; ILLEGITIMACY; MARRIAGE.	
<b>Length</b> of a witness' examination . . . . .	§ 783
of a hypothetical question . . . . .	683
of life . . . . .	223
of a trial . . . . .	1864
<b>Lessee</b> , declarations of, made during possession . . . . .	§ 1778
see also LEASE; VERBAL ACTS.	
<b>Letter</b> , delivery of, as evidenced by mailing . . . . .	§ 95
anonymous typewritten, individuality of style shown . . . . .	<i>note three</i> 87
habit of using government envelopes, to evidence stamp used on . . . . .	<i>note four</i> 95
third person's, as evidence of sanity . . . . .	§ 228
similar act of sending lewd . . . . .	<i>note nine</i> 367
receipt of, as qualifying a witness to handwriting . . . . .	§ 702
failure to reply to, as an admission . . . . .	§ 1073
found on accused is admissible . . . . .	<i>note two</i> 1073
of husband or wife, showing feelings . . . . .	§ 1730
putting in other letters in answer . . . . .	§ 2104, § 2120
received by mail in reply, as genuine . . . . .	§ 2153
admissions of sending or receiving . . . . .	<i>note one</i> § 2153
receipt of, as evidence of authorship . . . . .	2519
see also DOCUMENT.	
<b>Letter-press</b> copies, as originals . . . . .	§ 1234
<b>Lex fori</b> , rule of evidence in, applicable . . . . .	§ 5
statutes making, uniform . . . . .	6
<b>Liability</b> , facts of civil liability as privileged . . . . .	§ 2223
of criminal liability . . . . .	§ 2250
<b>Libel</b> ; see DEFAMATION.	
<b>License</b> to sell liquor, as evidence of sale . . . . .	§ 238
refusal to produce, as evidence of non-possession . . . . .	§ 291
to practice medicine, as qualifying a witness . . . . .	§ 569
to marry; see MARRIAGE.	
<b>Lie</b> ; see FALSEHOOD; PERJURY.	

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Lien</b> , privilege for documents held under . . . . .	2211
<b>Life</b> , presumption of continuance of . . . . .	§ 2531
of survivorship . . . . .	2532
expectation of, evidenced from long life of ancestors . . . . .	<i>note two</i> 223
<b>Life Insurance</b> ; see <b>INSURANCE</b> .	
<b>Life Table</b> , used in evidence . . . . .	§ 1698
judicially noticed . . . . .	2566
<b>Light</b> , distance or quality of, as shown by instances . . . . .	§ 460
<b>Limitations</b> ; see <b>STATUTE OF LIMITATIONS</b> .	
<b>Line of survey</b> ; see <b>BOUNDARIES</b> ; <b>SURVEY</b> .	
<b>Liquor</b> , effect of, as indicating nature . . . . .	§ 457
sample of, as indicating nature . . . . .	439
improperly used as sample by jurors . . . . .	§ 1159
selling to a minor; see <b>AGE</b> .	
going in sober and coming out drunk as evidence of obtaining . . . . .	<i>note five</i> 153
seized in illegal search, admissible . . . . .	<i>note two</i> 2264
druggist required by statute to file report of sales of . . . . .	<i>note twelve a</i> 2264
burden to show license in illegal sale of . . . . .	<i>note four</i> 2512
meaning of terms, judicially noticed . . . . .	§ 2582
intemperate use of, not provable by reputation . . . . .	§ 1621
see also <b>INTOXICATION</b> ; <b>LIQUOR-SELLING</b> .	
<b>Liquor-selling</b> , possession of liquor, as evidence of . . . . .	§ 153
other sales as evidence of common selling . . . . .	§ 203
as evidenced by license or tax-payment . . . . .	§ 238
to minor or intemperate, evidence of knowledge of . . . . .	§ 257
other sales, as evidence of intent . . . . .	§ 367
other keeping, as evidence of continuous keeping . . . . .	§ 382
burden of proof of license for . . . . .	§ 2512
privilege not to produce license for . . . . .	§ 2375
inference from refusal to produce . . . . .	§ 291
presumption from possession of liquor . . . . .	§ 2513
see also <b>INTOXICATION</b> ; <b>LIQUOR</b> .	
<b>Liquor-tax receipts</b> , disclosure of . . . . .	<i>note eleven b</i>
<b>List of witnesses</b> , before trial . . . . .	§ 1850
before grand jury . . . . .	§ 1852
<b>Literature</b> , counsel's argument referring to, for illustration . . . . .	<i>note three</i> 807
<b>Litigation</b> , fact of, as biasing a witness . . . . .	§ 949
pleadings in other, as admissions . . . . .	§ 1065-1067
kind of, in pedigree hearsay . . . . .	§ 1503
<b>Loan</b> , words accompanying, as <i>res gestæ</i> . . . . .	§ 1777
fact of, shown by possession of money . . . . .	§ 89, 224
lack of money, as evidence of motive for . . . . .	§ 392
see also <b>CONTRACT</b> ; <b>CREDITOR</b> ; <b>PAYMENT</b> .	
<b>Locomotive</b> ; see <b>MACHINE</b> ; <b>SPARKS</b> ; <b>SPEED</b> .	
<b>Log</b> , marks on, as evidence of ownership . . . . .	§ 150, § 2152
register of . . . . .	§ 1647
<b>Log-book of ship</b> , as a book of regular entries . . . . .	§ 1523
as an official register . . . . .	§ 1641
<b>Logical theory of relevancy</b> . . . . .	30
<b>Longevity</b> , evidenced by long life of ancestors . . . . .	<i>note two</i> 223
<b>Loss of a document</b> ; see <b>ORIGINAL DOCUMENT</b> .	
of a ship, as evidenced by lack of news . . . . .	§ 158, § 2531
<b>Lost Document</b> , substance of . . . . .	§ 2105-2107
contents of . . . . .	§ 1957
provable by recollection; see <b>RECOLLECTION</b> .	
copy of lost ancient deed . . . . .	§ 2143
copy of, judicially established . . . . .	§ 1347
proved by certified copy; see <b>CERTIFIED COPY</b> .	
of lost deed recited in another . . . . .	§ 1573

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Lost Document</b> ( <i>continued</i> ).	
substance of contents of lost deed . . . . .	§ 1957, § 2105
presumption of . . . . .	§ 2522
from lapse of time . . . . .	§ 1196
see also ORIGINAL DOCUMENT.	
<b>Lost Grant</b> , presumption of . . . . .	§ 2522
not to excuse from proof of loss of specific deed . . . . .	§ 1196
<b>Lottery</b> , other acts as evidence of intent . . . . .	§ 367
<b>Lunacy</b> , inquisition of . . . . .	§ 1671
appearance as evidence of . . . . .	§ 1154, § 1160
see also LUNATIC; SANITY.	
<b>Lunatic</b> , knowledge of purchaser from, as evidenced by repute . . . . .	253
disqualification of opponent as witness . . . . .	§ 578
admissions of . . . . .	§ 1053
capacity to take the oath . . . . .	1822
to be a witness . . . . .	§ 492
see also SANITY.	

## M

<b>Machine</b> , evidencing owner's knowledge of danger of . . . . .	§ 252
reputation of defect in a . . . . .	§ 252
former injuries caused by defective . . . . .	§ 252
repairs of, as evidence of negligence . . . . .	§ 283
capacity of, as shown by its effects . . . . .	§ 441-461
condition at another time or place, as evidence . . . . .	§ 437
other instances of operation, as evidence of condition of . . . . .	§ 451
similar injuries, as evidence of defect in . . . . .	§ 458
similar precautions, as evidence of safety of . . . . .	§ 461
negligence presumed from accident at . . . . .	§ 2509
see also EMPLOYEE; NEGLIGENCE.	
<b>Machinery</b> , injury from vibration of . . . . .	441, 442
<b>Magistrate</b> , confession made to . . . . .	§ 842-852
report of, on statement of accused . . . . .	§ 1326-1329, § 1349
report not taken, or lost . . . . .	1327, § 1349
usable as memorandum . . . . .	§ 1328
as confession . . . . .	§ 1328
report of witness' testimony . . . . .	§ 1329
report of, showing incompleteness . . . . .	§ 1349
examination of accused or witness; see EXAMINATION.	
see also PUBLIC OFFICER.	
<b>Magnifying-lens</b> , used by witness or jury . . . . .	§ 795, § 1152
<b>Mail</b> , course of, as evidence of an addressed letter's delivery . . . . .	§ 95
of a reply-letter's genuineness . . . . .	§ 2153, 2519
fraud in, other acts as evidencing intent . . . . .	§ 341
proof of loss of letter sent by . . . . .	§ 1201, § 1203
see also LETTER; POSTMARK.	
<b>Maker</b> , parol agreement collateral to instrument . . . . .	2443
proving signature of, or attesting witness . . . . .	§ 1320, 1513
see also BILL OF EXCHANGE; NOTE.	
<b>Malice</b> , as evidenced by an accused's threats . . . . .	§ 105
by other assaults, etc. . . . .	§ 363
by hostile expressions or conduct . . . . .	§ 396
by other utterances in defamation . . . . .	403
unproved plea of justification as evidencing . . . . .	404
as impeaching a witness; see BIAS.	
presumption of, in criminal cases . . . . .	§ 2511
see also MALICIOUS MISCHIEF; MALICIOUS PROSECUTION; INTENT;	
MOTIVE.	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Malicious Mischief</b> , evidence of intent in . . . . .	§ 367
<b>Malicious Prosecution</b>	
character of plaintiff, as mitigating damages . . . . .	§ 75, note one 76, § 209
evidence of prosecutor's belief . . . . .	§ 258
conduct as showing malice . . . . .	§ 396
former testimony in . . . . .	§ 1416
testimony before grand jury, not privileged . . . . .	§ 2363
burden of proof in . . . . .	2539
judge or jury to determine probable cause . . . . .	2554
<b>Malpractice</b> , character of defendant in . . . . .	67
other persons' conduct, as standard of care, etc. . . . .	§ 461
party's skill proved by reputation . . . . .	§ 1621
by particular instances of its exercise . . . . .	§ 208
by opinion . . . . .	§ 1984
privilege for communications to physician . . . . .	§ 2385, § 2389
see also NEGLIGENCE; ABORTION; HOMICIDE.	
<b>Map</b> , used to illustrate testimony . . . . .	790
verification of . . . . .	793
as an official survey . . . . .	§ 1665
as a declaration of boundary . . . . .	1570
as reputation of boundary . . . . .	1592
see also BOUNDARIES; SURVEY.	
<b>Marital Relationship</b>	
I. <i>Disqualification of husband or wife as witness for the other</i>	
II. <i>Privilege not to be witness against the other</i>	
III. <i>Privilege for communications</i>	
I. <i>Disqualification of husband or wife as witness for the other</i>	
history and general principle . . . . .	§ 600-604
policy of rule . . . . .	601
statutory alterations . . . . .	602
common law rule . . . . .	603
waiver . . . . .	604
distinction between disqualification and privilege . . . . .	§ 2334
who is excluded . . . . .	§ 605
marriage subsequent to crime . . . . .	note four 605
in bigamy . . . . .	§ 605
on whose behalf excluded . . . . .	§ 606-610
interest in cause . . . . .	§ 607
nominal party . . . . .	§ 607
spouse of nominal party . . . . .	§ 607
co-defendants . . . . .	§ 609
spouse of co-defendant . . . . .	§ 609
effect of death or divorce . . . . .	§ 610
effect of enabling-statutes . . . . .	§ 608
exceptions to the rule . . . . .	§ 612-617
injuries, bailments, account books . . . . .	§ 612
statutory exceptions, provisions, and abolitions . . . . .	§ 613, § 617, 619, 620
separate estate . . . . .	§ 614
wife "as if unmarried," cessation of disqualification . . . . .	§ 615
agent, other spouse as . . . . .	§ 616
statutory abolition . . . . .	619, 620
impeachment of witness by . . . . .	§ 949
under exceptions to the Hearsay rule . . . . .	1761
bastardizing the issue . . . . .	§ 2063
II. <i>Privilege not to be witness against the other</i>	
history and policy . . . . .	2227, 2228
marriage after process begun . . . . .	note four 605, § 2230
paramour . . . . .	§ 2230
bigamist . . . . .	§ 2231

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Marital Relationship</b> ( <i>continued</i> ).	
disputed marriage . . . . .	§ 2231
agent's admissions . . . . .	§ 2232
production of documents . . . . .	§ 2233
testimony obtained by information gained from the wife . . . . .	note one § 2233
what testimony is prohibited	
husband or wife not a party . . . . .	2234, § 2235
bankruptcy . . . . .	§ 2235
pauper-settlement . . . . .	§ 2235
adultery, etc. . . . .	§ 2235
co-indictee, co-defendant . . . . .	§ 2236
person deceased or divorced . . . . .	§ 2237
exceptions by necessity . . . . .	§ 2239
abduction . . . . .	§ 2239
abortion . . . . .	§ 2239
adultery . . . . .	§ 2239
assault and battery . . . . .	§ 2239
divorce . . . . .	§ 2239
incest . . . . .	§ 2239
injury to property . . . . .	§ 2239
poisoning . . . . .	§ 2239
rape . . . . .	§ 2239
by statute . . . . .	§ 2240
exceptions by statute; separate estate . . . . .	§ 2240
agency . . . . .	§ 2240
whose is the privilege . . . . .	§ 2241
waiver . . . . .	§ 2242
inference from claiming it . . . . .	§ 2243
privilege inoperative unless claimed . . . . .	§ 2243
statutory abolition . . . . .	§ 2245
<b>III. Privilege for communications</b>	
history and policy . . . . .	2232, 2233
distinction between privilege and disqualification . . . . .	§ 2234
statutes . . . . .	§ 2234
scope of the privilege . . . . .	§ 2236-2238
confidence to be judged from circumstances . . . . .	§ 2236
communications but not acts privileged . . . . .	§ 2237
third persons overhearing . . . . .	§ 2239
communicative documents in possession of third person . . . . .	§ 2239
who may claim; waiver . . . . .	§ 2340
death and divorce . . . . .	§ 2341
separation or unlawful cohabitation . . . . .	§ 2341
see also HUSBAND; WIFE; MARRIAGE; DIVORCE; LEGITIMACY.	
[Examine analyses on "Marital Relationship as a Disqualification,"	
Vol. I, p. 728; "Privilege for Anti-Marital Facts," Vol. III, p. 3034;	
and "Communications between Husband and Wife," Vol. IV, p.	
3257.]	
<b>Mark, illiterate's signature by; see ILLITERATE.</b>	
on logs, as evidence . . . . .	§ 150
register of . . . . .	§ 1647
<b>Market Reports, admissible in evidence . . . . .</b>	<b>§ 1704</b>
<b>Market Value; see VALUE.</b>	
<b>Marksman; see ILLITERATE.</b>	
<b>Marriage, breach of promise of; see BREACH OF PROMISE.</b>	
birth during, as evidence of legitimacy . . . . .	164
prior coverture, as evidence . . . . .	§ 382
certificate of, as evidence . . . . .	268, § 1645
habit and repute, as evidence . . . . .	268, § 2083
reputation, as evidence . . . . .	1602, § 2083

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Marriage</b> ( <i>continued</i> ).	
utterances of the parties as <i>res gesta</i> . . . . .	§ 1770
proof of marriage in fact . . . . .	§ 2082
meaning of "marriage in fact" . . . . .	§ 2082
conduct as evidencing prior consent . . . . .	§ 2083
authentication of certificate of . . . . .	note three § 2159
admissions . . . . .	§ 2086
register of, as evidence; see REGISTER OF MARRIAGE, BIRTH, AND DEATH.	
contracted in jest . . . . .	2414
statement concerning, as hearsay; see FAMILY HISTORY.	
presumption of consent . . . . .	§ 2505
of capacity . . . . .	§ 2506
of legitimacy . . . . .	§ 2527
of coercion . . . . .	§ 2514
of identity . . . . .	§ 2529
valid, presumed in bigamy . . . . .	§ 2506
husband or wife privileged by; see MARITAL RELATIONSHIP.	
privileged communications in; see MARITAL RELATIONSHIP.	
see also FOREIGN LAW; LEGITIMACY; HUSBAND; WIFE; CERTIFICATE.	
<b>Married Woman</b> ; see MARITAL RELATIONSHIP; WIFE; BASTARDY; MARRIAGE.	
<b>Master</b> ; see EMPLOYER; SCHOOLMASTER.	
<b>Materiality</b> , distinguished from admissibility . . . . .	2
<b>Mayhem</b> , ascertained by inspection . . . . .	§ 1152
<b>Meaning</b> ; see INTERPRETATION.	
<b>Means</b> of action, as evidence of an act done . . . . .	83
<b>Measures</b> , false, other acts evidencing intent . . . . .	§ 341
<b>Medical Books</b> , used in evidence . . . . .	§ 1690-1700
<b>Medical Matters</b> , witness' experience or knowledge as qualifying him . . . . .	§ 568, § 687
knowledge based on study of books . . . . .	§ 687
see also PHYSICIAN; EXPERT WITNESS; OPINION RULE.	
<b>Medical Treatment</b> , whether, is proper, as evidenced by acts of others . . . . .	§ 461
see also MALPRACTICE; PHYSICIAN; SKILL.	
<b>Medicine</b> , similar acts of unlawful prescription . . . . .	note nine 367
license to practise, as qualifying a witness . . . . .	§ 569
<b>Member of Congress</b> ; see CONGRESS.	
<b>Memorandum</b> to aid recollection; see RECOLLECTION.	
<b>Memory</b> , belief or impression as showing sufficient . . . . .	726
modes of refreshing or aiding; see RECOLLECTION.	
discrediting a witness by his lack of; see IMPEACHMENT.	
<b>Mental Capacity</b> , to do an act . . . . .	86
see also SANITY; WILL.	
<b>Mental Condition</b> , disproving objective facts causing insanity or excitement . . . . .	263
see also SANITY; INTENT; MALICE; MOTIVE; KNOWLEDGE; INSANE BELIEF; INSANITY.	
<b>Mental Condition, Declarations of</b>	
(a) <i>Pain and Suffering</i>	
(b) <i>Design, Intent, Motive, etc.</i>	
(c) <i>Testator</i>	
(d) <i>Sundries</i>	
-(a) <i>Pain and Suffering</i>	
to a physician or layman . . . . .	§ 1719
to a physician, discriminated . . . . .	1720, § 1722
after litigation begun . . . . .	§ 1721
past events . . . . .	§ 1722
failure to complain, as evidence . . . . .	note two § 1722, 1723
(b) <i>Design, Intent, Motive, etc.</i>	
design or plan to act . . . . .	§ 1725
intent in domicil . . . . .	§ 1727
intent in bankruptcy . . . . .	1728

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

### Mental Condition (*continued*).

Section

motive or reason . . . . .	§ 1729
alarm . . . . .	§ 1730
affection . . . . .	§ 1730
bias . . . . .	§ 1730
disgust . . . . .	§ 1730
emotion . . . . .	§ 1730
fear . . . . .	§ 1730
malice . . . . .	§ 1730
opinion and belief . . . . .	1731
accused person's statements . . . . .	§ 1732
(c) <i>Testator</i> . . . . .	
ante-testamentary statements of intent . . . . .	1735
post-testamentary statements of contents, etc. . . . .	§ 1736
intent to revoke . . . . .	§ 1737
undue influence or fraud . . . . .	§ 1738
intelligence or sanity . . . . .	§ 1739, 1740
(d) <i>Sundries</i> . . . . .	1790
exception to the Hearsay rule . . . . .	1714
see also KNOWLEDGE; INTENT; MALICE; MOTIVE; SANITY.	
[Examine analysis on "Declarations of a Mental Condition,"	
Vol. III, p. 2203.]	
<b>Microscope</b> , used by witness or jury . . . . .	§ 795, § 1152
<b>Midwife</b> as a witness; see EXPERT WITNESS; OPINION RULE.	
<b>Military</b> records, as evidence . . . . .	§ 1641
privilege against disclosure of secrets . . . . .	§ 2375
<b>Mill</b> ; see MACHINE; SPARKS.	
<b>Mind</b> , testimony to state of another's . . . . .	§ 661
<b>Mine</b> , inspection of . . . . .	<i>notes four and six</i> 1862
see also PREMISES.	
<b>Minister Plenipotentiary</b> ; see AMBASSADOR.	
<b>Minister of Religion</b> ; see PRIEST.	
<b>Minor</b> ; see CHILD; LIQUOR-SELLING; AGE.	
<b>Minutes</b> of clerk of court; see JUDICIAL RECORD.	
<b>Miscarriage</b> ; see ABORTION; PERSONAL INJURY.	
<b>Misconduct</b> of a juror . . . . .	§ 2354
<b>Mistake</b> , proof of, by parol evidence; see PAROL EVIDENCE RULE.	
names inserted or omitted by . . . . .	<i>note one</i> § 2421
in signing bill of exchange . . . . .	§ 2415-2419
by circumstantial evidence; see INTENT.	
<b>Mistress</b> ; see PARAMOUR.	
<b>Mitigation of Damages</b> ; see DAMAGES.	
<b>Mob</b> , violence by, other acts as evidencing intent . . . . .	§ 367, 1790
statements by . . . . .	<i>note three</i> 1079
<b>Model</b> , used to illustrate testimony . . . . .	790
verification of . . . . .	793
<b>Money</b> , possession of, as evidence of loan or payment . . . . .	§ 89, 224
as evidence of larceny . . . . .	32, § 154
offer of, to injured party in criminal case may be inadmissible . . . . .	279
lack of, as evidence of motive . . . . .	§ 392
to negative large stock of goods in fire loss . . . . .	<i>note one</i> 89
experience of expert to quality of . . . . .	§ 570
evidence of counterfeiting; see COUNTERFEITING.	
testimony to genuineness of; see PAPER MONEY; HANDWRITING.	
receipt of, as impeaching a witness; see CORRUPTION.	
payment of, mode of proving; see PAYMENT.	
see also VALUE.	
<b>Morphine</b> , use of, as disqualifying a witness . . . . .	§ 499, § 500
as impeaching a witness . . . . .	§ 934

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Mortality Table</b> , used in evidence . . . . .	§ 1698
judicially noticed . . . . .	note seven 2566
<b>Mortgage</b> , other transactions as evidence of debtor's intent; see FRAUD; FRAUD- ULENT TRANSFERS; FALSE REPRESENTATION.	
agreement to hold deed as, shown by parol . . . . .	§ 2437
admissions of mortgagor or mortgagee . . . . .	§ 1082, § 1779
production of original; see ORIGINAL DOCUMENT.	
see also DEED; SALE.	
<b>Mother</b> , statements of, to evidence pedigree; see FAMILY HISTORY.	
insanity of, as evidence . . . . .	§ 232
testimony to bastardy . . . . .	§ 2063
see also LEGITIMACY; BASTARDY.	
<b>Motion</b> , for a nonsuit or verdict . . . . .	§ 2495
to exclude all evidence . . . . .	§ 2495
to produce documents, on trial; see ORIGINAL DOCUMENT.	
before trial; see DISCOVERY.	
to strike out	
where objection is tardily made . . . . .	18
where evidence was conditionally admitted . . . . .	14, 18, 1871
where corroborating evidence fails . . . . .	18, 2030-2091
where the plaintiff's evidence as a whole is not sufficient to go to the jury	18, 2494
where an answer is non-responsive . . . . .	18, 785
see also OBJECTION.	
<b>Motive</b>	
<i>In general</i>	
1. <i>Circumstances creating a motive</i>	
2. <i>Conduct exhibiting a motive</i>	
3. <i>Prior and subsequent motive</i>	
4. <i>Sundries</i>	
<i>In general</i>	
as evidence of an act . . . . .	§ 117-119
an ambiguous term . . . . .	117
general theory of . . . . .	385
1. <i>Circumstances creating a motive</i>	
general principle . . . . .	389
motive for murder . . . . .	§ 390
motive for other acts and crimes . . . . .	§ 391
pecuniary circumstances as a motive . . . . .	155, § 392
legal liability as a motive . . . . .	§ 393
2. <i>Conduct exhibiting a motive</i>	
in general . . . . .	§ 394
3. <i>Prior and subsequent motive</i>	
hostility . . . . .	§ 359-397
sexual passion . . . . .	§ 398-402
malice in defamation . . . . .	§ 403-406
4. <i>Sundries</i>	
necessity of showing, to establish crime . . . . .	§ 118
existence of affection as negative, in homicide . . . . .	§ 118
as a fact in issue . . . . .	119
third person's motive, to evidence accused's innocence . . . . .	§ 141
testifying to another person's motive . . . . .	§ 661
to one's own motive . . . . .	§ 581
proof by opinion testimony . . . . .	1962
by declarations; see MENTAL CONDITION, DECLARATIONS OF.	
by reputation or information; see KNOWLEDGE.	
[Examine analysis on "Evidence to prove Emotion," Vol. I, p. 466.]	
<b>Multiple admissibility</b> . . . . .	13
<b>Municipal Corporation</b> ; see CORPORATION; PUBLIC DOCUMENT.	
ordinance or charter of, judicially noticed . . . . .	§ 2572

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

Section

**Murder; see HOMICIDE.**

**Mutual Mistake, under parol evidence rule** . . . . . 2417  
     clear proof of . . . . . § 2498

## N

**Name, as evidence of identity** . . . . . § 270, § 413  
     charactered, as evidence of ownership . . . . . notes four and five 150  
     falsity or non-existence of person evidenced by failure to find . . . . . note one 158  
     fictitious nature of, evidenced by failure of search . . . . . 158, 667  
     use of false, as evidence of guilt . . . . . § 276  
     testimony to knowledge of . . . . . § 667  
     identity of, as raising presumption . . . . . § 2529  
**Narrative, as unsound, in *res gestæ*** . . . . . 1756  
     as used for statements of pain . . . . . note one § 1722  
**Nationality, as evidenced by corporal traits** . . . . . § 167  
     as disqualifying a witness . . . . . § 516  
**Naturalization, statutes requiring *citizens'* testimony in** . . . . . note seven 516  
**Naval register, as evidence** . . . . . § 1641  
**Necessity, opinion testimony to** . . . . . § 1960  
**Negative instances, as evidencing cause or condition** . . . . . 448  
     observation, as showing that a thing did not occur . . . . . § 664  
**Negligence, character for, to evidence an act** . . . . . § 65  
     character for, as in issue . . . . . § 80  
     habit of, as evidence . . . . . § 93, 97  
     particular acts, as evidence of character . . . . . § 199, § 208  
     unfair surprise in showing acts of . . . . . § 199  
     employee's acts and repute, as evidencing employer's knowledge . . . . . § 249, § 250  
     evidenced by insurance against accident. . . . . § 282, § 393, § 949, § 969  
     subsequent repairs to evidence . . . . . § 283  
     other instances as evidence of habit of . . . . . § 376  
     defects of apparatus as evidence of . . . . . § 441-461  
     regulations of railroad as measure of . . . . . note one 461  
     other spark-emissions, as evidence of a defective locomotive . . . . . 452  
     other persons' conduct, as evidencing a standard . . . . . § 461  
     affected by statute or ordinance . . . . . note one 461  
     constitutionality of statute making liable without negligence . . . . . § 1354  
         making *prima facie* evidence of negligence . . . . . § 1354  
     proved by reputation . . . . . § 1621  
         by opinion evidence, of conduct . . . . . 1949  
             of character . . . . . § 1984  
     presumption of . . . . . § 2507-2510  
         contributory . . . . . § 2507  
         loss by bailee, carrier . . . . . § 2508  
         defective apparatus . . . . . § 2509  
         in injury to employee . . . . . § 2509  
         death by violence . . . . . § 2510  
     judge or jury to determine . . . . . 2552  
     jury may use general knowledge to determine . . . . . § 2570  
     in medical treatment; see **PHYSICIAN.**  
     see also **REPAIRS.**  
**Negotiable Instrument, admissions as applied to** . . . . . 1084  
     signed by officer of corporation . . . . . § 2444  
     raising presumption of consideration . . . . . § 2520  
     see also **BILL OF EXCHANGE; NOTE; PAYMENT; PAROL EVIDENCE RULE.**  
**Negro; see RACE.**  
**Newspaper, notice in, as evidencing knowledge** . . . . . § 255  
     quotations of prices, as evidence of value . . . . . § 719, § 1704  
     affidavit of publication of notice in . . . . . § 1710

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Newspaper</b> , communications to, not privileged . . . . .	§ 2286
see also PRINTED MATTER.	
<b>New Trial</b> , motion for, as confirming an exception . . . . .	§ 20
error of ruling as ground for . . . . .	§ 21
the Orthodox English Rule and the Exchequer Rule concerning . . . . .	§ 21
whether required for omission of oath . . . . .	§ 1819
granted for withholding evidence . . . . .	§ 290
validity on, of former judicial admission . . . . .	§ 2593
<b>Night</b> , evidence of power of vision at . . . . .	§ 460
<b>Noise</b> ; see SOUND.	
<b>Nolo Contendere</b> as an admission . . . . .	§ 1066
<b>Non-access</b> , as evidence of illegitimacy . . . . .	134, 135, 137
parent's testimony to . . . . .	§ 2063
rule not abolished by abolition of disqualification by interest . . . . .	<i>note fourteen</i> § 2063
see also BASTARDY.	
<b>Non-occurrence</b> of an event as shown by failure to see or hear . . . . .	160
<b>Non-residence</b> , evidenced by failure of search . . . . .	158, 667
<b>Non-suit</b> , motion for a . . . . .	§ 2495
<b>Notary</b> , using an entry to aid recollection; see RECOLLECTION.	
habit of, mailing notice of protest . . . . .	§ 98
record of protest, producing the original of . . . . .	§ 1240
whether conclusive . . . . .	§ 1352
regular entries of transactions by; see REGULAR ENTRIES.	
personal knowledge required . . . . .	§ 1635
certificate of protest . . . . .	§ 1675
of deed-acknowledgment . . . . .	§ 1676
conclusive in Louisiana law . . . . .	1358
seal presumed genuine . . . . .	§ 2165
power to compel testimony . . . . .	§ 2195
see also PUBLIC OFFICER.	
<b>Note</b> or memorandum, of testimony; see FORMER TESTIMONY.	
of stenographer, attorney, jurymen as official statements . . . . .	§ 1669
of a transaction, used to aid recollection; see RECOLLECTION.	
<b>Note, Promissory</b> , forgery of; see FORGERY.	
payment of; see PAYMENT.	
agent's authority to make; see AGENCY.	
impeaching one's own . . . . .	529
presumption of title from possession of . . . . .	§ 2516
of payment . . . . .	§ 2517, § 2518
admissions of assignor, indorser, etc. . . . .	1084
production of original; see ORIGINAL DOCUMENT.	
indorsement on, as statement against interest . . . . .	§ 1460, § 1466
protest of, as evidence . . . . .	§ 1675
signed by mistake . . . . .	§ 2415
delivery in escrow, shown by parol . . . . .	§ 2409, § 2420
collateral agreement, shown by parol . . . . .	§ 2443-2445
<b>Notice</b> (a state of mind); see KNOWLEDGE.	
<b>Notice</b> (a communication)	
(a) to produce a document	
(b) to fix liability for dishonor of bill	
(c) to quit	
(d) to take deposition	
(e) sundries	
(a) to produce a document	
as permitting use of copy	
notice to opponent . . . . .	1202
when not necessary . . . . .	§ 1203
when sufficient . . . . .	1204-1209
stolen original document . . . . .	1205

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Notice, exceptions to the rule</b> . . . . .	§ 1207
procedure of giving notice . . . . .	§ 1208
to agent . . . . .	§ 1208
notice to third person . . . . .	§ 1212
as compelling opponent's production of original . . . . .	§ 2219
as obtaining discovery before trial . . . . .	§ 1858
(b) <i>to fix liability for dishonor of bill</i> . . . . .	
evidenced by mailing . . . . .	§ 95
(c) <i>to quit</i> , as an admission of tenancy . . . . .	§ 1072
notice to produce a . . . . .	1206
(d) <i>to take deposition</i> . . . . .	§ 1378
(e) <i>sundries</i> . . . . .	
publication of, proved by affidavit . . . . .	§ 1710
giving of, as <i>res gesta</i> . . . . .	§ 1770, 1789
see also ORIGINAL DOCUMENT.	
[Examine analysis of "Production of Documentary Originals," Vol. II, p. 1383.]	
<b>Novation, shown by parol</b> . . . . .	§ 2441
<b>Nuisance, provable by other instances</b> . . . . .	§ 451
railroad as . . . . .	§ 451
amount of business to evidence . . . . .	§ 462
provable by reputation . . . . .	§ 1620
by noise, reproduced with phonograph . . . . .	795
<b>Null Tial Record, original required in</b> . . . . .	1216
tried by inspection . . . . .	§ 2555
<b>Number of witnesses; see WITNESSES, VII.</b>	
<b>Nuncupative Will, proved by two witnesses</b> . . . . .	§ 2050
<b>Nurse, as a witness; see EXPERT WITNESS; OPINION RULE.</b>	

## O

- Oath, 1. At Common Law**  
       2. Under Statutes  
       3. *Sundries*

**1. At Common Law**

history . . . . .	§ 1815
theory . . . . .	§ 1816
kind of belief . . . . .	1817
form of oath . . . . .	§ 1818
time of administration and of objection . . . . .	§ 1819
if omitted, whether new trial required . . . . .	§ 1819
capacity . . . . .	
disqualification under exceptions to Hearsay rule . . . . .	1761
mode of ascertaining . . . . .	§ 1820
infants . . . . .	§ 1821
lunatics, idiots . . . . .	1822
distinguished from testimonial capacity . . . . .	1823
persons subjected to . . . . .	
interpreters, showers to jury . . . . .	1824
peers, accused person . . . . .	§ 1825
whether a witness merely sworn is impeachable . . . . .	§ 1893

**2. Under Statutes**

abolition or dispensation . . . . .	§ 1827, § 1828
form, capacity, proof, etc. . . . .	1829

**3. *Sundries***

history of, in parties' disqualification . . . . .	§ 575
confession made on examination under . . . . .	842
statement out of court under oath, excluded . . . . .	1362, 1364
belief on, by witness to character . . . . .	§ 1985

[Examine analysis of "Prophylactic Rules," Vol. III, p. 2347.]

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Objection to evidence, time and form of</b> . . . . .	§ 18
as immaterial, incompetent, and irrelevant . . . . .	§ 18
general, if overruled may not avail . . . . .	§ 18
specific, if overruled will be effective to an extent . . . . .	§ 18
how waived . . . . .	§ 18
see also <b>WAIVER</b> .	
ruling upon an . . . . .	§ 18, § 19
distinguished from exception . . . . .	§ 20
to witness' qualifications . . . . .	§ 18, 486, § 586
by party, claiming privilege for witness . . . . .	2196, § 2270
renewal of, at close of case . . . . .	§ 2496
ruling on an, must be immediate and final . . . . .	§ 19
to deposition; see <b>DEPOSITION</b> .	
<b>Obligor, impeaching his own obligation</b> . . . . .	529
admissions of co-obligor . . . . .	§ 1077
<b>Obscenity of pictures, standard of</b> . . . . .	§ 461
proof of . . . . .	793
<b>Observation, capacity of</b> . . . . .	493
discredited by defective sight . . . . .	<i>note two</i> 934
<b>Occupancy, evidenced by assessor's books</b> . . . . .	§ 1640
<b>Offence; see CRIME.</b>	
<b>Offender, habitual; see HABITUAL CRIMINAL; COMMON OFFENDER.</b>	
<b>Offer of evidence, form and tenor</b> . . . . .	§ 17
cannot result from exchange of words between court and attorney . . . . .	§ 17
time to make . . . . .	§ 1866 <i>et seq.</i>
improper statements of counsel in . . . . .	1806
after argument begun . . . . .	§ 1878
to compromise, as an admission . . . . .	§ 1061
<b>Office, production of original appointment to</b> . . . . .	1228
presumption of title to . . . . .	272, § 2168, § 2534, § 2535
holding, evidenced from prior incumbency . . . . .	§ 382
of duty performed in . . . . .	§ 2534
<b>Office Copy; see CERTIFIED COPY.</b>	
<b>Officer, public; see PUBLIC OFFICER.</b>	
of a corporation, testifying on the faith of records . . . . .	§ 665
see also <b>CORPORATION</b> .	
<b>Official; see PUBLIC OFFICER.</b>	
<b>Official Certificate, contradicting one's own</b> . . . . .	§ 530
<b>Official Communications, privilege for</b> . . . . .	§ 2375
see also <b>STATE</b> .	
<b>Official Gazette, as evidence of a law</b> . . . . .	§ 1684
<b>Official Record; see PUBLIC DOCUMENT.</b>	
<b>Official Signature to document, not of attesting witness</b> . . . . .	§ 1292
<b>Official Statements; see PUBLIC DOCUMENT.</b>	
<b>Omission, to speak or claim, as a self-contradiction</b> . . . . .	§ 1042
as an admission . . . . .	§ 1072
of child by testator intentionally . . . . .	§ 2475
<b>Opening Statement, not evidenced afterwards</b> . . . . .	<i>note one</i> § 1808
<b>Opinion of value, as based on other sales</b> . . . . .	§ 463
stating the grounds of, by an expert . . . . .	§ 561
knowledge, as distinguished from . . . . .	658
as sufficient in point of memory . . . . .	726
hypothetical question; see <b>HYPOTHETICAL QUESTION</b> .	
as evidence of handwriting; see <b>HANDWRITING</b> .	
impeachment by inconsistent . . . . .	§ 1041
statements of political views . . . . .	§ 1732
by ordinary witness . . . . .	1917, 1924, 1926
distinction between fact and . . . . .	1919
admissible when preceded by facts . . . . .	§ 1922

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Opinion (*continued*)

as to value of services . . . . .	§ 1944
personal injuries . . . . .	§ 1944
breach of contract . . . . .	§ 1944
cost of living . . . . .	§ 1944
of business, etc. . . . .	§ 1944
as to care . . . . .	1950
moral character . . . . .	1950
professional skill . . . . .	1950
reasonableness . . . . .	1950
safety, etc. . . . .	1950
religious, privilege for . . . . .	2214
political, privilege for . . . . .	§ 2215
judicial; see JUDICIAL DECISION.	
see also EXPERT WITNESS; OPINION RULE.	

### Opinion Rule

(a) <i>in general</i>	
(b) <i>rule applied to specific topics</i>	
(c) <i>law</i>	
(d) <i>state of mind</i>	
(e) <i>sundry topics</i>	
(f) <i>character</i>	
(g) <i>handwriting</i>	
(a) <i>in general</i>	
distinguished from rule for expert qualifications . . . . .	557
history . . . . .	1917
competency of ordinary witness to give opinion . . . . .	1917, 1924
theory . . . . .	§ 1918-1922
distinction between fact and opinion . . . . .	1919
usurping functions of the jury . . . . .	§ 1920
practical tests . . . . .	1923-1927
form of rule negative or affirmative . . . . .	1928
hypothetical questions . . . . .	§ 672-684
(b) <i>rule applied to specific topics</i>	
insanity . . . . .	§ 1933-1938
value and damages . . . . .	§ 1940-1944
insurance risk . . . . .	§ 1946, 1947
care, safety, prudence, duty, skill, or propriety of human conduct or a place, machine, or apparatus . . . . .	§ 1949-1951
(c) <i>law</i>	
foreign law . . . . .	§ 1953
trade usage . . . . .	1954
technical words in documents . . . . .	§ 1955
location of deed-descriptions . . . . .	§ 1956
contents of a lost document . . . . .	§ 1957
testator's or grantor's capacity . . . . .	§ 1958
accused's capacity . . . . .	§ 1958
infant's capacity . . . . .	<i>note two</i> 1958
solvency . . . . .	1959
possession . . . . .	§ 1960
ownership . . . . .	§ 1960
necessity . . . . .	§ 1960
authority, etc. . . . .	§ 1960
miscellaneous applications of . . . . .	<i>note seven</i> § 1960
(d) <i>state of mind</i>	
intent, motive, purpose, in general . . . . .	§ 1963
another person's intention . . . . .	1964
one's own intention . . . . .	1965, § 1966
intent in dedication, voting, etc. . . . .	§ 1967

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Opinion Rule</b> ( <i>continued</i> ).	
meaning of a conversation, etc. . . . .	§ 1969
impression or understanding . . . . .	§ 1970, 1971
(e) <i>sundry topics</i>	
corporeal appearances . . . . .	§ 1974
medical and surgical matters . . . . .	§ 1975
probability and possibility . . . . .	§ 1976
capacity and tendency . . . . .	§ 1976
cause and effect . . . . .	§ 1976
distance . . . . .	§ 1977
time . . . . .	§ 1977
speed . . . . .	§ 1977
size . . . . .	§ 1977
weight . . . . .	§ 1977
direction . . . . .	§ 1977
form . . . . .	§ 1977
identity . . . . .	§ 1977
miscellaneous topics . . . . .	<i>note seven</i> § 1960, § 1978
rule enforced for dying declarations . . . . .	§ 1447
for books of regular entry . . . . .	1533
for declarations about boundaries . . . . .	1569
(f) <i>character</i>	
moral of a defendant . . . . .	1981, § 1983
of a witness . . . . .	§ 1982-1985
care, competence, or skill . . . . .	§ 1984
(g) <i>handwriting</i> ; see HANDWRITING.	
[Examine analysis on "Opinion Rule," Vol. I, pp. xli-xlii.]	
<b>Optum</b> , use of, as disqualifying a witness . . . . .	§ 500
as impeaching a witness . . . . .	§ 934, § 1005
<b>Opponent</b> , called as witness, whether he may be impeached . . . . .	§ 916
treated as if on cross-examination . . . . .	<i>note one</i> 1884
destruction of a document by . . . . .	§ 1198, 1199, § 1207
deposition of, when absent . . . . .	§ 1416
taking, but not using a witness' deposition . . . . .	§ 1389
see also ADMISSION; DEFENDANT; PARTIES.	
<b>Opportunity</b> in general, as evidence of a crime or other act . . . . .	§ 131-134
must be shown in advance that witness had, to observe . . . . .	34
exclusive, to do an act . . . . .	131
explaining away . . . . .	132
equal, for others . . . . .	132, § 133
<b>Oral admission of a party</b> ; see ADMISSIONS.	
distinction between "oral" and "verbal" . . . . .	<i>note one</i> 266, <i>note one</i> 2094
<b>Order of topics of testimony</b> ; see EXAMINATION, III.	
<b>Ordinance</b> , judicial notice of . . . . .	§ 2572
certified copy of . . . . .	§ 1680
printed copy of . . . . .	§ 1864
affecting negligence . . . . .	<i>note one</i> 461
<b>Original Document</b>	
(a) <i>in general</i>	
(b) <i>scope of the rule, as to writings</i>	
(c) <i>production required</i>	
(d) <i>excuses for not producing</i>	
(e) <i>what is the original</i>	
(f) <i>not applicable where contents are not in issue</i>	
(g) <i>exceptions to the rule</i>	
(h) <i>rules for proof of copy</i>	
(a) <i>in general</i>	
history of the rule requiring production . . . . .	§ 1177
general principle . . . . .	1179

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

## Original Document (continued).

Section

(b) <i>scope of the rule, as to writings</i>	
uninscribed chattels . . . . .	§ 1181
inscribed chattels . . . . .	§ 1182
all kinds of writings . . . . .	1183
books of account or regular entry . . . . .	§ 1532, § 1558
(c) <i>production required</i>	
what is production . . . . .	1185
for whose benefit . . . . .	1185
opponent's refusal to produce, as evidence of genuineness . . . . .	1298
original always usable . . . . .	§ 1186
proving execution also . . . . .	1187, 1188
order of proof between execution, loss, and contents . . . . .	1189
copy also offered . . . . .	§ 1190
in larceny of . . . . .	1205
(d) <i>excuses for not producing</i>	
loss or destruction . . . . .	§ 1193-1198
expert testimony to genuineness of lost document . . . . .	note four 1393
affidavit of party, to loss of . . . . .	§ 1196
sufficiency of search for . . . . .	§ 1194
proof of loss, by opponent's admission . . . . .	§ 1196
proof of loss established by record of judgment . . . . .	§ 1196
fraudulent suppression by opponent . . . . .	1197, § 1207, § 1209
larceny of . . . . .	1196, 1197, § 1200, § 1207
lost, supplied by affidavit . . . . .	1197
intentional destruction by proponent, presumed contents . . . . .	§ 291, § 1198
detention by opponent; notice to produce . . . . .	§ 1199-1210
control of, is possession . . . . .	§ 1200
out of jurisdiction may still be in possession . . . . .	§ 1200, § 1207
transfer of possession . . . . .	§ 1200
mode of proving possession . . . . .	§ 1201
possession of document sent by mail . . . . .	§ 1201, § 1203
notice in general . . . . .	1202
notice to third person . . . . .	note two § 1200, § 1208
both notice and possession must be shown . . . . .	§ 1203
rule of notice not applicable . . . . .	§ 1203
rule of notice satisfied . . . . .	1204
document in court, instant demand . . . . .	1204
notice by implication . . . . .	1205
"collateral" documents . . . . .	1205
notice unnecessary at subsequent trial . . . . .	1205
subject to privilege against self-crimination . . . . .	§ 1207
recorded deed provable by copy . . . . .	§ 1207
waiver of notice to produce . . . . .	§ 1207
notice to agent . . . . .	§ 1208
who should give notice . . . . .	§ 1208
time of giving notice . . . . .	§ 1208
attorney's possession as privileged . . . . .	§ 1201, § 2309
party notified, out of jurisdiction . . . . .	§ 1208
tenor and form of notice . . . . .	§ 1208
what is non-production . . . . .	§ 1209
consequences of non-production . . . . .	§ 1210
inference from non-production . . . . .	§ 1210
possession by third person . . . . .	§ 1211-1213
person not compellable to produce . . . . .	§ 1212
fraudulent retention by third person . . . . .	§ 1212
subpoena duces tecum . . . . .	§ 1212
possession by proponent's co-party . . . . .	§ 1212
foreign public document . . . . .	§ 1213

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Original Document</b> ( <i>continued</i> ).	
irremovable documents . . . . .	1214
judicial records (pleadings, wills, etc.) . . . . .	§ 1215-1217
part of record in trial at bar . . . . .	§ 1215
lost judicial record restored by decree . . . . .	<i>note three</i> 1215, § 1347, § 1660
exception for <i>nul tiel record</i> and perjury . . . . .	1216
other official documents . . . . .	§ 1218-1222
office working documents . . . . .	1218
made by private person and filed in public office . . . . .	1218
producing legislative journals . . . . .	§ 1219
election records . . . . .	<i>note three</i> § 1219, § 1223
corporation books . . . . .	<i>note three</i> § 1219, § 1223
marriage records, etc. . . . .	<i>note three</i> § 1219, § 1223
specific instances under statutes . . . . .	1220
books of banks, abstracts, etc. . . . .	§ 1223
of regular entry . . . . .	§ 1532, § 1558
recorded conveyances . . . . .	§ 1224-1227
appointments to office . . . . .	1228
illegible documents . . . . .	1229
voluminous records, accounts, etc. . . . .	§ 1230
absence of entries . . . . .	§ 1320
(e) <i>what is the original</i>	
may mean a copy . . . . .	1231
duplicates and counterparts . . . . .	§ 1232-1234
printed matter . . . . .	§ 1234, § 1237
copy acted on as original . . . . .	§ 1235
account stated . . . . .	§ 1235
telegraphic dispatches . . . . .	§ 1236
wills, etc. . . . .	1238
land-grants . . . . .	§ 1239
mining rights, etc. . . . .	§ 1239
tax-lists . . . . .	§ 1240
ballots, etc. . . . .	§ 1240
records . . . . .	1241
accounts, etc. . . . .	1241
memorandum to aid recollection . . . . .	§ 749, § 760
handwriting shown by photograph . . . . .	§ 797
ledger and day book . . . . .	§ 1558
(f) <i>not applicable where contents are not in issue</i>	
document read aloud, etc. . . . .	§ 1243
knowledge or belief about . . . . .	§ 1243
identity or effect of a document . . . . .	§ 1244
payment, receipts . . . . .	1245
ownership . . . . .	§ 1246, 1247
tenancy . . . . .	§ 1246, 1247
sale . . . . .	§ 1246, 1247
gift . . . . .	§ 1246, 1247
execution . . . . .	1248
delivery . . . . .	1248
publication . . . . .	1248
conversion . . . . .	§ 1249
forgery . . . . .	§ 1249
larceny . . . . .	§ 1249
agency, etc. . . . .	§ 1249
miscellaneous instances . . . . .	§ 1250
dying declarations . . . . .	1449
pedigree statements . . . . .	1497
(g) <i>exceptions to the rule</i>	
stolen document . . . . .	§ 1249

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Original Document (*continued*).

collateral facts . . . . .	§ 1252-1254
opponent's admission of contents . . . . .	§ 1082, § 1255, § 1256
deed-recitals, disclaimer of title . . . . .	§ 1257
New York rule on deed-recitals . . . . .	§ 1257
proving partnership irrespective of articles . . . . .	§ 1257
witness' admission on <i>voir dire</i> . . . . .	1258
witness' admission on cross-examination . . . . .	§ 1259
self-contradictory document . . . . .	§ 1259
prior statements in depositions . . . . .	§ 1262
record of conviction . . . . .	§ 1270
foreign statute . . . . .	§ 1271
secondary evidence of contents . . . . .	§ 1264 <i>et seq.</i>
(h) <i>rules for proof of copy</i> . . . . .	
copy preferred to recollection . . . . .	§ 1268
preferable kinds of recollection . . . . .	§ 1272
preference for examined or sworn copy . . . . .	§ 1273, 1337
copy of a copy . . . . .	1274
personal knowledge of correctness . . . . .	1278
loss proved by affidavit . . . . .	1709
whole must be copied . . . . .	§ 2105
proof of lost will . . . . .	§ 2052
of lost ancient deed . . . . .	§ 2143
see also COPY; CERTIFIED COPY.	
[Examine analysis on "Production of Documentary Originals," Vol. II, pp. 1383, 1384.]	

### Other Offences; see SIMILAR ACTS.

Overruling an objection . . . . . § 18

### Overt Act; see HOMICIDE; TREASON.

Owner of an animal, mode of evidencing knowledge . . . . .	§ 251
of a dangerous place or machine, mode of evidencing knowledge . . . . .	§ 252
admissions by; see ADMISSIONS.	
complaint by, after robbery or larceny . . . . .	1142
declarations of, about boundaries; see BOUNDARIES.	
testimony in larceny required . . . . .	§ 2089

### Ownership by adverse possession; see POSSESSION.

tag on automobile as <i>prima facie</i> evidence of . . . . .	<i>note four</i> 150
unrecorded brands to evidence . . . . .	<i>note two</i> 150
conduct of animals as evidence of . . . . .	§ 177, § 1154
taking of policy, as evidence of . . . . .	<i>note four</i> 282
as evidenced by prior ownership . . . . .	§ 382
admissions of; see ADMISSIONS.	
production of deed, in proof of fact of . . . . .	§ 1246
reputation to show, of premises or vehicles, by railroad . . . . .	<i>note eight</i> 1587
evidenced by assessor's books . . . . .	§ 1640
opinion testimony to . . . . .	§ 1960
presumption of, from possession . . . . .	§ 2515
continuity of . . . . .	§ 2530
possessor's declarations to confirm . . . . .	§ 1779
in common, presumption of . . . . .	§ 2526
see also TITLE.	

Oyer and Profert, when excused . . . . .	1192
as a means of inspection before trial . . . . .	§ 1858, § 1859

## P

Pain, expressions of . . . . .	1718
explaining away evidence of qualities of dental invention to allay . . . . .	35
failure to complain of . . . . .	<i>note two</i> § 1722
see also MENTAL CONDITION, DECLARATIONS OF.	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

**Paper to aid recollection; see RECOLLECTION.**

see also DOCUMENT; NEWSPAPER.

**Paper Money**, expert qualifications of witness to . . . . . § 570, 705

**Paramour**, as furnishing a motive; see MOTIVE.

as qualified to testify . . . . . § 605, § 2230

**Pardon**, promise of, as excluding a confession . . . . . 834

as restoring a witness' credit . . . . . § 1116, *note four* 2280

a witness' competency . . . . . § 523

as removing privilege against self-accrimination . . . . . 2280

**Parent**, admissions of, as evidence of advancement to child . . . . . 1777

**Parentage; see LEGITIMACY; PATERNITY; FAMILY HISTORY.**

**Parish Register; see REGISTER OF MARRIAGE, BIRTH, AND DEATH.**

**Parol Evidence Rule**

*Introduction*

A. *Creation of Legal Acts*

1. *Subject, tenor, delivery, in general*

2. *Intent and mistake*

3. *Voidable acts*

B. *Integration of Legal Acts (varying the terms of an instrument)*

1. *Unilateral acts*

2. *Bilateral acts*

3. *Writing required by Law*

C. *Solemnization of Legal Acts*

D. *Interpretation of Legal Acts*

1. *Standard of interpretation*

2. *Sources of interpretation*

*Introduction*

not a rule of evidence . . . . . 2400

*lex fori* not applicable to . . . . . § 5

rules defining the constitution of legal acts . . . . . 2401

A. *Creation of Legal Acts*

general principle; intent and expression; subject, tenor, and delivery . . . . . 2404

history of the principle . . . . . 2405

1. *Subject, tenor, delivery, in general*

transactions of jest, friendship, charity, and pretence . . . . . § 2406

explaining signature of attesting witness . . . . . § 2406

terms must be definite; document void for uncertainty . . . . . 2407

act must be final; delivery, as applied to deeds; conditions precedent;

escrows . . . . . § 2408

delivery as applied to negotiable instruments . . . . . § 2409

delivery, as applied to contracts in general; conditions precedent and

subsequent; assent of third persons; blanks; dates . . . . . § 2410

publication as applied to wills . . . . . 2411

2. *Intent and mistake*

intention and mistake in general; test of reasonable consequences . . . . . 2413

intent not to be bound at all . . . . . 2414

terms of an act; (a) signing a completed document; individual mistake,

not known to or induced by the second party . . . . . § 2415

individual mistake known to or induced by the second party . . . . . § 2416

mutual mistake; general principle . . . . . 2417

mutual mistake as affecting *bona fide* holders for value . . . . . § 2418

(b) signing a document having blanks or capable of alteration; writing

one's name not as a signature . . . . . 2419

delivery of a document; escrow; deeds or negotiable instruments de-

livered to *bona fide* holders, contrary to intent of maker . . . . . § 2420

unilateral acts; foregoing principles applied to wills and ballots . . . . . § 2421

3. *Voidable acts*

motive as making an act voidable; mistake, fraud, duress, infancy, and

insanity . . . . . § 2423

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

### Parol Evidence Rule (*continued*).

	Section
<b>B. <i>Integration of Legal Acts (varying the terms of an instrument)</i></b>	
general theory of the rule against varying the terms of an instrument	§ 2425
history of the rule . . . . .	2426
1. <i>Unilateral Acts</i>	
official documents (surveys, appointments, assessments, etc.) . . . . .	2427
2. <i>Bilateral Acts</i>	
no integration at all; casual memoranda . . . . .	§ 2429
partial integration; general test for applying the rules; "collateral agreements" . . . . .	2430
incorrect tests; fraud, in Pennsylvania . . . . .	2431
receipts and releases; bill of lading . . . . .	§ 2432
recital of consideration in a deed . . . . .	§ 2433
warranty in a sale; insurance warranties . . . . .	§ 2434
agreements not to sue, or not to enforce, or to hold conditional only . . . . .	2435
agreements of counterclaim, set-off, renewal, or mode of payment . . . . .	2435
agreement to hold a deed absolute as conditional only; agreement to hold in trust . . . . .	§ 2437
agreement to hold as agent or surety only . . . . .	§ 2438
fraud . . . . .	§ 2439
trade usage and custom . . . . .	§ 2440
novation, alteration, and waiver; subsequent agreements . . . . .	§ 2441
miscellaneous applications of the rule to admit or exclude "collateral agreements" . . . . .	§ 2442
rule applied to negotiable instruments; general principle . . . . .	2443
agreements affecting the express terms of the document . . . . .	§ 2444
agreements affecting the implied terms . . . . .	§ 2445
rule binding upon the parties to the document only . . . . .	§ 2446
burden of proof; who must produce the document. . . . .	2447
3. <i>Writing required by Law</i>	
at common law	
judicial records . . . . .	§ 2450
corporate acts and records; negotiable instruments . . . . .	§ 2451
under statutes	
wills; ballots; insurance policies . . . . .	§ 2452
conclusive certificates, distinguished . . . . .	§ 2453
<b>C. <i>Solemnization of Legal Acts</i></b>	
writing as a formality; statute of frauds . . . . .	§ 2454
discharge and alteration of specialties, etc. . . . .	§ 2455
other formalities than writing; signature, seal, attestation, registration, stamp . . . . .	2456
<b>D. <i>Interpretation of Legal Acts</i></b>	
general nature of interpretation; standard and sources of interpretation	2458
"Intention" and "Meaning" distinguished . . . . .	2459
1. <i>Standard of Interpretation</i>	
general principle: four standards, — popular, local, mutual, individual	§ 2461
rule against "disturbing a plain meaning," or, forbidding explanation except of ambiguities; history and general principle . . . . .	§ 2462
application of the rule to wills, deeds, etc. . . . .	§ 1956, § 2463
usage of trade or locality, when to apply . . . . .	§ 2464
parties' mutual understanding; identifying a description . . . . .	§ 2465
individual party's meaning; deeds and contracts . . . . .	§ 2466
wills . . . . .	§ 2467
2. <i>Sources of Interpretation</i>	
general principle; all extrinsic circumstances may be considered . . . . .	2470
exception for declarations of intention . . . . .	§ 2471
for equivocation or latent ambiguity . . . . .	§ 2472
blanks and patent ambiguities . . . . .	§ 2473
for erroneous description . . . . .	§ 2474

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Parol Evidence Rule (*continued*).

for rebutting an equity (legacies and advancements) . . . . .	§ 2475
<i>falsa demonstratio non nocet</i> ; general principle . . . . .	2476
application to deeds and wills . . . . .	§ 2477
not applicable to books of account . . . . .	1558
sundry rules; interpretation of statutes . . . . .	§ 2478
[Examine analysis of "Parol Evidence Rule," Vol. IV, pp. 3367, 3368.]	

Particular Acts, to evidence character, in general . . . . .	§ 192-201
to evidence character for negligence . . . . .	§ 199, § 208
bad character of defendant . . . . .	193, § 194
good character of defendant . . . . .	195
of misconduct of defendant to impeach credit or increase sentence . . . . .	§ 196
to evidence character in homicide . . . . .	§ 198
to show negligence in civil cases . . . . .	§ 199
of unchastity, to attack character of woman as witness . . . . .	§ 200
to show character of complainant in rape . . . . .	§ 200
of animal to show disposition . . . . .	§ 201
to evidence character of common offenders . . . . .	§ 203
of prostitutes to show occupation . . . . .	204
of prostitution to show character of house . . . . .	204
to show unchastity, in action for breach of promise . . . . .	206
to show incompetency of employee or physician . . . . .	§ 208
admissible to prove character, but not reputation . . . . .	§ 209
inadmissible to mitigate damages in defamation . . . . .	§ 209
to show father's or daughter's character, in action for seduction . . . . .	210
shown to mitigate damages, in seduction . . . . .	210
to show system in crime . . . . .	215
to impeach witness . . . . .	979
to impeach expert . . . . .	99, § 1005, § 1022

see also SIMILAR ACTS; ACT; PARTICULAR INSTANCES.

**Particular Instances**, of conduct as evidencing human character, etc.; see  
CHARACTER; STRENGTH; HEALTH; NEGLIGENCE; PARTICULAR ACTS;  
SIMILAR ACTS; ACT.

of injury, work, speed, etc., as evidencing cause or condition of a thing § 447-461

### Parties

character of	
to prove an act	
in criminal cases . . . . .	§ 55-61
in civil cases . . . . .	§ 64-67
in issue . . . . .	§ 70-80
to mitigate damages . . . . .	§ 70-76
conduct of, to evidence character . . . . .	§ 192-213
to evidence consciousness of weak case . . . . .	§ 277-291
failure to testify or produce evidence . . . . .	§ 285-289
common law disqualification as witnesses . . . . .	577
testifying to their own intent . . . . .	§ 581
admissions by; see ADMISSIONS.	
books of account of; see BOOKS OF ACCOUNT.	
agent or kinsman of, not to take deposition . . . . .	§ 803
impeachment of their own witness; see IMPEACHMENT.	
whether impeachable, when testifying for themselves . . . . .	890
when called by the opponent . . . . .	§ 916
opponent as witness, treated as if on cross-examination . . . . .	note one 1884
exhibiting injuries to jury . . . . .	§ 1158
affidavit of, to lost document . . . . .	§ 1196, § 1225, 1709
former testimony of same . . . . .	§ 1388
books of account kept by; see REGULAR ENTRIES.	
exclusion from court during testimony . . . . .	§ 1841
disclosure of documents or testimony before trial; see DISCOVERY.	

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

## Parties (*continued*).

	Section
testifying first on their own side . . . . .	§ 1869
answer to interrogatories, as evidence . . . . .	§ 2124
claiming privilege for witness . . . . .	2196, § 2270
privileged not to testify . . . . .	2217
discovery; statutes . . . . .	§ 2218
production of documents . . . . .	§ 2219
premises, chattels, bodily exposure . . . . .	§ 2220, 2221
parol evidence rule, restricted to . . . . .	§ 2446
understanding of, to affect a document; see PAROL EVIDENCE RULE.	
burden of proof upon; see BURDEN OF PROOF.	
Partner, admissions of . . . . .	§ 1077
Partnership, knowledge of, as evidenced by repute . . . . .	§ 255
books of, as evidence . . . . .	§ 1074
admissions made after dissolution . . . . .	<i>note seven</i> 1078
evidence of subsequent, by prior . . . . .	<i>note ten</i> 382
proof of, without producing instrument . . . . .	§ 1249, § 1257
provable by reputation . . . . .	§ 1624
books of, presumed correct . . . . .	<i>note two</i> 2537
Passengers, behavior of, as evidence of danger . . . . .	§ 461
Past Fact as " narrative " . . . . .	1756
Pastor; see CLERGYMAN.	
Patent Ambiguity in a document . . . . .	§ 2472
Patent of Invention, producing original of assignment . . . . .	§ 1226
execution of assignment of, proved by record . . . . .	§ 1657
inspection of machine before trial . . . . .	§ 1161, § 1862
infringement of, privilege for trade secret . . . . .	§ 2212, § 2374
Patent of Land; see DEED; LAND-OFFICE.	
Paternity, other intercourse as evidence of . . . . .	§ 133, 134
improper familiarities with others to disprove . . . . .	§ 133
procuring of abortion as evidence of . . . . .	§ 282
child's resemblance, as evidence of . . . . .	§ 166, § 1154, § 1168
see also BASTARDY; NON-ACCESS.	
Patient, physician's testimony to illness of . . . . .	§ 688
expressions of pain by . . . . .	1718
privilege for communications to physician . . . . .	§ 2380
Pavement, test when showing other injuries on, to evidence a particular injury	33
Payee, parol agreement of, collateral to instrument . . . . .	2443
see also BILL OF EXCHANGE; NOTE.	
Payment, possession of money, as evidence of . . . . .	§ 89, 224
possession of instrument, as evidence of . . . . .	156
offer of, as an admission . . . . .	§ 1061
production of receipt for . . . . .	1245, § 1254
indorsements of, as statements against interest . . . . .	§ 1461, § 1466
books of account as evidence of . . . . .	§ 1539, § 1549
words accompanying, as <i>res gesta</i> . . . . .	§ 1777
agreement as to mode of, shown by parol . . . . .	2436, § 2444
presumption of . . . . .	§ 2517, § 2518
from indorsement on note . . . . .	<i>note one</i> 2134
lapse of time as presumption of . . . . .	159, § 2517
see also CONTRACT; MONEY.	
Pecuniary Condition as evidence of ability to make loan . . . . .	224
as evidence of motive . . . . .	§ 392
Pedigree, hearsay statements of; see FAMILY HISTORY.	
statement in deposition to evidence . . . . .	1495
of an animal, proved by reputation . . . . .	§ 1621
by registry . . . . .	§ 1706
inquisition of, by the heralds . . . . .	§ 1670
see also ANIMAL.	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
Peer, whether required to be sworn . . . . .	§ 1825
Penalty, privilege not to disclose . . . . .	§ 2257
Penitent, privilege for communications to priest . . . . .	§ 2394
Perambulations as evidence of boundary . . . . .	1563
Performance of official duty, presumed . . . . .	§ 2534
of contract, burden of proof of . . . . .	§ 2537
Perjury, other falsities, as evidencing intent in . . . . .	342
in proving alibi . . . . .	§ 279
confession of, as disqualifying a witness . . . . .	§ 527
as impeaching a witness . . . . .	§ 959
attempt at subornation of . . . . .	960, 962
producing original of chancery answer in . . . . .	1216
in inadmissible deposition . . . . .	note twelve 1349
penalty for, as a requirement . . . . .	1831
in deposition . . . . .	§ 1832
in answer erroneously compelled and falsely given . . . . .	note six 2270
two-witness rule . . . . .	2040
committed in disclosure for amnesty . . . . .	§ 2281
does not apply to act of swearing or words . . . . .	§ 2042
does not apply to every detail of fact . . . . .	§ 2042
rule in civil cases . . . . .	§ 2042
subornation of, one witness rule not applied . . . . .	§ 2042
testimony before grand jury, not privileged . . . . .	2363
who is an accomplice in subornation of . . . . .	note one 2060
see also FALSEHOOD.	
Perpetuam memoriam; see DEPOSITION.	
Person; see NAME.	
Person in Authority; see CONFESSION OF CRIME.	
Personal Injury; see CORPORAL INJURY.	
Pharmacist, privileged communications to . . . . .	§ 2382
required by statute to file reports of sales of liquor . . . . .	note twelve a 2264
Phonograph used to reproduce nuisance created by noise . . . . .	795
Photograph of a person, as used to identify him . . . . .	§ 660, 790
used by a witness to illustrate testimony . . . . .	§ 790-797, 2019
witness using, need not be maker of . . . . .	§ 794
verification of . . . . .	793
objection to use of . . . . .	§ 792
X-ray . . . . .	§ 795
enlarged . . . . .	§ 797
of handwriting . . . . .	§ 797, 2010, 2019
process judicially noticed . . . . .	2566
Physical traits to show race or nationality . . . . .	§ 167
inconvenience of production of evidence . . . . .	§ 1161
traits, to evidence strength; see POWER.	
Physician, character of, as defendant in malpractice . . . . .	67
conduct, as evidencing negligence or incompetence of . . . . .	§ 199, § 200, § 208
unfair surprise in showing acts of incompetence by . . . . .	§ 208
mode of treatment by another, as a standard of care . . . . .	§ 461
qualified to be an expert witness . . . . .	§ 569, § 687
license to practice, as qualifying an expert . . . . .	§ 569
testimony of, to possible developments in corporal injury . . . . .	663
acquaintance with person insane or diseased . . . . .	§ 689
hypothetical question to; see HYPOTHETICAL QUESTION.	
witness to value of services of . . . . .	§ 715
patient's expressions of pain to . . . . .	1718
character for skill . . . . .	§ 1984
amount of fee demandable as expert . . . . .	§ 2203
privileged not to attend court . . . . .	2206
inspection of injured person by . . . . .	§ 2220

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Physician, privilege for patient's communications to</b> . . . . .	§ 2380
privilege of, as attesting witness . . . . .	§ 2390
see also MALPRACTICE; OPINION RULE; POISON; PHYSICIAN AND PATIENT.	
<b>Physician and Patient, privileged communications</b> . . . . .	§ 2380
burden of proof of confidence . . . . .	§ 2381
third person hearing . . . . .	§ 2381
must be in professional character . . . . .	§ 2382
not privileged on hypothetical question involving privileged facts . . . . .	<i>note five</i> § 2382
consultation of physicians . . . . .	§ 2382
patient's belief of matters necessary to treatment . . . . .	§ 2383
communication may be by exhibition . . . . .	§ 2384
insanity observed . . . . .	§ 2384
privilege limited to <i>tenor</i> of communication . . . . .	§ 2384
no application to partaker in crime . . . . .	§ 2385
request to commit crime . . . . .	<i>note two</i> § 2385
privilege is patient's . . . . .	§ 2386
patient need not be party to cause to claim privilege . . . . .	<i>note one</i> § 2386
inference from claim . . . . .	§ 2386
claimed by representative of deceased . . . . .	§ 2386
"shall not be compelled" means "shall not be allowed" . . . . .	<i>note one</i> § 2386
death does not terminate privilege . . . . .	§ 2387
may be waived . . . . .	§ 2388
waiver in insurance policy . . . . .	<i>note six</i> § 2388
by conduct . . . . .	§ 2389
by bringing suit for malpractice . . . . .	§ 2389
by testifying . . . . .	§ 2389
at former trial . . . . .	§ 2389
by asking physician to attest will . . . . .	§ 2390
by calling physician as witness . . . . .	§ 2390
by certificate in "proofs of death" . . . . .	§ 2390
by personal representative . . . . .	§ 2391
see also PHYSICIAN.	
[Examine analysis of "Communications between Physician and Patient," Vol. IV, p. 2347.]	
<b>Picture, of a person or place, to illustrate testimony</b> . . . . .	790
see also PHOTOGRAPH; X-RAY.	
<b>Pier</b> ; see PREMISES.	
<b>Pilot, as a necessary witness and therefore cross-examinable</b> . . . . .	917
<b>Piracy</b> ; see ROBBERY; COPYRIGHT.	
<b>Pistol</b> ; see WEAPON.	
<b>Place, condition in one, evidencing that in another</b> . . . . .	§ 437, § 438
value at another, as evidence of value . . . . .	§ 463
character of a witness at another . . . . .	929, § 1615
of birth, death, etc., as evidenced by family hearsay . . . . .	1501
judicially noticed . . . . .	§ 2575, § 2581
see also PREMISES.	
<b>Plaintiff, character of, as evidence</b> . . . . .	§ 64-67
character of, as in issue or as mitigating damages . . . . .	§ 70-80
mode of evidencing character by conduct . . . . .	§ 192-213
see also PARTIES.	
<b>Plan, used to illustrate testimony</b> . . . . .	790
see also DESIGN; SURVEY.	
<b>Plat, used to illustrate a witness' testimony</b> . . . . .	790
see also SURVEY.	
<b>Platform</b> ; see PREMISES.	
<b>Plea of truth as evidence of malice; see DEFAMATION.</b>	
of <i>nolo contendere</i> as admission . . . . .	<i>note four</i> 1066
of "guilty," as admission in civil case . . . . .	§ 815

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Pleading</b> , distinguished from evidence . . . . .	2
from judicial admission . . . . .	2589
as a party's admission . . . . .	§ 1064
original in court records not produced . . . . .	§ 1215
statement in, to evidence pedigree . . . . .	1495
see also JUDICIAL RECORD.	
<b>Pledge</b> ; see MORTGAGE.	
<b>Poison</b> , evidence to show knowledge of . . . . .	§ 87
possession of, as indicating criminal design . . . . .	§ 238
similar acts to show intent in administration of . . . . .	<i>note six</i> 111, § 363
nature of, as shown by samples . . . . .	439
symptoms, as indicating nature of . . . . .	§ 457
witness' experience as qualifying him . . . . .	§ 568
statements while eating poisoned lunch . . . . .	<i>note three</i> § 1750
see also HOMICIDE.	
<b>Poles</b> , telegraph or telephone; see NEGLIGENCE; HIGHWAY.	
<b>Police-officer</b> obtaining a confession; see CONFESSION.	
<b>Policy</b> of insurance; see INSURANCE.	
<b>Poll-book</b> ; see ELECTION.	
<b>Population</b> , as evidenced by census . . . . .	§ 1671
judicially noticed . . . . .	§ 2577
<b>Possession</b> of tools, as evidence of a crime . . . . .	88, § 238
of chattels to evidence crime . . . . .	152, § 238, § 153
of money, as evidence of loan or payment . . . . .	§ 89, 224
as evidence of larceny . . . . .	§ 154, § 2513
as evidence of motive for crime, etc. . . . .	§ 392
of a document, as evidence of knowledge . . . . .	§ 260
as an admission . . . . .	§ 1073
by opponent, as excusing non-production . . . . .	1199
of receipts, etc., as evidence of payment . . . . .	156
of deed, to evidence delivery and execution of it . . . . .	§ 157
of land, continued after mortgage or sale as showing intent to defraud creditors . . . . .	160
under ancient document as evidencing genuineness . . . . .	§ 2141
as creating inference of deed . . . . .	§ 157
as evidenced by a lease or deed . . . . .	§ 157
by payment of taxes . . . . .	<i>note two</i> 157
by ancient document . . . . .	§ 157
of forged documents, as evidence of intent . . . . .	309
of stolen goods, as evidence of larceny, etc. . . . .	152, § 153
other possession, as evidence of intent . . . . .	324
accused's explanations . . . . .	1143
presumption from . . . . .	§ 2513
possessor's declarations of facts against interest . . . . .	§ 1458
assessment-books as evidence of . . . . .	§ 1640
statements about boundary, by a possessor; see BOUNDARIES.	
reputation about . . . . .	§ 1587
opinion testimony to . . . . .	§ 1960
by grantor, raising presumption of fraud in sale . . . . .	§ 2504
presumption of ownership from . . . . .	§ 2515
of payment from, of receipt . . . . .	§ 2518
of continuance of . . . . .	§ 382, § 2530
of original document; see ORIGINAL DOCUMENT.	
<b>Adverse Possession</b>	
ancient documents, as evidence of . . . . .	§ 157
knowledge of claim, as evidenced by repute . . . . .	§ 254, § 255
possession of part, as evidencing possession of whole . . . . .	378
under deed as evidence of boundaries . . . . .	378
oral admissions of title . . . . .	§ 1257
statements made during, as <i>res gesta</i> . . . . .	§ 1778

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

## Possession (*continued*).

	as affecting presumptions of ownership	§ 1779
	see also DOCUMENT; DEED.	
Possibility of doing or happening, as evidenced by instances		§ 446-461
Posting in the mail; see MAIL; POSTMARK.		
on a wall or fence, original not required		1214
Postmark, as evidence		151
presuming genuineness of		§ 2152
as an official statement		§ 1674
Poverty, as evidence of non-payment		§ 89
as negating probability of loan		§ 89, 224
as evidence of motive for a crime or transaction		32, § 392
evidenced by assessor's books		§ 1640
Power, physical, as evidence of an act		§ 85
instances of physical, as evidence		§ 220
Power of Attorney; see AGENCY.		
Power of Legislature, to make rules of evidence		§ 7
Preamble of statute; see RECITAL.		
Precautions to remedy or prevent injury		§ 282, § 461
Preferential Rules defined		1172
Pregnancy, events in, as evidenced by birthmark		§ 168
admissible to show intercourse in rape, seduction, etc.		168
see also BASTARDY.		
Prejudice, undue,		
by showing particular criminal acts		§ 194
acts of negligence in civil cases		§ 199
of unchastity		§ 200
of employee or physician in negligence		§ 208
not applicable to conduct to show character in issue		202
as affecting order of evidence		1863
in circumstantial evidence		1904
Premises, owner's knowledge of defect, evidenced by prior condition or injury		§ 252
leased for gaming, proved by repute		254
repairs, as evidence of negligence		32, § 283
condition at another time or place, as evidence		437, § 438
instances of condition or quality, as evidence		§ 451
marks on, as evidence of identity		416
similar injuries, as evidence of defect		§ 458
similar precautions, as evidence of safety		461
photograph of, to illustrate testimony		790
inspection of, compellable at trial		1162, § 2194, 2221
before trial		1162, § 1862
presumption of defect, from accident		§ 2509
Preparation, as evidence of crime		§ 238
Preponderance of evidence		§ 2498
Prescription of title, by possession; see POSSESSION.		
of physician, as privileged		§ 2383
Presence as evidence of design to commit crime		§ 238
shown in burglary to be for another purpose		§ 391
President, privilege of		2368-2372
personal liability of one who signs as		§ 2444
Press Copies, as originals		§ 1234
Presumption of good character		§ 290
of continuity, founded on inference		457
of innocence		§ 1732, § 2511
not evidence in favor of accused		note three § 2511
legal effect of		2490
distinction between, and inference		note one 2490
of law and fact		§ 2491

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### **Presumption** (*continued*).

conclusive . . . . .	2492
conflicting, counter . . . . .	2493
of felonious intent from taking of goods . . . . .	<i>note four</i> § 2511
possession of stolen goods as a . . . . .	§ 2513
of title, from possession or payment . . . . .	§ 2516-2518
of consideration . . . . .	§ 2520
of legitimacy in bastardy . . . . .	§ 2527
of life, or death . . . . .	§ 2531
see also BURDEN OF PROOF.	
conclusive; see CONCLUSIVENESS.	

[Examine analysis of "Burdens and Presumptions," Vol. IV, pp. 3520, 2548.]

<b>Presumptive evidence</b> , as meaning circumstantial evidence . . . . .	25
--	----

**Pretences**, false; see REPRESENTATIONS.

**Price**; see SALES; VALUE.

<b>Price-current</b> , as qualifying a witness to value . . . . .	§ 719
as admissible in evidence . . . . .	§ 1704

<b>Priest</b> , confession to . . . . .	840
privilege for communications to . . . . .	§ 2394
see also MARRIAGE.	

<b>Priest and Penitent</b> , privileged communications created by statute . . . . .	§ 2395
---	--------

<b>Prima Facie Evidence</b> , statutes making . . . . .	§ 7, § 1354
sufficient to go to jury . . . . .	§ 2494

**Primary Evidence**; see BEST EVIDENCE; ORIGINAL DOCUMENT; COPY.

<b>Principal</b> , admissions of, against surety . . . . .	§ 1077
agent's admissions against . . . . .	§ 1078
undisclosed, shown by parol . . . . .	§ 2438
joint, is accomplice . . . . .	<i>note one</i> § 2060
see also AGENT.	

### **Printed copy of public document**

sundry documents . . . . .	§ 1684
reports of decisions . . . . .	§ 1684, 1703
statutes . . . . .	§ 1684
see also COPY.	

<b>Printed Matter</b> , as a duplicate original . . . . .	§ 1234, § 1237
sample copies as evidence . . . . .	440
proving genuineness of	

newspapers . . . . .	2150
official statutes and reports . . . . .	2151

see also BOOK; MAIL; NEWSPAPER.

<b>Printer</b> , official, authentication of copies of . . . . .	§ 1684
--	--------

**Prior and Subsequent**; see TIME; CONDITION.

<b>Prison</b> , escape from, as evidence of guilt . . . . .	§ 276
---	-------

<b>Private statute</b> , judicial notice of . . . . .	§ 2572
---	--------

**Privies in interest**, admissions of; see ADMISSIONS.

### **Privilege**

I. *From Attending*

II. *From Testifying*

(a) *in general*

(b) *privileged topics*

(c) *privileged communications*

III. *Sundry Rules*

I. *From Attending*

no privilege in general . . . . .	§ 2192
illness . . . . .	2205
sex and occupation . . . . .	2206
officers of government . . . . .	2206, 2371
distance from place of trial . . . . .	§ 2207

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Privilege (<i>continued</i>).</b>	
subpoena . . . . .	§ 2199
expenses . . . . .	§ 2200
<b>II. <i>From Testifying</i></b>	
(a) <i>in general</i>	
no privilege in general . . . . .	§ 2192-2194
of ambassador . . . . .	2372
officers having compulsory power . . . . .	§ 2195
privilege personal to witness . . . . .	2196
party may not object . . . . .	2196
party excepting to improper ruling on privilege . . . . .	2196
(b) <i>privileged topics</i>	
irrelevant matters . . . . .	§ 2210
documents of title, etc. . . . .	2211
witness required to describe deed for identification . . . . .	<i>note three</i> 2211
trade secrets . . . . .	§ 2212
customers' names . . . . .	§ 2212
official secrets . . . . .	§ 2375
theological opinions . . . . .	2214
political votes . . . . .	§ 2215
waiver of voter's privilege . . . . .	§ 2215
disgracing facts . . . . .	§ 984-987, 2216, 2255
bodily exposure . . . . .	2216
partly interested . . . . .	2217
opponent compellable . . . . .	§ 2218
production of documents . . . . .	§ 2219
bodily exposure . . . . .	§ 2220
premises and chattels . . . . .	2221
witness interested . . . . .	2222
civil liability in general . . . . .	§ 2223
for incriminating matters in report made by requirement of law . . . . .	2264
husband and wife; see MARITAL RELATIONSHIP.	
self-crimination; see SELF-CRIMINATION.	
(c) <i>privileged communications</i>	
in general . . . . .	2285
mere pledges of privacy and oaths of secrecy . . . . .	§ 2286
clerks . . . . .	§ 2286
commercial agency . . . . .	§ 2286
bankers . . . . .	§ 2286
trustees . . . . .	§ 2286
newspapers, etc. . . . .	§ 2286
telegrams . . . . .	2287
of agent . . . . .	2301, § 2317
attorney and client; see ATTORNEY AND CLIENT.	
husband and wife; see MARITAL RELATIONSHIP.	
physician and patient; see PHYSICIAN AND PATIENT.	
petit jurors	
communications . . . . .	§ 2346
impeaching a verdict . . . . .	§ 2348-2356
arbitrators . . . . .	§ 2358
grand jurors	
vote and opinion . . . . .	2361
witness' testimony . . . . .	2362
grounds for indictment . . . . .	§ 2364
number of votes . . . . .	§ 2364
official communications . . . . .	§ 2368-2376
government and informer . . . . .	§ 2374
physician and patient . . . . .	§ 2380-2391
priest and penitent . . . . .	§ 2394-2396

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italica*) refer to supplement; § 1678 refer to both.]

	Section
<b>Privilege</b> ( <i>continued</i> ).	
offer of compromise . . . . .	§ 1061
<b>III. Sundry Rules</b>	
as permitting proof by copy, for privileged document . . . . .	§ 1212
as excusing production of attesting witness . . . . .	1317
as allowing use of deposition . . . . .	1407
claim of, on cross-examination, as excluding the direct testimony . . . . .	§ 1391
books of account, from production . . . . .	§ 2193, 2205, § 2286
[Examine analysis of " Rules of Optional Exclusion," Vol. I, pp. xlv-xlvii.]	
<b>Probable Cause</b> for prosecution or arrest, evidence of belief of . . . . .	§ 258
in malicious prosecution, burden of proof of . . . . .	2539
judge or jury to determine . . . . .	2554
<b>Probate</b> ; see WILL; JUDICIAL RECORD; CERTIFIED COPY; ATTESTING WITNESS.	
<b>Proceedings</b> , presumption of regularity of . . . . .	§ 2534
<b>Process</b> , special form to secure corporation books . . . . .	§ 200
statute may create new forms of . . . . .	note three 2193
see also COMPULSORY PROCESS; JUDICIAL RECORDS; CONSTITUTIONAL RULES.	
<b>Proclamations</b> , Executive, to evidence certain propositions . . . . .	§ 1662
<b>Production</b> of evidence in general, failure to make, as showing a weak case	277, § 285-291
<i>of document or chattel</i>	
which party is bound to produce . . . . .	2447
by opponent at trial . . . . .	§ 2219
by witness . . . . .	§ 2193
subpoena <i>duces tecum</i> . . . . .	§ 2200
privilege against self-elimination . . . . .	§ 2246
of attorney and client . . . . .	§ 2307, 2318
of government officials . . . . .	§ 2373
before trial, on discovery . . . . .	§ 1858, § 1859
proof by copy; see ORIGINAL DOCUMENT.	
<b>Profert</b> , required in proving a document . . . . .	§ 1177, § 1858
see also PRODUCTION OF DOCUMENTS.	
<b>Profits</b> , amount of receipt of; see CONTRACTS; SALES; VALUE.	
<b>Promise</b> as excluding a confession; see CONFESSION.	
<b>Proof</b> , distinguished from admissibility . . . . .	12
from relevancy . . . . .	§ 29
beyond reasonable doubt . . . . .	§ 2497
<b>Proofs of Loss</b> , in insurance, as an admission . . . . .	§ 1073
Kentucky doctrine . . . . .	note five 1073
coroner's verdict to show cause of death in . . . . .	note eight § 1671
as <i>res gestæ</i> . . . . .	§ 1770
privilege waived by sending physician's certificate . . . . .	§ 2390
<b>Property</b> , conveyance of, as evidence of a weak case . . . . .	§ 282
sales of other, as evidence of value . . . . .	§ 462
qualifications of a witness to value . . . . .	567, 711
value of, proved by assessor's books . . . . .	§ 1640
lack of, proved by assessor's books . . . . .	§ 1640
presumption of ownership from possession of . . . . .	§ 2515
see also POSSESSION; CUSTOM; CONTRACT; PREMISES; OWNERSHIP.	
<b>Prophylactic Rules</b> defined . . . . .	1172
<b>Prosecution</b> , may show accused's bad character in rebuttal only . . . . .	57, 58
malicious; see MALICIOUS PROSECUTION.	
delay or failure to institute, as evidence . . . . .	§ 284
may impeach eye-witnesses called by it . . . . .	§ 918
list of witnesses of, before trial . . . . .	§ 1850
<b>Prospectant Evidence</b> , classification of . . . . .	51
<b>Prostitution</b> , enticement for, character of complainant as evidence . . . . .	§ 62

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]  
Section

### Prostitution (*continued*).

house of; see HOUSE OF ILL-FAME.

other offences as evidence of intent to entice for . . . . . 349, 360

### Protest; see NOTARY.

Prudence, opinion as to . . . . . 1949

in matters of business, evidenced by acts of others . . . . . § 461

Psychology applied in the impeachment of witnesses . . . . . 876

### Public Corporation; see CORPORATION.

### Public Document

#### 1. *Admissible to prove the Facts stated therein*

(a) *in general*

(b) *registers and records*

(c) *returns and reports*

(d) *certificates*

#### 2. *Proving Contents and Execution of Public Documents*

#### 1. *Admissible to prove the Facts stated therein*

(a) *in general*

general principle . . . . . 1631

as best evidence . . . . . § 1335

whether conclusive, or preferred to other testimony . . . § 1335, 2427, § 2453

official duty of maker . . . . . 1632

deputies, *de facto* officers, etc. . . . . § 1633

absence of record to negative occurrence . . . . . § 1633

publicity of document . . . . . § 1634

officer's personal knowledge . . . . . § 1635

constitutionality of using as evidence . . . . . § 1398

(b) *registers and records*

sundry kinds . . . . . § 1639

statutory regulation of admissibility . . . . . *note two* § 1639

assessment and electoral registers . . . . . § 1640

tax-records admissible by statute . . . . . *note nine* § 1640

military and naval registers . . . . . § 1641

registers of marriage, birth, death . . . . . § 1642-1646

certificates of marriage . . . . . § 1645

registers of title (ships, stock-brands, timber-marks) . . . § 1647

as admission of ownership . . . . . § 1647

registers of conveyances

deeds and mortgages . . . . . § 1648-1656

admissible only to prove deeds lawfully recorded . . . . . 1649

in foreign state . . . . . § 1652

proof when registration is unauthorized or faulty . . . . . § 1653

registration as admission of execution . . . . . § 1653

as showing claim of title . . . . . 1654, § 1777

certified and sworn copies . . . . . 1655

certified copy of deed itself . . . . . 1655

discrimination between principles of evidence involved . . . 1656

assignments of invention-patent . . . . . § 1657

wills . . . . . § 1658

government land-grants . . . . . 1659

judicial records . . . . . § 1660

corporation records . . . . . 1661

legislative records . . . . . § 1662

executive proclamations . . . . . § 1662

(c) *returns and reports*

sundry kinds . . . . . § 1664

sheriff's returns and recitals . . . . . § 1664

surveyor's returns . . . . . § 1665

former testimony reported

judges' notes . . . . . 1666

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.] Section

### Public Document (*continued*).

magistrates' reports . . . . .	1667
bills of exceptions . . . . .	1668
stenographers' notes, etc. . . . .	§ 1669
inquisitions and reports	
domain, escheat, and title . . . . .	§ 1670
pedigree in heralds' books . . . . .	§ 1670
lunacy . . . . .	§ 1671
coroner's inquest of death . . . . .	§ 1671
census of population . . . . .	§ 1671
miscellaneous kinds . . . . .	§ 1672
(d) <i>certificates</i>	
miscellaneous kinds . . . . .	§ 1674
notary's protest . . . . .	§ 1675
deed-acknowledgments; oaths . . . . .	§ 1676
certified copies . . . . .	§ 1677-1683
printed copies . . . . .	§ 1684
court decisions . . . . .	§ 1684
statutes . . . . .	§ 1684
2. <i>Proving Contents and Execution of Public Documents</i>	
whether removable for use in evidence . . . . .	§ 1186, 2182, § 2183, § 2373
production of original not required . . . . .	§ 1218-1222
provable by examined or sworn copy . . . . .	§ 1273
by certified or office copy . . . . .	§ 1677-1683
certified copy preferred to others . . . . .	§ 1273
by printed copy . . . . .	§ 1684
any copy preferred to recollection . . . . .	§ 1267, § 1268
attesting witness dispensed with . . . . .	1318
see also COPY; CERTIFIED COPY.	
whether the whole must be proved	
lost or destroyed record . . . . .	2107
record accessible . . . . .	2108
sundry public records . . . . .	§ 2109
judicial record . . . . .	§ 2110
genuineness, how proved	
by seal . . . . .	§ 2161-2169
by official custody . . . . .	§ 665, § 2158, § 2159
by certificate of attestation . . . . .	1677, § 2162
as privileged . . . . .	§ 2183, § 2373
privileged as State secrets . . . . .	2368-2372
irremovability of . . . . .	§ 2373
right of citizen to inspect . . . . .	<i>note two</i> 1858
see also CERTIFICATE; EXECUTION; JUDICIAL RECORD; RECORDED CONVEYANCE; NOTARY; PAROL EVIDENCE RULE.	
[Examine analyses of "Official Statements," Vol. III, pp. 1975, 1976; and "Verbal Completeness," Vol. III, p. 2819.]	
Public Interest, matters of; see REPUTATION.	
Public Officer, impeaching his own certificate . . . . .	529
having power to compel testimony . . . . .	§ 2195
privileged from testifying . . . . .	2368-2372
regularity of proceedings presumed . . . . .	§ 2534
appointment and authority presumed . . . . .	§ 2535
judicially noticed . . . . .	§ 2577
see also JUDICIAL RECORD; PUBLIC DOCUMENT.	
Public Record; see PUBLIC DOCUMENT.	
Publication, in newspaper, as evidencing knowledge . . . . .	§ 255
of libel or slander; see DEFAMATION.	
proving the fact of, without producing document . . . . .	§ 1249
affidavit of . . . . .	§ 1710

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Publication (*continued*).

- of testimony in newspaper, forbidden . . . . . 1836
  - see also PRINTED MATTER; NOTICE; BOOK.
- Publicity of trial, as a security for truth . . . . . 1834
  - exceptions to the rule . . . . . § 1835
  - exclusion of mere spectators . . . . . § 1835
  - adjournment of court to another place affecting . . . . . § 1835
- Publisher; see PUBLICATION; PRINTED MATTER; COPYRIGHT.
- Punishment, as evidenced by practice of others . . . . . § 461
- Pupil; see SCHOOLMASTER.
- Purchaser, knowledge of equitable or other interest by . . . . . § 254
  - see also GRANTEE; CREDITOR; SALES.
- Putting in the Case; see EXAMINATION, III.
- Putting under the Rule; see SEPARATION OF WITNESSES.

## Q

- Qualifications of a witness; see WITNESS, I, *Qualifications*.
  - distinctions in proving defective . . . . . § 876
- Quality of a chattel, place, weapon, etc., as evidenced by its effects, etc. . . . . § 437-461
  - as evidenced by sales or rentals . . . . . § 462
- Quantitative Rules defined . . . . . 1172
- Quarrels, refuting evidence of animosity resultant from old . . . . . 34
  - details of prior, to show hostility of deceased . . . . . *note three 396*
  - see also MOTIVE; INTENT; BIAS; DECEASED BY HOMICIDE.
- Question to a Witness, in hypothetical form . . . . . § 672-684
  - in leading form . . . . . § 769-779
    - allowable only in discretion . . . . . § 770, 776
    - judge may put leading . . . . . § 784
    - kinds of leading questions . . . . . 771
    - exceptions to the rule . . . . . 776
    - put to one's own witness . . . . . 915
  - in misleading form . . . . . § 780
  - cross-examiner need not state purpose of . . . . . § 780
  - with intimidating or annoying manner . . . . . § 781
  - repetition of . . . . . § 782
  - multiple examiners . . . . . § 783
  - as limited to one counsel . . . . . § 783
  - by the judge . . . . . § 784, § 2484
  - topics of, for impeachment or other purposes; see DIRECT EXAMINATION;
- CROSS-EXAMINATION.
  - witness' prior knowledge of . . . . . 788
  - continuous narration by witness without . . . . . § 785
  - stating the purpose of . . . . . § 1871
  - as a foundation for impeachment
    - by expressions of bias or corruption . . . . . § 953, 964
    - by self-contradiction . . . . . 1025
    - by a writing . . . . . § 1259
    - by admissions of a party . . . . . § 1051
  - impeaching a witness sworn but not questioned . . . . . § 1893
  - relevancy of, no concern of witness . . . . . § 2210
  - self-incriminating, not forbidden . . . . . 2266
  - warning witness of right to refuse a self-incriminating answer . . . . . § 2269
- [Examine analysis of "Testimonial Narration or Communication,"  
Vol. I, p. 858.]

## R

- Race, evidenced by corporal traits . . . . . § 167, § 1154
- disqualifying a witness . . . . . § 516

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

## Race (*continued*).

impeaching a witness . . . . .	936
evidenced	
by reputation . . . . .	§ 1605
by family hearsay . . . . .	§ 1502
corroboration required for Chinese . . . . .	§ 2066
see also ALIENS.	

## Radiograph, as a basis for testimony to bodily condition . . . . . § 795

## Railroad, nuisance, nature of . . . . . § 451

custom as to switch-lights on other . . . . .	<i>note twenty-six 18</i>
regulations of, as measure of negligence . . . . .	<i>note one 481</i>
reputation to show ownership of premises or vehicles by . . . . .	<i>note eight 1587</i>
see also NEGLIGENCE; EMPLOYEE; PREMISES; HIGHWAY; SPARKS; MA- CHINE; CARRIER; RATES.	

## Rape, character of complainant as evidence . . . . . § 62, § 200

of plaintiff in indecent assault . . . . .	§ 75
civil action for rape . . . . .	62
opinion rule applicable to moral character of complainant . . . . .	§ 1983
other persons' intercourse as evidence of paternity . . . . .	§ 133
acts of unchastity, to show complainant's consent . . . . .	§ 199
under age of consent, other acts . . . . .	§ 398
other intercourse, as evidencing defendant's intent or motive . . . . .	§ 357, § 398
other attempts on same woman in . . . . .	402
pregnancy as evidence of . . . . .	168
improper familiarities as evidencing consent in . . . . .	402
discriminations in regard to . . . . .	402
infant or imbecile witness in . . . . .	§ 498, § 508
failure to complain speedily of . . . . .	§ 284
total failure to make complaint in . . . . .	<i>note five 1155</i>
conduct of complainant, to impeach credibility . . . . .	§ 987
restoring credit of complainant . . . . .	1106
complainant's outcry or information, received . . . . .	1134
complainant in, too young to be a witness . . . . .	<i>1139, 1761</i>
details of complaint, admissible . . . . .	§ 1760
who is accomplice in . . . . .	§ 2060
uncorroborated complainant in . . . . .	§ 2061
what is corroborative evidence in . . . . .	<i>note three 2062</i>
marital privilege in . . . . .	§ 2239
see also AGE OF CONSENT.	

## Rates of charge by railroad, conclusiveness of official schedule . . . . . § 1354

## Ratification; see AGENCY.

## Rationality of the rules of evidence . . . . . 9

## Re-cross-examination; see CROSS-EXAMINATION; EXAMINATION, III.

## Re-direct Examination; see EXAMINATION, III; DIRECT EXAMINATION.

## Reading a prepared paper, by witness . . . . . 787

a deposition to deponent before signing . . . . .	805
impeachment of skill of a witness in . . . . .	§ 991
scientific books to jury . . . . .	§ 1700

## Real Evidence (or Autoptic Preference)

defined . . . . .	24
general principle and instances . . . . .	§ 1150-1152
mode of inspecting . . . . .	§ 1152
place of inspecting . . . . .	§ 1152
color, resemblance, appearance, etc., to show age, paternity, etc. . . . .	§ 1154
exhibition of body as privileged . . . . .	1155
weapons, clothes, etc., in criminal cases . . . . .	§ 1157
corporal injuries, in civil cases . . . . .	§ 1158
indecent exhibition . . . . .	§ 1159
liquor sampled by jurors . . . . .	§ 1159

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italica*) refer to supplement; § 1678 refer to both.]

	Section
<b>Real Evidence</b> ( <i>continued</i> ).	
experiments, insanity, etc. . . . .	§ 1160
physical inconvenience of production . . . . .	§ 1161
view by jury . . . . .	§ 1162-1167
jury's view as evidence . . . . .	§ 1168
specimens proved genuine; in Massachusetts, jury may reject in criminal trials . . . . .	<i>note three</i> 2020
whether an inscribed chattel must be produced . . . . .	§ 1182
of premises, chattels, etc., discovery before trial . . . . .	§ 1862
not privileged . . . . .	§ 2220, 2221, § 2264
<b>Reason for an act, hearsay statement of</b> . . . . .	§ 1729
<b>Reasonable Doubt, proof beyond</b> . . . . .	§ 2497
<b>Reasonableness, other persons' conduct, as evidence of</b> . . . . .	§ 461
information received, as evidence of . . . . .	1789
opinion as to . . . . .	1950
judge or jury to determine . . . . .	2553
see also KNOWLEDGE; NEGLIGENCE.	
<b>Rebuttal, of irrelevant evidence, by other irrelevant evidence</b> . . . . .	§ 15
accused's bad character in . . . . .	58
scope of testimony in . . . . .	§ 1869, § 1873
<b>Re-call of a witness by opponent, whether it prevents impeachment</b> . . . . .	§ 911-913
to ask as to a self-contradiction . . . . .	§ 1036
see also EXAMINATION.	
<b>Receipt received as an admission</b> . . . . .	156
of land-office receiver, original required . . . . .	§ 1239
production of original, in proving payment . . . . .	1245
admissible as statement against interest . . . . .	§ 1456, § 1460
varied by parol . . . . .	§ 2432
presumption of payment . . . . .	§ 2518
<b>Receiver of stolen goods, knowledge as evidenced by repute</b> . . . . .	§ 254
as evidenced by other possession . . . . .	324
thief not an accomplice of . . . . .	<i>note one</i> § 2060
<b>Recital in a deed, of another deed's contents</b> . . . . .	§ 1257
in a statute, whether conclusive . . . . .	§ 1352
whether admissible . . . . .	§ 1662
in a sheriff's deed, whether conclusive . . . . .	§ 1354
whether admissible . . . . .	§ 1664
in an ancient deed, of boundary or lost deed . . . . .	§ 1573
of pedigree . . . . .	§ 1573
in a will, as evidence of pedigree; see FAMILY HISTORY.	
of consideration, varied by parol . . . . .	§ 2433
<b>Recollection</b>	
(a) <i>in general</i>	
(b) <i>record of past recollection</i>	
(c) <i>present recollection refreshed</i>	
(d) <i>sundry rules</i>	
(a) <i>in general</i>	
general principles . . . . .	§ 725-730
cross-examination to impeach . . . . .	730
"impression," "belief," etc. . . . .	§ 727-729
examining to grounds of recollection . . . . .	730
distinction between past and present . . . . .	§ 735
(b) <i>record of past recollection</i> . . . . .	§ 734-754, 800
[ <i>distinguish from present recollection, infra</i> (c)]	
history and general principles . . . . .	§ 734, 739
from stenographer's notes . . . . .	737, <i>note two</i> 751
signature by attesting witness . . . . .	737
regular entries in course of business . . . . .	737, § 747
notary's certificate . . . . .	737

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Recollection (<i>continued</i>).</b>	
New York doctrine . . . . .	738
written copies preferred to oral . . . . .	739
must be written . . . . .	744
contemporaneous . . . . .	§ 745
accuracy sworn to . . . . .	746, § 747
attesting witness testifying without . . . . .	§ 747
Massachusetts rule for regular entries . . . . .	§ 747
witness not the writer . . . . .	§ 748
original . . . . .	§ 749, 750
verification of copy . . . . .	750
stenographer's report from interpreter . . . . .	<i>note two</i> 751
transactions by several persons (book-keeper and salesman, etc.) . . . . .	§ 751, 752
salesman deceased or unavailable . . . . .	752
copier of statement as witness to . . . . .	752
showing to opponent . . . . .	753
handing to jury . . . . .	§ 754
(c) <i>present recollection refreshed</i> . . . . .	§ 758-764
[ <i>distinguish from past recollection, supra (b)</i> ]	
general principle . . . . .	758
any writing may be used . . . . .	758
witness not the writer . . . . .	§ 765
original . . . . .	§ 760
contemporaneous . . . . .	§ 761
depositions used . . . . .	§ 761, § 904
to refresh, of hostile witness . . . . .	§ 761
showing to opponent . . . . .	§ 762
handing to jury . . . . .	§ 763
use by cross-examiner . . . . .	764
(d) <i>sundry rules</i>	
refreshing the memory of one's own witness by his prior self-contradiction . . . . .	§ 905
cross-examination to test . . . . .	§ 995
contradicting by showing failure of . . . . .	§ 1005, § 1022
self-contradiction by failure of . . . . .	§ 1037, § 1043
lost negotiable instrument provable by . . . . .	§ 1267
lost will provable by . . . . .	§ 1267
preference of copy of a document, to recollection of contents; see COPY OF A DOCUMENT, 2.	
failure of recollection of attesting witness . . . . .	§ 1302, 1315
refreshing recollection by report of prior testimony . . . . .	737, § 1328
by seeing specimens of writings . . . . .	2007
stenographer's notes, as preferred to . . . . .	§ 1330
report used by magistrate or clerk to aid . . . . .	1667
books of account used as memoranda of . . . . .	1560
[Examine analysis of "Testimonial Recollection," Vol. I, p. 820.]	
<b>Record, of stock-brand, as evidence . . . . .</b>	<b>§ 150</b>
of business, used by witness not having personal knowledge . . . . .	666
of public office in hands of successive officials . . . . .	§ 665
of a predecessor, as qualifying a witness to handwriting . . . . .	§ 704
production of, under original document rule . . . . .	§ 1186
of recollection of a witness; see RECOLLECTION.	
of conviction of crime, to impeach a witness; see CONVICTION OF CRIME.	
judicial; see JUDICIAL RECORD.	
official, in general; see PUBLIC DOCUMENT.	
of conveyance; see RECORDED CONVEYANCE.	
voluminous, proved by summary . . . . .	§ 1230, § 1244
of assignment . . . . .	§ 1657
absence of an entry in, how proved . . . . .	§ 1230, § 1244, § 1678, § 1957, § 1978

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Record (<i>continued</i>).</b>	
abstract of burnt . . . . .	§ 1705, § 2105, 2107
copy received of torn or illegible . . . . .	§ 1275
certificate of <i>effect</i> . . . . .	§ 1674, § 1675
docket is not a . . . . .	<i>note seven</i> §450
<b>Recorded Conveyance</b>	
record-book admissible, instead of copy of it . . . . .	§ 1186, 1655, § 2373
conveyance on file in public office . . . . .	§ 1219
production of original deed not required . . . . .	§ 1224-1227
preference for certified copy . . . . .	§ 1273
copy of a copy . . . . .	1274
mode of proving copy . . . . .	1277
production of attesting witness excused . . . . .	§ 1290, 1318
record admissible to prove contents and execution	
deeds, etc., lawfully recorded . . . . .	§ 1648-1651
record in another jurisdiction . . . . .	§ 1652
unauthorized record . . . . .	§ 1653
proof of other matters recorded . . . . .	1654
certified and sworn copies . . . . .	1655
whole of record must be copied . . . . .	§ 2109
kinds of certified copies admissible . . . . .	§ 1677-1683
certificate of acknowledgment, as evidence . . . . .	§ 1676
assignment of invention-patent . . . . .	§ 1657
will . . . . .	§ 1658
government land-grant . . . . .	1659
copy of ancient deed recorded . . . . .	§ 2143
presumption of consideration . . . . .	§ 2520
date . . . . .	§ 2520
delivery . . . . .	§ 2520
notice . . . . .	§ 2520
seal . . . . .	§ 2520
Referee as witness . . . . .	1912
Reformation of contract, in equity . . . . .	2417
Refreshment of Memory; see RECOLLECTION.	
Refusal, to submit to a test, as evidence of guilt . . . . .	275
to escape, as evidence of innocence . . . . .	§ 276, § 293
to produce witness or document, as evidence of a weak case . . . . .	§ 285-291
to testify, prosecution for . . . . .	<i>note six</i> §270
Register of enlistment, as evidence . . . . .	§ 1641
official, in general; see PUBLIC DOCUMENT.	
Register of Deeds; see RECORDED CONVEYANCE.	
Register of Land-office; see LAND-OFFICE.	
Register of Marriage, Birth, or Death, production of original required . . . . .	§ 1219, § 1223
not preferred to eye-witness of marriage . . . . .	1336
preferred as proof of birth . . . . .	§ 1335
admissible as a deceased person's regular entry . . . . .	§ 1523
as an official record . . . . .	1642, § 1646
certified copy of, by custodian . . . . .	1682, § 1683
sworn copy of, by custodian . . . . .	§ 1710
not required in bigamy . . . . .	§ 2088
copy of whole required . . . . .	§ 2109
presumed genuine, from official custody . . . . .	§ 2159
identity shown by name . . . . .	§ 2529
kept in a family, as evidence; see FAMILY HISTORY.	
Register of Ship, whether conclusive . . . . .	§ 1352
whether admissible . . . . .	§ 1641, § 1647
Registration of Title or Deed, proved by copy . . . . .	§ 1239
whether conclusive . . . . .	§ 1352
whether admissible . . . . .	§ 1647

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Registration of Title or Deed, as a required formality</b>	2456
as presuming delivery of deed	§ 2520
no notice of prior deed	§ 2520
see also RECORDED CONVEYANCE.	
<b>Regular Entries, exception to the Hearsay rule</b>	1517
history and statutes	1518, § 1519
as an aid to recollection; see RECOLLECTION.	
I. <i>Regular Entries in general</i>	§ 1521-1533
death, absence, etc., of entrant	§ 1521, § 1561
admissible to avoid mercantile inconvenience	§ 1521, § 1530
kind of business	§ 1523
duty to superior	§ 1524
regularity	1525
may be evidenced by inspection of book	1525
contemporaneousness	1526
no motive to misrepresent	1527, § 1644
oral reports	1528
personal knowledge	§ 1530
salesman and bookkeeper acting jointly	§ 1530
form of entry	1531
any interpretable mark sufficient	1531
absence of entry to negative transaction	1531
impeaching credit	1531
production of original	§ 1532
II. <i>Parties' Account-Books</i>	
no clerk	§ 1538
cash payments	§ 1539, § 1549
goods delivered to third person	1540
special contracts	1541
special contract proved, may use to show delivery	<i>note one</i> 1541
kind of business	§ 1542, 1547
of book	§ 1548, § 1558
of item	1543, § 1549
each entry must be separate transaction	§ 1549
contemporaneousness	1550
regularity	1547
honest appearance	1551
reputation for correctness	1552
suppletory oath; cross-examination	§ 1554
used by or against surviving party	§ 1554
personal knowledge	§ 1555
party and salesman jointly acting	§ 1555
form of entry	§ 1556
must show delivery as well as order	§ 1556
impeaching the book	§ 1557
using the entries as admissions	§ 1557
production of original; ledger and day-book	§ 1558
effect of statutes	1560
using inadmissible, as memorandum to refresh	1560
books of deceased clerk	§ 1561
[Examine analysis of "Regular Entries," Vol. II, p. 1878.]	
<b>Regularity of official proceedings presumed</b>	§ 2534
<b>Regulations, of department, judicial notice of</b>	§ 2572
<b>Relationship, hearsay statements, as evidence of; see FAMILY HISTORY.</b>	
bearing on good faith in conveyance	§ 391
invoked by counsel, disregarded by jury	<i>note two</i> § 949
in financial matters, to show bias of witness	<i>note three</i> 949
<b>Release, varied by parol</b>	§ 2432
see also DOCUMENT.	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Relevancy</b> , distinguished from admissibility . . . . .	12
with reference to real evidence . . . . .	24
general considerations affecting the rules of . . . . .	27, 28
distinguished from minimum probative value . . . . .	28
from weight or proof . . . . .	§ 29
logical theory of . . . . .	30-36
of character, distinguished from conduct to evidence character . . . . .	53
of facts admitted conditionally on further evidence . . . . .	14, 40, § 1871
distinction between definite and indefinite . . . . .	879
no privilege for irrelevant matters . . . . .	§ 2210
of question, no concern of witness . . . . .	§ 2210
<b>Religious Belief</b> , as disqualifying a witness . . . . .	§ 516, 518
as influencing a confession . . . . .	840
as impeaching a witness . . . . .	§ 935
as requisite for an oath . . . . .	1817
disclosure of, privileged . . . . .	2214
<b>Renewal</b> , agreement for, shown by parol . . . . .	2436, § 2445
<b>Repairs</b> , of a machine or place, to evidence negligence . . . . .	32, § 283
to evidence control . . . . .	§ 283
<b>Repetition</b> , of questions to a witness . . . . .	§ 782
of defamatory utterances; see DEFAMATION.	
<b>Reply</b> to letter by mail, as genuine . . . . .	§ 2152
to telegram . . . . .	§ 2153
opponent's case in . . . . .	1872
see also LETTER.	
<b>Report</b> of an official . . . . .	§ 1664-1672
of injury, made by agent to principal, as privileged . . . . .	note one § 2319, note five 2319
of a magistrate; see MAGISTRATE.	
of domain, pedigree, title, etc. . . . .	§ 1670
of a judicial decision . . . . .	
by officially printed copy . . . . .	§ 1684
by private printed copy . . . . .	1703
of a magistrate; see MAGISTRATE.	
proving genuineness of . . . . .	2151
of particular business required by law, privilege for incriminating matters in . . . . .	2264
of testimony, kinds of; see FORMER TESTIMONY.	
prohibition of publication of . . . . .	1836
of a clerk or bookkeeper; see REGULAR ENTRIES.	
see also PUBLIC DOCUMENT.	
<b>Reports</b> , sundry . . . . .	§ 1672
<b>Representation</b> , knowledge of falsity of, as evidenced by repute . . . . .	§ 256
as evidenced by other false representations . . . . .	320
<b>Reputation</b>	
1. <i>Land-boundaries and Land-customs</i>	
2. <i>Events of General History</i>	
3. <i>Marriage and other Facts of Family History</i>	
4. <i>Moral Character of Party or Witness</i>	
5. <i>Sundry Facts provable by Reputation</i>	
1. <i>Land-boundaries and Land-customs</i>	
by perambulations . . . . .	1563
matter must be ancient . . . . .	§ 1582
kind of reputation . . . . .	§ 1583-1591
private boundaries proved by . . . . .	§ 1587
possession proved by . . . . .	§ 1587
title proved by . . . . .	§ 1587
in proving title by adverse possession . . . . .	note nine 1587
qualifications of, evidence . . . . .	§ 1588
source of . . . . .	§ 1591
form of reputation . . . . .	1592-1595

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

Section

## Reputation (*continued*).

- from old deeds, leases, maps, surveys, etc. . . . . 1592
  - from jury's verdict . . . . . 1593
  - evidenced by judicial decree . . . . . 1594
  - absence of, as evidence . . . . . 1595
  - 2. *Events of General History*
    - ancient matters of general interest . . . . . 1597-1599
    - historical works to evidence . . . . . 1597, 1598
    - judicial notice of . . . . . 1599
    - proved by scientific treatises . . . . . 1599
  - 3. *Marriage and other Facts of Family History*
    - marriage . . . . . § 1602-1604
    - sufficiency of, evidence . . . . . § 1604
    - absence . . . . . note eight § 1605
    - ancestry . . . . . § 1605
    - birth . . . . . § 1605
    - death . . . . . § 1605
    - legitimacy . . . . . § 1605
    - race . . . . . § 1605
    - relationship . . . . . § 1605
    - residence . . . . . note eight § 1605
  - 4. *Moral Character of Party or Witness*
    - reputation distinguished from character . . . . . 52, 920, 1608
    - see also CHARACTER.
    - as mitigating damages in defamation . . . . . § 209
    - of deceased in homicide, to evidence accused's belief . . . . . § 246
    - of employee, to evidence employer's knowledge . . . . . § 249
    - of lunatic, insolvent, or partner, to evidence purchaser's knowledge . . . . . § 253-255
    - of arrested person, as evidencing probable cause . . . . . § 258
    - qualifications of a witness to . . . . . § 691, § 692
    - witness to, cross-examined as to rumors . . . . . § 988, § 1111
    - prima facie* evidence of crime, under statute . . . . . § 1354
    - constitutionality of using, as evidence . . . . . § 1398
    - of honesty, required for a party's account-book . . . . . 1552
    - place and extent of reputation . . . . . § 1615-1616
    - time of reputation . . . . . § 1618-1619
    - kind of character reputed (chastity, sanity, temperance, etc.) . . . . . § 1620, § 1621
    - to prove common offender . . . . . § 1620
    - of animal to evidence disposition or pedigree . . . . . § 1621
    - witness' or party's character; see also CHARACTER.
  - 5. *Sundry Facts provable by Reputation*
    - of place of procuring abortion . . . . . § 391
    - solvency, wealth . . . . . § 1623
    - partnership . . . . . § 1624
    - knowledge of partnership . . . . . § 255
    - incorporation . . . . . § 1625
    - miscellaneous facts . . . . . § 1626
    - party's knowledge of a fact reputed . . . . . 1789
    - see also KNOWLEDGE.
- [Examine analysis of "Reputation," Vol. II, p. 1931.]
- Res Gestæ*, other crimes admitted when a part of . . . . . § 218
  - "coloring" as used in, doctrine . . . . . 365
  - complaint in rape, as part of . . . . . 1134, § 1760
  - in robbery or larceny . . . . . 1142, 1762
  - declarations about private boundary . . . . . 1563, 1571
  - distinguished from circumstantial evidence . . . . . § 1715
  - confusion of, with declarations of intent . . . . . § 1726

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Res Gestæ (continued).</b>	
statements of mental or physical condition . . . . .	§ 1715-1740
of the circumstances of an injury or affray . . . . .	§ 1745-1756
after corporal injury . . . . .	1747
of intent or motive . . . . .	§ 1714-1740
exclamation of bystander as . . . . .	§ 1755
loose usage of term . . . . .	1757
charge made in travail by bastard's mother . . . . .	1764
statements about boundary . . . . .	1764
declarations by an accused . . . . .	§ 1732, 1765
plaintiff's conduct as . . . . .	§ 1770
utterances in contract as . . . . .	§ 1770
proofs of loss as . . . . .	§ 1770
words accompanying the taking as, in conversion . . . . .	§ 1777
showing words as, in consideration . . . . .	§ 1777
accompanying statements in dedication as . . . . .	§ 1777
claim of title as part of . . . . .	§ 1778
exclamations in a mob or riot . . . . .	1790
exclamations on violent injury . . . . .	1745
sundry applications . . . . .	1757, 1796
admission of agent or co-conspirator as . . . . .	§ 1079, 1797
distinguished from circumstantial evidence . . . . .	1715
utterances a part of the issue, or verbal acts; see HEARSAY RULE, III.	
general theory of doctrine . . . . .	1745, 1768, 1796
history of phrase . . . . .	§ 1795
see also SPONTANEOUS EXCLAMATIONS; VERBAL ACTS; MENTAL CONDI- TION, DECLARATIONS OF.	
[Examine analyses of "Declarations of a Mental Condition," "Spontaneous Exclamations," and "Verbal Acts," Vol. I, pp. xxxviii, xxxix.]	
<b>Res ipsa loquitur</b> . . . . .	24, § 2509
<b>Resemblance</b> of child, as evidence of paternity . . . . .	§ 166, § 1154
see also IDENTITY.	
<b>Residence</b> , evidenced by prior residence . . . . .	§ 382
presumed to continue . . . . .	§ 2530
see also DOMICIL.	
<b>Resistance</b> , as evidence of guilt . . . . .	§ 276
<b>Return</b> , of sheriff. . . . .	§ 1664, § 1670
of surveyor . . . . .	§ 1665
of sundry officers . . . . .	§ 1672
distinguished from certificate . . . . .	§ 1674
<b>Revocation</b> , testator's utterances as evidence . . . . .	1734, 1782
<b>Reward</b> , as impeaching a witness . . . . .	§ 969
as excluding a confession . . . . .	§ 835
<b>Riot</b> , other acts, as evidencing . . . . .	§ 367
see also MOB.	
<b>Road</b> ; see HIGHWAY.	
<b>Robbery</b> , possession of goods or money, as evidence of . . . . .	§ 153, § 154, § 2513
other crimes, as evidencing intent . . . . .	§ 351
by threatening demands . . . . .	352
motive for . . . . .	§ 392
owner's complaint after, as <i>res gestæ</i> . . . . .	1142, 1762
proof of identity in; see IDENTITY.	
<b>Röntgen-ray photograph</b> . . . . .	§ 795
see also X-RAY.	
<b>Roman Catholic</b> as a witness; see RELIGIOUS BELIEF.	
<b>Rule</b> , "Putting under the rule"; see SEPARATION OF WITNESSES.	
<b>Rules of Court</b> , judicially noticed . . . . .	§ 2578
limiting right of cross-examination to one counsel . . . . .	§ 783

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

<b>Ruling upon objections</b> . . . . .	Section § 19
error of, as ground for new trial . . . . .	§ 21
<b>Rumors, on cross-examination of a witness to reputation</b> . . . . .	197, § 988, § 1111
distinguished from reputation, to prove character . . . . .	1611

### S

<b>Safety of machine, premises, etc., as evidenced by other instances</b> . . . . .	§ 451, § 461
opinion as to . . . . .	1949
<b>Sales, course of business in, as evidence of a transaction</b> . . . . .	94, 372, § 377, 379
of liquor; see LIQUOR-SELLING.	
of other property, as evidence of value . . . . .	§ 463
as qualifying a witness to value . . . . .	§ 714
as evidence of intent; see FRAUD; FALSE REPRESENTATIONS; FRAUDULENT TRANSFERS.	
price, etc., as evidence of a motive . . . . .	§ 392
decrease of, as evidence of nuisance, etc. . . . .	§ 462
production of instrument, in proof of fact of . . . . .	1247
buyer's utterances, used against seller's creditor . . . . .	§ 1779
intent of debtor in . . . . .	§ 1967
presumption of fraud applicable to . . . . .	§ 2504
books of account, as evidence of; see REGULAR ENTRIES.	
warranty in, shown by parol . . . . .	§ 2434
statute of frauds applied to . . . . .	§ 2454
see also GRANTOR.	
<b>Salesman, using entry to aid recollection; see RECOLLECTION; REGULAR ENTRIES.</b>	
<b>Sample, as evidence of an entire lot</b> . . . . .	439
<b>Sanity (or Insanity), conduct as evidence of</b> . . . . .	§ 228-235
hereditary, as evidence of . . . . .	§ 232
capacity of insane person to testify . . . . .	§ 492-497
of testator, qualification of witness to will as to . . . . .	§ 689
witness' experience in, or knowledge of . . . . .	§ 568, § 688, § 689
witness' insanity, in impeachment . . . . .	932
inspection of insane person by tribunal . . . . .	§ 1160
insanity excusing absence of an attesting witness . . . . .	§ 1316
of a deponent . . . . .	1408
of a declarant of facts against interest . . . . .	§ 1456
of a maker of regular entries . . . . .	§ 1521, § 1561
insanity disqualifying dying declarant . . . . .	§ 1445
provable by reputation . . . . .	§ 1621
by inquisition of lunacy . . . . .	§ 1671
by declarations of testator . . . . .	§ 1738-1740
by opinion testimony . . . . .	§ 1933-1938
of attesting witness . . . . .	1936
of lay witness . . . . .	1933
by inspection . . . . .	§ 2220
burden of proof of . . . . .	§ 2500, § 2501
in criminal trials . . . . .	§ 2501
presumed to continue . . . . .	§ 2530
hypothetical question as to; see HYPOTHETICAL QUESTION.	
see also LUNATIC; INSANITY.	
<b>Scandal, in pleading</b> . . . . .	2216
<b>Schoolmaster, evidence of standard of discipline of</b> . . . . .	§ 461
<b>Science, men of, as witnesses; see EXPERT WITNESS.</b>	
instruments and tabulated data of, used by a witness . . . . .	§ 665, § 795
books of, physician's testimony based on . . . . .	§ 688
used in evidence . . . . .	§ 1690-1700
judicially noticed . . . . .	2566

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

**Scienter**; see KNOWLEDGE; OWNER; ANIMAL.

**Scientific Books**; see LEARNED TREATISES; SCIENCE.

**Scintilla of evidence** . . . . . § 2494

**Scrip, of land grant**; see DEED.

**Seal, official, as authenticating a document**

    general principle . . . . . 2161, § 2162

    seal of State . . . . . 2163

        of court or clerk . . . . . § 2164

        of notary . . . . . § 2165

        of sundry officers . . . . . § 2166

    official signatures . . . . . § 2167

        title to office . . . . . § 2168

    attested copy under seal . . . . . § 1679, § 1680, § 1681

    corporate seals . . . . . § 2169

    history of, as making documents . . . . . 2426

    form of . . . . . 2456

    presumption of consideration from . . . . . *note seven* 2520

    existence of, indicated in copy of recorded deed . . . . . *note one* § 2105

    judicial notice of foreign . . . . . § 2166, 2566

    of foreign court of admiralty presumed genuine . . . . . § 1681, § 2164

**Search, evidence obtained by illegal** . . . . . § 2183

    liquor seized in illegal, admissible . . . . . *note two* 2264

    for lost document . . . . . § 1194

    for attesting witness . . . . . § 1313

**Seaworthiness, presumption of** . . . . . 2533

**Secondary Evidence, are there degrees of** . . . . . § 1268

**Secret of trade, as privileged** . . . . . § 2212, § 2374

    of State . . . . . § 2375

    of friendship . . . . . 2285

    promise to keep, not privileged . . . . . § 2286

        see also PRIVILEGE.

**Security, agreement to hold deed as, shown by parol** . . . . . § 2437

    higher, for same debt, merger presumed . . . . . *note one* 2540

**Sedition, other acts as evidencing intent** . . . . . § 367

    other persons' utterances, as a standard of loyalty . . . . . § 461

    putting in the whole of an utterance . . . . . § 2097, § 2115, § 2119

        see also DEFAMATION; TREASON.

**Seduction**

    character of the woman as in issue or mitigating damages . . . . . § 75, *note one* 76, 77, 79

    poverty as bearing on probability of . . . . . *note ten* 392

    evidenced by pregnancy . . . . . 168

    sexual desire as evidencing . . . . . 401

        as negating promise of marriage in . . . . . 401

    not evidence of prior promise of marriage . . . . . *note three* 1770

    statutory action or criminal prosecution for . . . . . 79

    father's action for, of daughter . . . . . 210

    intercourse of third person, as evidence of paternity . . . . . § 133

    acts of unchastity, as defeating prosecution or mitigating damages . . . . . § 205, 210

    meaning of "chaste character" in action for . . . . . § 205

    acts of unchastity after, not relevant . . . . . § 205

    rebuttal of testimony to unchaste character in . . . . . 1620

    unfair surprise in showing conduct . . . . . § 205

    privilege against self-crimination . . . . . *note seven* 2257

    other intercourse, as evidencing intent or motive . . . . . 360, § 398

    who is accomplice in . . . . . § 2060

    uncorroborated complainant . . . . . § 2061

    what is corroborative evidence in . . . . . *note three* 2062

    marital privilege in . . . . . § 2239

    proof beyond a reasonable doubt . . . . . § 2498

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Self-contradiction, as impeaching a witness

one's own witness . . . . .	§ 902-096
general theory . . . . .	1017
unfair surprise in . . . . .	1019
collateral facts excluded . . . . .	1020
material facts . . . . .	§ 1021
bias, knowledge, skill, etc. . . . .	§ 1022
preliminary question to witness . . . . .	§ 1025-1039
time and place of inconsistent statement, asked . . . . .	<i>note one</i> 1027, § 1029
what is a self-contradiction . . . . .	§ 1040-1043
opinion . . . . .	§ 1041
silence, omission to claim or speak . . . . .	§ 1042
explaining away the inconsistency . . . . .	§ 1044
joining issue on the explanation . . . . .	1046
putting in the whole . . . . .	§ 1045
distinguished from a party's admissions or confessions . . . . .	§ 821, § 1051

[Examine analysis of "Self-contradiction," Vol. II, p. 1177.]

### Self-crimination, Privilege against

(a) <i>in general</i>	
(b) <i>kinds of facts protected</i>	
(c) <i>form of disclosure protected</i>	
(b) <i>mode and effect of making claim</i>	
(e) <i>waiver of privilege</i>	
(f) <i>criminality removed</i>	
(a) <i>in general</i>	
history . . . . .	§ 2250
policy . . . . .	§ 2251
correct moral attitude toward . . . . .	<i>note sixteen</i> 2251
application to grand jury . . . . .	§ 2252
legislature . . . . .	§ 2252
in bankruptcy . . . . .	§ 2257, § 2260, <i>note five</i> 2282
constitutional sanction . . . . .	§ 2252
common law not changed . . . . .	§ 2252
applies to witness as well as accused . . . . .	§ 2252
applies in all proceedings . . . . .	§ 2252
of corporation, by facts obtained from third person . . . . .	2281
distinguished from confession-rule . . . . .	823, § 850, 2266
(b) <i>kinds of facts protected</i>	
civil liability . . . . .	§ 2254
infamy . . . . .	2255
forfeiture . . . . .	§ 2256
penalty . . . . .	§ 2257
seduction . . . . .	§ 2257
adultery . . . . .	§ 2257
foreign crime . . . . .	§ 2258
crime of third person . . . . .	§ 2259
of corporation . . . . .	§ 2259
of corporation distinguished from official's personal privilege . . . . .	<i>note two</i> 2259
public records . . . . .	§ 2259
facts tending to criminate . . . . .	§ 2260
facts furnishing a clue . . . . .	§ 2261
(c) <i>form of disclosure protected</i>	
testimony . . . . .	2263
documents and chattels . . . . .	§ 2264
bodily exposure . . . . .	§ 2265
confessions . . . . .	823, 850, 2266
confessions distinguished from . . . . .	2266
opponent's proof of document by copy . . . . .	§ 1207, § 1209

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Self-crimination, Privilege against</b> ( <i>continued</i> ).	
evidence obtained by illegal seizure . . . . .	2183
(d) <i>mode and effect of making claim</i>	
cross-examination to character . . . . .	§ 2268
judge's warning . . . . .	§ 2269
claim by party or counsel . . . . .	§ 2270
effect of erroneous compulsion . . . . .	§ 2270
counsel cannot claim for witness . . . . .	§ 2270
judge determines claim . . . . .	§ 2271
what constitutes compulsion . . . . .	<i>note six</i> § 2270
inferences from claim . . . . .	§ 2272, § 2273
comment by counsel on accused's failure to testify . . . . .	§ 2272
(e) <i>waiver of privilege</i>	
by contract . . . . .	§ 2275
by voluntary testimony . . . . .	§ 2276-2278
must be claimed at outset if at all . . . . .	§ 2276
distinction between ordinary witness and an accused . . . . .	§ 2276
waiver at one trial is not, for later trial . . . . .	§ 2276
impeaching accused's character on stand . . . . .	§ 2277
cross-examining to one's own case . . . . .	2278
weight of credit to be given accused's testimony . . . . .	2278
(f) <i>criminality removed</i>	
by acquittal . . . . .	2279
by lapse of time . . . . .	2279
by pardon . . . . .	2280
by promise of immunity by prosecutor . . . . .	2280
disgracing facts . . . . .	2280
by statutory amnesty . . . . .	§ 2281
collusive disclosure . . . . .	§ 2281
immunity to witness destroys privilege, even if disclosure incriminates a third person . . . . .	§ 2281
testimony not to be used . . . . .	§ 2282
[Examine analysis of "Privilege for Self-criminating Facts," Vol. III, p. 3069.]	
<b>Self-defence, burden of proof of</b> . . . . .	§ 2512
character of deceased by homicide, to evidence . . . . .	§ 63, § 246
threats of deceased by homicide, to evidence . . . . .	110, § 247
acts of violence, to evidence . . . . .	§ 198, § 248
see also HOMICIDE.	
<b>Self-serving Statements, admissibility of</b> . . . . .	§ 1732, 1765
<b>Sentence, increase of, by prior convictions</b> . . . . .	§ 196
of conviction of crime, as affecting a witness; see CONVICTION OF CRIME.	
<b>Separate Estate, wife as witness to</b> . . . . .	§ 614
presumption of gift to or from . . . . .	§ 2526
<b>Separation of Witnesses, history, statutes</b> . . . . .	§ 1837
probative effect . . . . .	1838
demandable as of right . . . . .	§ 1839
mode of procedure . . . . .	§ 1840
time for requesting . . . . .	§ 1840
by whom request is made . . . . .	§ 1840
persons to be included . . . . .	§ 1841
disqualification for disobedience . . . . .	§ 1842
party testifying first on his own side . . . . .	§ 1869
<b>Servant; see EMPLOYEE; SERVICES.</b>	
<b>Service of writ, proof of, without production</b> . . . . .	§ 1249
<b>Services Rendered, value as evidence of price agreed</b> . . . . .	§ 392
opinion as to value of . . . . .	<i>note one</i> § 1944
capacity or quality, as shown by effects . . . . .	§ 460
price of other, as evidence of value . . . . .	§ 463

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Services Rendered</b> ( <i>continued</i> ).	
value of, by attorney . . . . .	§ 715, <i>note one</i> § 1944
by physician . . . . .	§ 715
qualifications of a witness to value . . . . .	567, 711
gratuitous, of a child . . . . .	§ 2526
<b>Servitude</b> , as disqualifying a witness . . . . .	§ 516
<b>Set-off</b> , agreement for, shown by parol . . . . .	2436, § 2445
<b>Settlement</b> , offer of, as an admission . . . . .	§ 1061
<b>Sewer</b> , as highway defect; see HIGHWAY.	
<b>Sex</b> , as disqualifying a witness . . . . .	517
<b>Sheriff</b> , debtor's admissions used against . . . . .	§ 1077
deed of, conclusiveness . . . . .	§ 1354
recital in deed by, to prove authority to sell . . . . .	§ 1664
return of process	
conclusiveness . . . . .	§ 1347
admissibility . . . . .	§ 1664, § 1670
as witness . . . . .	1912
<b>Ship</b> , log-book of; see LOG-BOOK.	
see also VESSEL.	
<b>Shipping-register</b> ; see REGISTER.	
<b>Shooting</b> , as a crime; see HOMICIDE.	
<b>Shopbooks</b> , parties'; see REGULAR ENTRIES.	
<b>Shorthand</b> ; see STENOGRAPHER.	
<b>Showers</b> , at a view by a jury . . . . .	1167, § 1802
<b>Sidewalk</b> ; see HIGHWAY.	
<b>Sight</b> , evidence of capacity of . . . . .	222
witness' defective, as affecting credit of observation . . . . .	<i>note two</i> 934
<b>Sign</b> , dying declaration by making . . . . .	§ 1445
testimony by making; see DEAF-MUTE.	
<b>Signature</b> , modes of evidencing genuineness; see HANDWRITING.	
forgery of; see FORGERY.	
of deponent to deposition . . . . .	805
official, is not of attesting witness . . . . .	§ 1292
number of attesting signatures to be proved . . . . .	1306
of attesting witness or maker of document . . . . .	§ 1320, § 1511, 1513
proof of unobtainable attesting, dispensed with . . . . .	§ 1320, 1321
proof of, not always necessary . . . . .	§ 2134
typewritten or stamped . . . . .	§ 2149
as a formality required . . . . .	2456
by illiterate's mark; see ILLITERATE.	
certificate authenticated by . . . . .	§ 2162
of official, as presuming genuineness . . . . .	§ 2164, § 2167
as agent, creating a personal liability . . . . .	§ 2444
time of . . . . .	§ 2520
alteration of; see ALTERATION.	
<b>Silence</b> , as an inconsistency impeaching a witness . . . . .	§ 1041
as an admission by a party . . . . .	292, 1052, § 1071, § 1072
as impeaching complainant in rape . . . . .	1134
in robbery . . . . .	1142
<b>Similar Acts</b> , to evidence a common barrator . . . . .	§ 203
of adultery, immaterial in criminal prosecution . . . . .	<i>note six</i> 205
to show Knowledge, Design, or Intent . . . . .	§ 300-367
for other purposes than to show Knowledge, Design, or Intent . . . . .	§ 306
subsequent . . . . .	316
to show intent in arson . . . . .	§ 354
assault . . . . .	§ 364, 396
blackmail . . . . .	352
bribery . . . . .	§ 343
burglary . . . . .	§ 351

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Similar Acts</b> ( <i>continued</i> ).	
counterfeiting . . . . .	309
forgery . . . . .	309
infringement of copyright . . . . .	§ 371
rape; see RAPE.	
of adultery or bigamy, material to show motive or intent . . . . .	360, § 398
to evidence Knowledge, Design or Intent in civil cases . . . . .	370
Habit in civil cases . . . . .	<i>note three</i> § 376
as evidence of authority to accept bill of exchange . . . . .	§ 377
as evidencing Habit, Plan, or System in contracts . . . . .	§ 377
as evidence of danger . . . . .	§ 451-461
see also DESIGN; INTENT; KNOWLEDGE.	
[Examine analysis of "Other Offences, or Similar Acts, as Evidence of Knowledge, Design, or Intent," Vol. I, p. 386.]	
<b>Similar Instances</b> , of human conduct; see NEGLIGENCE; CHARACTER; SIMILAR Acts.	
of effects of a machine, weapon, place, etc., to evidence cause, condition, or quality . . . . .	§ 441-461
<b>Similar Statements</b> by a witness; see WITNESS, III.	
<b>Simplificative Rules</b> defined . . . . .	1172
<b>Skill</b> , as evidence of an act done . . . . .	83, § 87
instances of, as evidence . . . . .	§ 199, § 221, § 461
mode of evidencing . . . . .	§ 220, § 221
of a witness; see EXPERT WITNESS.	
opinion as to another person's . . . . .	1949
<b>Skidograph</b> as a basis for testimony to bodily condition . . . . .	§ 795
<b>Slander</b> ; see DEFAMATION.	
<b>Slave</b> , as a witness . . . . .	§ 516
ancestry of, as evidenced by color . . . . .	§ 167
see also RACE.	
<b>Sleep</b> , confession in . . . . .	<i>note two</i> § 500
<b>Smoke</b> ; see NUISANCE.	
<b>Snow</b> , as a highway defect; see HIGHWAY.	
as a kind of weather; see WEATHER.	
<b>Sodomy</b> , other offences, as evidencing intent . . . . .	360
failure to make complaint of . . . . .	<i>note one</i> 1135
who is accomplice in . . . . .	§ 2060
<b>Solvency</b> , as evidence of payment . . . . .	§ 89
false statements as to; see FALSE REPRESENTATIONS.	
as evidenced by prior condition . . . . .	§ 382
by reputation . . . . .	253, § 1623
by opinion . . . . .	1959
see also DEBTOR; BANKRUPT; INSOLVENCY; PAYMENT.	
<b>Sound</b> , distance or quality of, as shown by instances . . . . .	§ 460
<b>Sovereign</b> ; see KING; EXECUTIVE.	
<b>Space</b> ; see DISTANCE.	
<b>Sparks</b> from a locomotive, as evidence of negligence or cause . . . . .	§ 452-456
presumption of negligence from . . . . .	§ 2509
<b>Specialty</b> , discharged by parol . . . . .	2426, § 2455
<b>Specimen</b> of handwriting; see HANDWRITING.	
articles proved genuine; in Massachusetts jury may reject in criminal trials . . . . .	<i>note three</i> 2020
<b>Speculative</b> testimony to injury . . . . .	663
<b>Speed</b> , expert qualifications of witness to . . . . .	§ 571
rate of, at one place evidenced by, at another . . . . .	<i>note ten</i> 382
opinion testimony to . . . . .	§ 1977
<b>Spelling</b> , traits of, as evidence of authorship . . . . .	99
<b>Spiritism</b> ; see TELEPATHY.	
<b>Spoliation</b> of evidence in general, as indicating guilt . . . . .	§ 278

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Spoilation</b> ( <i>continued</i> ).	
of documents, as evidence of contents . . . . .	§ 291
of execution . . . . .	§ 2132
as creating a presumption . . . . .	2524
<b>Spontaneous Exclamations</b> , distinction between, and Verbal Acts . . . . .	1745, 1752
general theory . . . . .	1747
death, absence, etc., need not be shown . . . . .	1748
requirements of the exclamation . . . . .	§ 1750
need not be contemporaneous . . . . .	§ 1750
time not essence of doctrine . . . . .	§ 1750, 1756
bystander's declaration admissible . . . . .	§ 1751, § 1755
relevancy of "main act" is immaterial . . . . .	1753
"main act" need not be equivocal . . . . .	1754
must be in reference to the startling occurrence . . . . .	1754
of one in a collision . . . . .	note three § 1750, note two § 1755
in connection with assault or homicide . . . . .	note three § 1750, note two § 1755
[Examine analysis of "Spontaneous Exclamations," Vol. III, p. 2247.]	
<b>Spouse</b> ; see MARITAL RELATIONSHIP; HUSBAND; WIFE.	
<b>Spy</b> , as impeached by his interest . . . . .	§ 969
whether corroboration is needed . . . . .	§ 2060
<b>Stains</b> ; see BLOOD.	
<b>Stamp</b> , law requiring, whether <i>lex fori</i> is applicable . . . . .	§ 5, § 6
exclusion of documents lacking . . . . .	§ 6, § 2184
tax laws enforced in the Territories . . . . .	note six 2184
required formality of . . . . .	2456
on letter, evidenced from habit of using government envelopes . . . . .	note four 95
<b>Standard of handwriting</b> ; see HANDWRITING.	
<b>State</b> , statute of, when applicable . . . . .	§ 6
seal of, presumed genuine . . . . .	2163
secrets of, privileged . . . . .	2213, § 2375
who determines necessity for secrecy . . . . .	2376
judicial notice of foreign . . . . .	2566
conducting a prosecution; see PROSECUTION; DEFENDANT.	
see also FOREIGN LAW.	
<b>Statement</b>	
balance of, may be used to rebut evidence produced by part of . . . . .	34
adoption of, as an admission . . . . .	§ 1075
of pain or suffering . . . . .	1718
to a physician . . . . .	§ 1719, 1720
after suit brought . . . . .	§ 1721
of past events . . . . .	§ 1722
about health . . . . .	1723
of design or plan . . . . .	§ 1725
of intent in domicile cases . . . . .	§ 1727
of intent in bankruptcy cases . . . . .	1728
of motive, reason, or intent . . . . .	§ 1729
of emotion, bias, malice, or affection . . . . .	§ 1730
of opinion or belief . . . . .	1731
by accused person . . . . .	§ 1732
self-serving . . . . .	§ 1732
improper, in argument by counsel . . . . .	1806
see also AGAINST INTEREST.	
<b>State of Mind</b> ; see BELIEF; INTENT; MOTIVE; KNOWLEDGE; MENTAL CONDITION.	
<b>Statute Book</b> proving genuineness of . . . . .	2151
<b>Statute</b> , Federal or State, applicable in Federal trials . . . . .	§ 6
limiting judicial powers in invalid . . . . .	§ 7
or ordinance affecting negligence . . . . .	note one 461

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

### Statute (*continued*).

Section

mode of proof	
of foreign, domestic, public, private	§ 1684
by official printed copy	§ 1684
by private printed copy	1703
by expert, without copy	§ 1271
copy of whole required	§ 2109
enrolment, conclusiveness of	§ 1350
conclusiveness of recital in	§ 1352, § 1662
interpretation of	§ 2478
judicial notice of	§ 2572
constitutionality of; see CONSTITUTIONAL RULES.	
recital in; see RECITAL.	
see also LAW; FOREIGN LAW.	

### Statutes

Federal, respecting "trials at common law," do not include criminal trials	§ 6
Canadian, in general	§ 6
constitutionality of, defining crime	§ 1354
may create new forms of process	<i>note three</i> § 2193
pertaining to wills, ballots, insurance policies, under parol evidence rule	§ 2452
granting immunity from criminal prosecution; see IMMUNITY.	
cited in this book	

on witness' qualifications	§ 488, § 524, § 576, 577, § 579, 602, 619
on view by jury	§ 1163
on a witness' examination in writing	§ 1326
on attesting witnesses	§ 1290, § 1310, § 1320
on dying declarations	1430
on statements of facts against interest	1455
on statements of pedigree	1480
on regular entries	§ 1519
on oaths	§ 1828
on separation of witnesses	1837
on marital privilege	§ 2240, § 2245, § 2334
on privilege against self-crimination	§ 2252, § 2281
on privilege for communications to attorney	§ 2292
to physician	§ 2380
to priest	§ 2395

specific statutes; see the TABLE OF STATUTES CITED, Vol. IV, p. 3633.

<b>Statute of Frauds</b> , whether <i>lex fori</i> is applicable	§ 5
provisions requiring numbers of witnesses	2049, § 2050
general policy of	2091
requiring formality of writing	§ 2454
<b>Statute of Limitations</b> , other defamatory utterances barred by	§ 403-406
indorsement of payment, as removing the bar	§ 1460, § 1466
annuls privilege against self-crimination	2279
burden of proof of	§ 2538
see also TIME.	

<b>Stenographer</b> , notes of testimony taken by	§ 1669
testifying from notes of former testimony	737
notes, as preferred to recollection	§ 1330
see also RECOLLECTION.	

**Stipulation**; see JUDICIAL ADMISSION.

**Stock**; see ANIMALS; BUSINESS; CORPORATION; VALUE.

<b>Stock Car</b> , custom, as waiver of agreement not to ride in	<i>note one</i> 2441
<b>Stockholder</b> , books of corporation used against	§ 1074
admissions of	§ 1076
desiring information, procedure for	<i>note four</i> § 1858
<b>Stolen Goods</b> , possession of, as evidence of larceny, etc.	152, § 153, § 2513
other, found on search, to show motive	§ 391

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Stolen Goods</b> ( <i>continued</i> ).	
knowledge of receiver or possessor of, as evidenced by repute . . . . .	§ 254
as evidenced by possession of other goods . . . . .	324
accused's explanation of possession . . . . .	1143, § 1777, § 1781
presumption from possession of . . . . .	§ 2513
thief not an accomplice in receiving . . . . .	<i>note one</i> § 2060
receiver of, judgment of stealer's conviction used against . . . . .	1588
see also LARCENY.	
<b>Street</b> , defective; see HIGHWAY.	
<b>Street Car</b> , negligence in injury by . . . . .	§ 199
see also NEGLIGENCE.	
<b>Strength</b> , as evidence of an act done . . . . .	83, § 84, § 225
instances of conduct, to prove . . . . .	§ 220
mode of evidencing . . . . .	§ 220, § 221
of deceased, to evidence self-defence . . . . .	§ 246
expert qualifications of witness to . . . . .	§ 571
<b>Strike Out</b> , misuse of motion to, a document, or evidence . . . . .	<i>note seventeen</i> 18
motion to, distinguished from "instruction to disregard" . . . . .	<i>note three</i> 19
motion to, testimony in gross . . . . .	<i>note eighteen</i> 18
<b>Strychnia</b> ; see POISON.	
<b>Subornation</b> , as evidence of guilt . . . . .	§ 278
in proving alibi . . . . .	§ 279
other crimes as evidencing intent in . . . . .	§ 343
as impeaching a witness . . . . .	§ 960-962
who is accomplice in . . . . .	<i>note one</i> 2060
see also PERJURY.	
<b>Subpoena</b> , history of . . . . .	§ 2190
officers having power to issue . . . . .	§ 2195
general practice . . . . .	§ 2199
<i>duces tecum</i> . . . . .	§ 2200
necessary for proving third person's detention of document . . . . .	§ 1212
cross-examination of witness under . . . . .	1894
document is for inspection of court only, pending admissibility . . . . .	§ 2200
opponent not to see irrelevant parts . . . . .	<i>note eight</i> § 2200
witness required to read document aloud . . . . .	<i>note eight</i> § 2200
expenses . . . . .	§ 2201
<b>Subscribing Witness</b> ; see ATTESTING WITNESS.	
<b>Sue</b> , agreement not to, shown by parol . . . . .	§ 2406, 2435, § 2444
<b>Suffering</b> , expressions of . . . . .	1718
<b>Sufficiency</b> of highway, cattle-guard, machine, etc., as shown by effects . . . . .	§ 461
of a search; see SEARCH.	
of evidence, judge to determine . . . . .	§ 2551
<b>Suggestion</b> to a witness, by leading questions . . . . .	§ 769-779
by other improper modes . . . . .	§ 786-788
<b>Suicide</b> , deceased's intention of, as evidencing innocence of an accused . . . . .	143, § 1725, § 1726
plans of, to negative homicide . . . . .	113
motive for . . . . .	§ 144, § 391, 394
disproving by emotions averse to . . . . .	§ 144
presumption of insanity from . . . . .	§ 2500
presumed instead of accident . . . . .	§ 2510
not presumed from taking morphine . . . . .	<i>note one</i> 2540
<b>Summary</b> of voluminous records or accounts . . . . .	§ 1230, § 1244
<b>Superstition</b> of the accused . . . . .	<i>note one</i> 86
<b>Superstitious tests</b> of guilt . . . . .	9
refusal to undergo . . . . .	275, <i>note one</i> 276
<b>Suppletory Oath</b> for books of account . . . . .	§ 1554
<b>Support</b> , collateral agreement to, as consideration for deed . . . . .	<i>note one</i> § 2442

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

<b>Supporting a witness' credit; see WITNESS, III.</b>	
<b>Suppression of evidence, as indicating guilt . . . . .</b>	<b>§ 278</b>
<b>Surety, principal's admissions used against . . . . .</b>	<b>§ 1077</b>
<b>using principal debtor's statement against . . . . .</b>	<b>1474</b>
<b>parol agreement to hold only as . . . . .</b>	<b>§ 2438, 2443, § 2444</b>
<b>Surgeon; see PHYSICIAN.</b>	
<b>Surprise; see UNFAIR SURPRISE.</b>	
<b>Surrebuttal, scope of testimony in . . . . .</b>	<b>§ 1874</b>
<b>Surrender to arrest, as evidence of innocence . . . . .</b>	<b>§ 293</b>
<b>Survey, as evidence of adverse possession of a whole tract . . . . .</b>	<b>378</b>
<b>as illustrating testimony . . . . .</b>	<b>§ 791</b>
<b>not to be impeached . . . . .</b>	<b>1346</b>
<b>whether conclusive . . . . .</b>	<b>2427</b>
<b>as containing declaration or reputation of boundary; see BOUNDARIES.</b>	
<b>as an official document . . . . .</b>	<b>§ 1665</b>
<b>judicially noticed . . . . .</b>	<b>§ 2575</b>
<b>Surveyor, records of a predecessor, as qualifying a witness to handwriting . . . . .</b>	<b>§ 704</b>
<b>official, not required in proving boundaries . . . . .</b>	<b>§ 794</b>
<b>testimony not required . . . . .</b>	<b>§ 1339</b>
<b>opinion testimony to boundary; see BOUNDARIES.</b>	
<b>declarations about boundaries; see BOUNDARIES.</b>	
<b>official return of . . . . .</b>	<b>§ 1665</b>
<b>as regular entry; see REGULAR ENTRIES.</b>	
<b>Survivor disqualified as a witness . . . . .</b>	<b>§ 578</b>
<b>use of account-books by or against . . . . .</b>	<b>§ 1554</b>
<b>testimony must be corroborated . . . . .</b>	<b>§ 2065</b>
<b>Survivorship, presumption of . . . . .</b>	<b>2532</b>
<b>Sustaining an objection . . . . .</b>	<b>§ 18</b>
<b>a witness' credit; see WITNESS, III.</b>	
<b>Swearing; see OATH.</b>	
<b>Sweat-box, confession made in . . . . .</b>	<b>§ 833, 851</b>
<b>Switch; see PREMISES.</b>	
<b>Switch-lights; see RAILROAD.</b>	
<b>Sworn Copy; see COPY.</b>	
<b>System, of evidence, analyzed . . . . .</b>	<b>3</b>
<b>of conduct, as evidencing a crime . . . . .</b>	<b>304</b>
<b>similar acts to show, in crime . . . . .</b>	<b>215, § 216</b>
<b>see also SIMILAR ACTS.</b>	

## T

<b>Table of weights, etc., used in evidence . . . . .</b>	<b>§ 1698, § 1704, § 1706</b>
<b>of mortality, used in evidence . . . . .</b>	<b>§ 1698, 2566</b>
<b>of interest, used in evidence . . . . .</b>	<b>§ 1672</b>
<b>use of calculating . . . . .</b>	<b>§ 665</b>
<b>Tally-book of voters; see ELECTION.</b>	
<b>Tax, payment of, as evidence of liquor-selling . . . . .</b>	<b>§ 238</b>
<b>of possession of land . . . . .</b>	<b>note two 157</b>
<b>fraud in, other acts as evidencing intent . . . . .</b>	<b>§ 341</b>
<b>books of assessment or collection of; see ASSESSOR'S BOOKS.</b>	
<b>records admissible by statute . . . . .</b>	<b>note nine § 1640</b>
<b>privilege against disclosure of . . . . .</b>	<b>§ 2374</b>
<b>authentication of receipt . . . . .</b>	<b>note one 2166</b>
<b>Tax-collector, conclusiveness of deed of . . . . .</b>	<b>§ 1254</b>
<b>admissibility of recitals of . . . . .</b>	<b>§ 1664</b>
<b>Tax-list, production of original . . . . .</b>	<b>§ 1240</b>
<b>Tax-title, regularity of . . . . .</b>	<b>note one 2534</b>
<b>Teacher; see SCHOOLMASTER.</b>	
<b>Telegram, delivery of, as evidenced by dispatch of original . . . . .</b>	<b>§ 95</b>

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italica) refer to supplement; § 1678 refer to both.]

	Section
<b>Telegram</b> ( <i>continued</i> ).	
production of original . . . . .	§ 1223, § 1236
received in reply, as genuine . . . . .	§ 2154
not privileged . . . . .	2287
receipt of, as evidence of authorship . . . . .	2519
<b>Telepathy</b> , testimony based on . . . . .	795
<b>Telephone</b> , testimony to conversations by . . . . .	§ 669
authenticating a conversation by . . . . .	§ 2155
<b>Tenancy</b> , production of lease, in proof of . . . . .	§ 1246
disputing landlord's title . . . . .	1472
declarations made during possession . . . . .	§ 1778, § 1779
<b>Tendency</b> , of a machine, weapon, place, etc., as evidenced by its effects, etc. § 437-461	
to criminate, facts having . . . . .	§ 2260
<b>Tender of witness' expenses</b> . . . . .	§ 2201
utterances qualifying a . . . . .	§ 1777
<b>Terms</b> , varying the, of a document . . . . .	§ 2425
<b>Test</b> ; see <b>EXPERIMENT</b> .	
<b>Testator</b> , conduct as evidence of sanity . . . . .	§ 229
utterances evidencing insanity . . . . .	1790
family relationship of . . . . .	230
conduct and utterances of . . . . .	230
assertions of undue influence by . . . . .	230
belief, as evidence of will's execution . . . . .	271
statements of execution, contents, revocation, undue influence, etc. § 1734-1740	
ante-testamentary statements by . . . . .	1735
post-testamentary statements by . . . . .	§ 1736
statements as to intention to revoke . . . . .	§ 1737
as to undue influence or fraud . . . . .	§ 1738
incapacity of, to resist influence . . . . .	§ 1738
opinion testimony to legal capacity of . . . . .	§ 1958
intention of . . . . .	§ 112
intent or mistake of; see <b>PAROL EVIDENCE RULE, D</b> .	
burden of proof of insanity . . . . .	§ 2500
of undue influence . . . . .	§ 2502
presumption of advancement by . . . . .	§ 2526
prior testamentary plans of . . . . .	§ 229, 230
undue influence of . . . . .	§ 229, 230
see also <b>WILL</b> ; <b>SANITY</b> .	
<b>Testimonial evidence</b> , defined . . . . .	25
relative value of . . . . .	§ 26
general theory of . . . . .	475
rules for admissibility of; see <b>WITNESS</b> .	
<b>Testimonio</b> ; see <b>DEED</b> .	
<b>Testimony</b> , failure to offer, civil and criminal cases distinguished . . . . .	<i>note four 4</i>
motion to "strike out in gross" . . . . .	<i>note eighteen 18</i>
based on telepathy . . . . .	795
prosecution for refusal to give . . . . .	<i>note six 2270</i>
rules of testimonial preference . . . . .	§ 1345-1354
rules of conclusive preference . . . . .	1348
at criminal trial admitted in civil . . . . .	§ 1388
expressed by acting . . . . .	§ 789
comment by counsel on accused's failure to give . . . . .	§ 2272
voluntary, as a waiver . . . . .	§ 2327
see also <b>WITNESS</b> ; <b>EVIDENCE</b> ; <b>EXPERT WITNESS</b> ; <b>FORMER TESTIMONY</b> ;	
<b>EXAMINATION</b> ; <b>QUESTION TO A WITNESS</b> .	
<b>Theological belief</b> ; see <b>RELIGIOUS BELIEF</b> .	
<b>Thing</b> ; see <b>CHATTEL</b> ; <b>PREMISES</b> ; <b>HIGHWAY</b> ; <b>ANIMALS</b> ; <b>WEAPON</b> ; <b>MACHINE</b> .	
<b>Think</b> ; see <b>BELIEF</b> .	
<b>"Third Degree"</b> confessions . . . . .	§ 833, 851

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Third Person, crime of, as evidencing accused's innocence</b> . . . . .	139
conduct to prove, guilty . . . . .	<i>note one</i> 273
threats of, to negative guilt of accused . . . . .	139, § 140, § 1726
conviction of, for same crime, to negative guilt of accused . . . . .	142
character of, as evidence of his act . . . . .	§ 68
motive of . . . . .	§ 141
letter of, as evidencing testator's sanity . . . . .	§ 228
flight of, as evidence of guilt . . . . .	§ 276
confession of guilt . . . . .	142, § 1476
fraud of, as evidence of a weak case . . . . .	§ 280
admissions of; see ADMISSIONS.	
<b>Threatening Letters; see EXTORTION.</b>	
<b>Threats of an accused, as evidence of doing the act</b> . . . . .	§ 105, § 1732
in general . . . . .	§ 106
conditional . . . . .	107
time of . . . . .	§ 108
explaining away . . . . .	109
distinction between communicated and uncommunicated . . . . .	<i>note one</i> 111
limitations on admissibility of . . . . .	§ 111
rebutted by showing peaceful plans . . . . .	<i>note six</i> 111
of a deceased, as evidence of self-defence . . . . .	110, § 247
as excluding a confession; see CONFESSION.	
of a third person, as evidencing innocence of the accused . . . . .	139, § 140, § 1726
<b>Ticket, completeness of contract in</b> . . . . .	<i>note two</i> § 2432
<b>Timber, marks on, as evidence of ownership</b> . . . . .	§ 150, § 2152
register of, as evidence . . . . .	§ 1647
<b>Time of possession of money, as evidence of payment</b> . . . . .	§ 89
of threats of an accused . . . . .	§ 108
of intercourse in bastardy . . . . .	§ 133
of possession of stolen goods . . . . .	152
of health, strength, etc. . . . .	§ 225
of sanity . . . . .	§ 233
of intoxication . . . . .	§ 235
of defect in highway . . . . .	§ 252
of possession, coverture, debt, etc. . . . .	§ 382
of intercourse in sexual offences . . . . .	§ 398
of other defamatory utterances . . . . .	§ 403-406
of utterances, as evidencing identity . . . . .	§ 416
of other injuries or effects, as evidencing cause . . . . .	§ 437-461
limitation of, for performance of act . . . . .	§ 460
prior or subsequent existence, to prove present existence . . . . .	§ 438
of other weather-conditions . . . . .	§ 438
of other spark-emissions . . . . .	§ 456
of work done, or things seen or heard, as shown by other instances . . . . .	§ 460
of values . . . . .	§ 463
of qualifications of witness . . . . .	483, 493, 583
of objection to a witness' qualification. . . . .	486, § 586
of seeing specimens of handwriting . . . . .	697, 707
of memorandum in aid of recollection . . . . .	§ 745, § 761
length of, for a witness' examination . . . . .	§ 783
of character of a witness . . . . .	§ 928
length of time illustrated to jury by a watch . . . . .	<i>note twelve</i> 1152
of condition of an object . . . . .	§ 1154
as presuming loss of document . . . . .	§ 1196
of notice to produce an original . . . . .	§ 1208
of plural depositions . . . . .	§ 1379
of birth, death, etc., proved by family hearsay . . . . .	1501
of certifying a copy . . . . .	1677
of recording a deed . . . . .	1649

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Time</b> ( <i>continued</i> ).	
of hearsay expressions of pain . . . . .	1718
of <i>res gesta</i> utterances . . . . .	§ 1750, 1776
identified by a person's utterances . . . . .	1791
opinion evidence to . . . . .	§ 1977
of putting in testimony . . . . .	§ 1867-1900
of execution of ancient document . . . . .	2137
of deed, proved by parol . . . . .	§ 2410
lapse of, presuming payment . . . . .	§ 2517
of execution of document . . . . .	§ 2520
of alteration of document, presumed . . . . .	§ 2525
of death, not presumed . . . . .	§ 2531
of survival, not presumed . . . . .	2532
things done same day, presumed same time . . . . .	<i>note one</i> 2540
what is a reasonable, judge or jury to determine . . . . .	2553
judicially noticed . . . . .	§ 2581
see also ACT.	
<b>Time-book</b> used as a memorandum . . . . .	§ 751
as regular entry . . . . .	§ 1530, § 1558
<b>Title</b> , by adverse possession; see POSSESSION.	
documents of; see DOCUMENT; RECORDED CONVEYANCE; DEED.	
registration of; see REGISTRATION OF TITLE.	
in ejectment, affidavit denying common source of . . . . .	<i>note six</i> 1385
disclaimer of, as a fact against interest . . . . .	§ 1458
of landlord disputed by tenant . . . . .	§ 1473
proved by reputation . . . . .	§ 1587
assessment-books as evidence of . . . . .	§ 1641
official register of . . . . .	§ 1647
registration as showing claim of . . . . .	1654, § 1777
inquisition of, by the sheriff . . . . .	§ 1670
abstract of; see ABSTRACT.	
deeds of, privilege for . . . . .	2211
presumption of, from possession . . . . .	§ 2515
from lost grant . . . . .	§ 2522
to bill of exchange . . . . .	§ 2516
to office, presumption of . . . . .	§ 2553
admissions of; see ADMISSIONS.	
see also OWNERSHIP; LAND OFFICE.	
<b>Tombstone</b> , as evidence of pedigree; see FAMILY HISTORY.	
<b>Tortfeasor</b> , admission by . . . . .	§ 1079
see also CONTRIBUTION.	
<b>Tools</b> , possession of, as evidence of a crime . . . . .	88, § 238, § 318
of burglary . . . . .	§ 149, § 153, § 238
see also MACHINE.	
<b>Traces</b> as evidence of criminal's identity . . . . .	148, § 149
<b>Tracks</b> ; see FOOTPRINTS.	
<b>Trade</b> , secret of, as privileged . . . . .	§ 2212, § 2374
see also CUSTOM; USAGE.	
<b>Trade Journal</b> ; see NEWSPAPER.	
<b>Train-sheet</b> , used as memorandum . . . . .	§ 751
as regular entry . . . . .	§ 1530
<b>Transcript</b> of stenographic notes of testimony; see FORMER TESTIMONY.	
<b>Transfers</b> , in fraud of creditors, mode of evidencing intent . . . . .	333
admissions of debtor or creditor . . . . .	§ 1082
<b>Translation</b> , required for alien's testimony . . . . .	§ 811
see also INTERPRETER.	
<b>Travall</b> , complaint in, by bastard's mother . . . . .	§ 1141
<b>Traveller</b> ; see HIGHWAY.	
<b>Treason</b> , other acts of, as evidencing intent . . . . .	§ 367

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Treason</b> ( <i>continued</i> ).	
confession of, as dispensing with two witnesses . . . . .	818, 2038
accused's expressions of loyalty . . . . .	§ 1732
list of witnesses before trial . . . . .	§ 1850
two witnesses to overt act . . . . .	§ 2036
must be to <i>same</i> overt act . . . . .	2038
both witnesses must be believed . . . . .	2038
overt act need not be first proved . . . . .	2038
other overt acts to evidence intent . . . . .	<i>note eleven</i> 2038
<b>Treatise</b> , scientific, used in evidence . . . . .	§ 1690-1700
<b>Treaty</b> , judicial notice of . . . . .	§ 2573
proof by copy; see PUBLIC DOCUMENT.	
<b>Tree</b> , family, as evidence of pedigree; see FAMILY HISTORY.	
<b>Trespass</b> , by battery, evidence of intent in . . . . .	§ 364
of another animal . . . . .	<i>note three</i> 142
to property, evidence of intent in . . . . .	§ 367
evidence of malice in . . . . .	§ 367
<b>Trial</b> , at common law in Federal court, rules for . . . . .	§ 6
new trial, motion for, to confirm an exception . . . . .	§ 20
material error of ruling, as ground for . . . . .	§ 21
demeanor during, as evidence of guilt . . . . .	274
severance of, of persons jointly charged as a removal of interest . . . . .	§ 580
adjournment of, to exterior place, distinguished from view by jury . . . . .	<i>note three</i> 1802
coroner's inquest is not a . . . . .	<i>note seven</i> 1834
publicity of, as a security for truth . . . . .	1834
exclusion of spectators . . . . .	§ 1835
prohibition of printed reports . . . . .	1836
separation of witnesses during . . . . .	§ 1837
by inspection . . . . .	§ 2555
see also INSPECTION; WITNESS; PLEADING.	
<b>Trover</b> , notice to produce document converted . . . . .	1205
proof of conversion, without producing original . . . . .	§ 1249
<b>Trust</b> , agreement to hold property in, shown by parol . . . . .	§ 2437
<b>Trust-combination</b> , proved by repute . . . . .	§ 1626
<b>Trustee</b> , admissions of . . . . .	§ 1076
communications to, not privileged . . . . .	§ 2286
<b>Truth</b> of defamatory words; see DEFAMATION.	
<b>Turntable</b> ; see PREMISES.	
<b>Typewriting</b> , manifold copies by, as originals . . . . .	<i>note four</i> § 1234
proving genuineness of . . . . .	§ 2149
authorship of letter in, evidenced from expression . . . . .	<i>note three</i> 87
imperfect impression to show authorship . . . . .	<i>note one</i> 149, <i>note two</i> 2024

## U

<b>Unchastity</b> ; see CHASTITY.	
<b>Understanding</b> , testimony to a witness'; see BELIEF; OPINION.	
as varying a document; see PAROL EVIDENCE RULE.	
<b>Under-valuation</b> ; see IMPORTATION.	
<b>Undisclosed Principal</b> , shown by parol . . . . .	§ 2438
<b>Undue Influence</b> , testator's statements of . . . . .	§ 1738
burden of proof of . . . . .	§ 2502
see also WILL.	
<b>Unfair Prejudice</b> ; see PREJUDICE.	
<b>Unfair Surprise</b> , as applied to conduct to show character in issue . . . . .	§ 194, 202, 1849
in showing particular acts of negligence in civil cases . . . . .	§ 199
of unchastity . . . . .	§ 200
two aspects of, distinguished . . . . .	202
in showing conduct to evidence character in seduction . . . . .	§ 205

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Unfair Surprise</b> , justifying acts in defamation of character . . . . .	§ 207
showing acts of incompetence by employee or physician . . . . .	§ 208
evidencing tendency, capacity, quality . . . . .	443
showing collateral facts to impeach witness . . . . .	1002, § 1007
self-contradiction . . . . .	1019
preliminary warning to guard witness against . . . . .	1025
as grounds for discovery . . . . .	1845
continuance granted for . . . . .	1848
bill of particulars to avoid . . . . .	1848
<b>Unilateral Acts</b> ; see PAROL EVIDENCE RULE, B.	
<b>United States</b> , conflict between State law and Federal law . . . . .	§ 6
<b>Unseaworthiness</b> , presumption of . . . . .	2533
<b>Unskilfulness</b> ; see SKILL; NEGLIGENCE.	
<b>Usage</b> , among conveyancers, proved by repute . . . . .	§ 1625
as proved by opinion . . . . .	1954
by one witness . . . . .	§ 2053
varying the terms of an agreement . . . . .	§ 2440
interpreting a document . . . . .	§ 2462, § 2464
see also CUSTOM; HABIT.	
<b>Use of machinery, premises, etc.</b> , as evidence of safety, etc. . . . .	§ 461
<b>Usury</b> , impeachment an instrument for . . . . .	529
shown by parol evidence . . . . .	2414
terms of a contract of; see CONTRACT.	
<b>Utterance of other forged documents or money</b> ; see FORGERY; COUNTERFEITING.	
of libel or slander; see DEFAMATION.	
as identifying a time or place . . . . .	§ 416
separate, excluded . . . . .	§ 2119
incorporated by reference . . . . .	§ 2120
under rule of completeness; see WHOLE OF AN UTTERANCE.	
see also HEARSAY RULE, III.	

### V

<b>Vacuum-ray photograph</b> . . . . .	§ 795
machine, use of . . . . .	§ 665
see also X-RAY.	
<b>Validity</b> , under substantive law . . . . .	<i>note five</i> 2167
<b>Value</b> , of an article sold, as evidence of price agreed . . . . .	§ 392
witness to, tested by adjacent values . . . . .	464
property taken, as evidenced by other sales . . . . .	§ 463
experience or knowledge as qualifying witness to . . . . .	558, 567, 653, § 711-721
impeached by inconsistencies . . . . .	§ 1040
special training or occupation unnecessary to estimate . . . . .	712
proper tests to show value standard . . . . .	713
proving land . . . . .	§ 714
of services . . . . .	§ 715
of attorney's services . . . . .	§ 715, <i>note one</i> § 1944
of physician's services . . . . .	§ 715
of chattels . . . . .	§ 716
witness to, must know market . . . . .	§ 717
knowledge of, must be of vicinity . . . . .	§ 718
must not be by hearsay . . . . .	§ 719
estimating, from price-list trade journals . . . . .	§ 719, <i>note two</i> § 1704
provable by jury's view . . . . .	§ 1168
by books of assessors . . . . .	§ 1640
by opinion testimony . . . . .	§ 1940-1943
jury may use general knowledge of . . . . .	§ 2570
of evidence; see WEIGHT.	
see also SALES; DAMAGES.	
<b>Varying the terms of a document</b> ; see PAROL EVIDENCE RULE.	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Vehicle, injuries to, as evidence of a highway defect</b> . . . . .	§ 458
character of driver of; see NEGLIGENCE.	
standard of conduct as passengers, employees, etc. . . . .	§ 461
<b>Vendor; see GRANTOR.</b>	
<b>Vendee; see GRANTEE.</b>	
<b>Venereal disease, as evidence of adultery</b> . . . . .	§ 168
<b>Veracity, character for; see CHARACTER.</b>	
<b>Verbal Acts, general principles</b> . . . . .	1772
distinction between, and declaration of mental condition . . . . .	§ 1715
and <i>res gestæ</i> . . . . .	§ 1715
distinguished from statements of intent . . . . .	§ 1726
applicable to statements of intent in domicil cases . . . . .	§ 1727
conduct must be equivocal . . . . .	1774
words must aid in completing act . . . . .	1775
act must be material to issue . . . . .	1773
words must accompany conduct in time . . . . .	1776
rule applied to receiving money . . . . .	§ 1777
acceptance . . . . .	§ 1777
advancement . . . . .	§ 1777
agency . . . . .	§ 1777
consideration . . . . .	§ 1777
conversion . . . . .	§ 1777
dedication . . . . .	§ 1777
rule applied to delivery . . . . .	§ 1777
entry . . . . .	§ 1777
gift . . . . .	§ 1777
larceny . . . . .	§ 1777
loan . . . . .	§ 1777
payment . . . . .	§ 1777
sale . . . . .	§ 1777
sundries . . . . .	§ 1777
possessor's declarations on issue of prescription . . . . .	§ 1778
declarations of claimant of title . . . . .	§ 1779
various rules concerning declarations of land-title . . . . .	1780
declarations by accused found with stolen goods . . . . .	§ 1781
affecting revocation of will . . . . .	1782
of a bankrupt . . . . .	1783
as to domicil . . . . .	§ 1784
of intent or motive by an accused . . . . .	1785
fragmentary utterance, rule of completeness . . . . .	1786
see also HEARSAY RULE, III.; <i>RES GESTÆ</i> .	
[Examine analysis of "Verbal Acts," Vol. III, p. 2274.]	
<b>Verdict, in another cause, as reputation</b> . . . . .	1593
not to be impeached by jurors . . . . .	2348
except in six jurisdictions . . . . .	§ 2354
determination of, by lot . . . . .	§ 2354
acceptance of, by court . . . . .	§ 2356
direction of a . . . . .	§ 2495, § 2496
mistake in rendering . . . . .	§ 2355, note two § 2356
in directed, juror's unwillingness to assent . . . . .	note four § 2355
see also JUDICIAL RECORD.	
<b>Verification, by cross reading of document</b> . . . . .	1279
<b>Vessel, loss of, as evidenced by lack of news</b> . . . . .	§ 158, § 2531
safety of, custom of other owners, as evidence . . . . .	§ 461
presumption of unseaworthiness of . . . . .	2533
log-book of; see LOG-BOOK.	
<b>Veto of governor, whether journals of legislature can be used to prove</b> . . . . .	1350
<b>Viciousness, of an animal, evidence of owner's knowledge of</b> . . . . .	§ 251
see also ANIMAL.	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both]

	Section
<b>View by Jury, general principle</b> . . . . .	1162
allowable on any issue . . . . .	§ 1163
trial court's discretion . . . . .	§ 1164
by part of jury . . . . .	1165
unauthorized view . . . . .	§ 1166
showers . . . . .	1167, § 1802
fence or road viewers . . . . .	1167
view as evidence . . . . .	§ 1168
evidence not to be taken at . . . . .	§ 1802
juror disclosing at later trial, knowledge obtained at, on former . . . . .	<i>note one 1910, 2348</i>
adjournment of trial to exterior place, distinguished from . . . . .	<i>note three 1802</i>
adjournment of court for a view . . . . .	1803
defendant's presence at . . . . .	1803
<b>Violence of deceased; see HOMICIDE</b> . . . . .	§ 248
<b>Voice, as identified by utterance</b> . . . . .	222
as identifying a person . . . . .	§ 660
by opinion testimony . . . . .	§ 1977
<b>Void, parol evidence to show a transaction</b> . . . . .	§ 2406, § 2423
<b>Voidable Acts, affected by parol evidence rule</b> . . . . .	§ 2423
<b>Voir Dire, for ascertaining a witness' qualifications</b> . . . . .	485, § 497, § 508, § 560, 583
no duty of judge to examine on . . . . .	<i>note three 497</i>
admissions of a document's contents on . . . . .	1258
right of cross-examination on . . . . .	§ 1384, § 2550
examining into religious belief on . . . . .	§ 1820
<b>Vote, refusing to receive, evidence of intent in</b> . . . . .	§ 367
fraudulently casting, evidence of intent in . . . . .	§ 367
declarations concerning, by a voter . . . . .	§ 1712
disclosure of, privileged	
elector . . . . .	§ 2215
juror . . . . .	§ 2346, 2361
member of legislature . . . . .	§ 2375
see also <b>BALLOT</b> .	
<b>Voter, declarations of domicile by</b> . . . . .	§ 1712
waiver of privilege by . . . . .	§ 2215

## W

<b>Wager of law, in the history of rules of evidence</b> . . . . .	§ 575
<b>Wagon; see VEHICLE.</b>	
<b>Waiver of inadmissibility, by offering other inadmissible evidence</b> . . . . .	§ 15
accused's bad character erroneously admitted, rebutted by good character,	
is not a . . . . .	<i>note twenty-six 18</i>
of objection in general . . . . .	§ 18
by failure to object to admission of document, extends to authority of agent . . . . .	2132
of right of confronting accusers . . . . .	§ 1398, § 1415, § 2592
of privilege, not to testify against husband or wife . . . . .	§ 2242, § 2340
against self-crimination . . . . .	§ 2275
of attorney and client . . . . .	§ 2327-2329
of physician and patient . . . . .	§ 2388
of voter . . . . .	§ 2215
at one trial is not, for later trial . . . . .	§ 2276
custom as, of agreement not to ride in stock car . . . . .	<i>note one 2441</i>
of motion to direct verdict . . . . .	§ 2496
of proof; see <b>JUDICIAL ADMISSION.</b>	
of right to absent witness' testimony . . . . .	§ 2595
<b>Warrant of land-entry, original required</b> . . . . .	§ 1239
see also <b>JUDICIAL RECORD; LAND OFFICE.</b>	
<b>Warranty, distinguished from an admission</b> . . . . .	§ 1056
shown by parol . . . . .	§ 2434
<b>Water, other instances of effect of, as evidence</b> . . . . .	§ 451

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

	Section
<b>Weakness of case, evidenced by fraudulent acts</b> . . . . .	§ 280
by conveyance of property . . . . .	§ 282
failure to produce evidence, indicating . . . . .	§ 285-291
failure to call expert, indicating . . . . .	§ 290
<b>Wealth, provable by reputation</b> . . . . .	§ 1623
by assessors' books . . . . .	§ 1640
<b>Weapon, deceased's carrying of a, as evidencing self-defence</b> . . . . .	§ 246
as evidence of identity . . . . .	§ 413
capacity of, as shown by its effects . . . . .	§ 441-461
condition of, as evidenced by effects . . . . .	§ 437
other acts to evidence carrying concealed . . . . .	<i>note nine</i> 367
other instances of its effects, as evidence . . . . .	§ 451
to show capacity or tendency of a . . . . .	§ 457
see also UNFAIR SURPRISE.	
exhibition to the jury . . . . .	§ 1157
experiment with gun in jury room . . . . .	<i>note one</i> 460, <i>note one</i> 1160
<b>Weather, as shown by conditions at other times or places</b> . . . . .	§ 438
record of conditions of . . . . .	§ 1523, § 1639
<b>Weight, of evidence, distinguished from relevancy</b> . . . . .	12, § 29
of circumstantial evidence . . . . .	§ 26
of negative knowledge . . . . .	664
of confessions . . . . .	§ 861, § 866
of testimony wilfully false . . . . .	1008
no rules of law for . . . . .	§ 26, § 2034
<b>Weights, fraudulent, other acts evidencing intent</b> . . . . .	§ 341
<b>Whisky, judicially noticed</b> . . . . .	§ 2582
<b>Whole, existence of, inferred from part</b> . . . . .	§ 438
<b>Whole of an Utterance, put in evidence</b>	
general principle . . . . .	§ 2094
instruction on . . . . .	<i>note four</i> 2094
<b>I. Compulsory Completeness</b>	
precise words required	
conversations, etc. . . . .	§ 2097
former testimony . . . . .	§ 2098
all parts required	
conversations, etc. . . . .	§ 2099
confessions . . . . .	§ 2100
whole of a writing required	
depositions, etc. . . . .	§ 2103
separate writings . . . . .	§ 2104
lost deed or contract . . . . .	§ 2105
abstract of title . . . . .	§ 2106
lost will . . . . .	§ 2106
public records . . . . .	§ 2107-2109
judicial records . . . . .	§ 2110
bill and answer in chancery . . . . .	2111
<b>II. Optional Completeness</b>	
remainder may be put in . . . . .	§ 2113
conversations, admissions, confessions, etc. . . . .	§ 2115
sundry writings . . . . .	§ 2116
charge and discharge statements . . . . .	2117
account-books . . . . .	§ 2118
separate utterances . . . . .	§ 2119
letters of a correspondence . . . . .	§ 2120
answer in chancery made evidence . . . . .	§ 2121-2124
opponent's inspection making the whole admissible . . . . .	2125
self-contradiction . . . . .	§ 1045, § 2098
dying declaration . . . . .	§ 1448
[Examine analysis of "Verbal Completeness," Vol. III, p. 2819.]	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Widow, as a witness; see MARITAL RELATIONSHIP.</b>	
<b>Wife, notice to, as evidencing husband's knowledge . . . . .</b>	<b>§ 261</b>
husband's desire or motive to get rid of . . . . .	191
character of, in alienation of affection . . . . .	§ 391
of defendant as witness . . . . .	§ 609
of party as witness to books of account . . . . .	§ 612
testimony of, as disqualified or privileged; <b>see MARITAL RELATIONSHIP.</b>	
communications by or to, as privileged; <b>see MARITAL RELATIONSHIP.</b>	
of plaintiff as witness against carrier . . . . .	§ 612
admissions of, against husband . . . . .	§ 1078, § 1086, § 2232
acknowledgment of execution of deed, conclusive . . . . .	§ 1347
statements of, to evidence pedigree; <b>see FAMILY HISTORY.</b>	
expressions of feelings towards husband . . . . .	§ 1730
presumption of gift by or to . . . . .	§ 2526
of accomplice, to corroborate him . . . . .	§ 2059
presumption of coercion by husband . . . . .	§ 2514
<b>see also CRIMINAL CONVERSATION; HUSBAND; MARRIAGE.</b>	
<b>Will, attestation of, whether <i>lex fori</i> is applicable to . . . . .</b>	<b>§ 5</b>
forgery of, character of third person as evidence . . . . .	§ 68
skill in drafting, as evidence of authorship . . . . .	§ 87
testamentary plans, as evidence of execution or contents . . . . .	§ 112
execution of, as evidenced by testator's belief . . . . .	271
spoliation of, as evidence of contents . . . . .	§ 291
proving testator's signature in absence of attesting witness . . . . .	§ 1320
production of original; <b>see ORIGINAL DOCUMENT.</b>	
kinds of copy admissible; <b>see COPY; CERTIFIED COPY.</b>	
calling the attesting witness; <b>see ATTESTING WITNESS.</b>	
undue influence evidenced by other instances . . . . .	338
using testimony given at preliminary probate . . . . .	§ 1417
record of probate, to prove execution . . . . .	§ 1658
certified copy of . . . . .	§ 1681
testator's statements	
of contents, execution, revocation, undue influence, etc. . . . .	§ 1734-1740, 1782
normality of disposition in . . . . .	§ 1738
intelligent execution of . . . . .	§ 1739
utterances by maker of, as to sanity . . . . .	1740
recital in, as evidence of pedigree; <b>see FAMILY HISTORY.</b>	
interpretation of; <b>see PAROL EVIDENCE RULE, D.</b>	
proof of, by two witnesses	
personalty . . . . .	§ 2048
rule in Pennsylvania . . . . .	§ 2048
realty . . . . .	2049
nuncupative wills . . . . .	§ 2050
holographic wills . . . . .	§ 2051
revocations . . . . .	§ 2051
alterations, etc. . . . .	§ 2051
contents of lost will . . . . .	§ 2052, 2090, § 2106
testimonial evidence required . . . . .	2090
made in a single document . . . . .	§ 2452
proof of, by age of document . . . . .	§ 2137-2146
in testator's custody, marks of cancellation on, presumed genuine . . . . .	note two § 148
publication of . . . . .	2411
reading over to testator . . . . .	§ 2421
intent or mistake of testator; <b>see PAROL EVIDENCE RULE, D.</b>	
lost will, clear proof of . . . . .	§ 2498
non-discovery of, as inference of revocatory destruction . . . . .	160
burden of proof of . . . . .	§ 2500, § 2502
presumptions of execution and revocation of . . . . .	§ 2523
<b>see also TESTATOR; DOCUMENT; EXECUTION; SANITY; INSANITY.</b>	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

**Wires;** see NEGLIGENCE; PREMISES; HIGHWAY; MACHINE.

### **Witness**

#### **I. Qualifications and Disqualifications**

- (a) *in general*
- (b) *insanity*
- (c) *infancy*
- (d) *alienage, race, color*
- (e) *sex*
- (f) *religion*
- (g) *infamy*
- (h) *turpitude self-confessed*
- (i) *experience*
- (j) *interest*
- (k) *marital relationship*
- (l) *knowledge*
- (m) *recollection*

#### **II. Examination**

- (a) *in general*
- (b) *direct-examination*
- (c) *cross-examination*

#### **III. Impeachment and Discredit**

#### **IV. Restoring Credit**

#### **V. Witnesses Required to be called before others**

- (a) *attesting witnesses*
- (b) *magistrates' report*
- (c) *sundry witnesses*

#### **VI. Separation of Witnesses**

#### **VII. Number of Witnesses**

- (a) *excessive number*
- (b) *required number*

#### **VIII. Kinds of Qualified Witnesses excluded or required to be corroborated for special reasons**

#### **IX. Securing Attendance and Testimony**

#### **X. Privileged Testimony**

#### **XI. Sundry Topics**

#### **XII. Absent Witnesses**

For matters of Attestation; see ATTESTING WITNESS.

Attested Copy; see CERTIFIED COPY.

#### **I. Qualifications and Disqualifications**

<b>(a) <i>in general</i></b>	
general theory . . . . .	475
time . . . . .	483
attesting, must be competent at time of attestation . . . . .	§ 1510
burden of proof . . . . .	484
capacity is presumed . . . . .	484, § 497
mode of proof . . . . .	485
time of objection . . . . .	486
judge determines . . . . .	487, § 497, § 2550
statutory enactments . . . . .	§ 488
Federal rules . . . . .	§ 6
to corporal injury . . . . .	§ 688
<b>(b) <i>insanity, etc.</i></b> . . . . .	§ 492-501
deaf-mutes . . . . .	§ 498
intoxication . . . . .	§ 499
disease, etc. . . . .	§ 500
blindness . . . . .	§ 500
under exception to Hearsay rule . . . . .	1751
<b>(c) <i>infancy</i></b> . . . . .	§ 505-509
under exception to Hearsay rule . . . . .	1751

# INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]

Section

## Witness (*continued*).

- (d) *alienage, race, color* . . . . . § 516
- (e) *sex* . . . . . 517
- (f) *religion* . . . . . 518
  - theological belief; see OATH.
- (g) *infamy* (conviction of crime) as a disqualification . . . . . § 519-524
  - under exception to Hearsay rule . . . . . 1751
  - kind of crime . . . . . 520
  - judgment of crime . . . . . § 521, § 522
  - conviction in another jurisdiction . . . . . § 522
  - pardon, reversal, etc. . . . . § 523
  - statutory changes . . . . . § 524

[Examine analysis of "Moral Depravity," Vol. I, p. 642.]
- (h) *turpitude self-confessed*, as a disqualification . . . . . § 525-531
  - accomplice . . . . . § 526
  - perjurer . . . . . § 527
  - attesting-witness . . . . . § 528
  - repudiating one's own instrument . . . . . § 530
- (i) *experience* as a qualification (except capacity) . . . . . § 555-571
  - general principles . . . . . § 555-562
  - foreign law . . . . . 564-566
  - value . . . . . 567
  - laymen in expert capacity . . . . . § 568-571
  - medical and chemical topics . . . . . § 568, § 569
  - sanity . . . . . § 568, § 569
  - handwriting and paper money . . . . . § 570
  - sundry topics of expert testimony . . . . . § 571
  - opinion in general; see OPINION.
  - see also EXPERT WITNESS.

[Examine analysis of "Experiential Capacity," Vol. I, p. 667.]
- (j) *interest* as a disqualification . . . . . § 575-587
  - see also WITNESS, VIII.
  - history . . . . . § 575
  - interest in general . . . . . § 576
  - civil parties . . . . . 577
  - survivor against deceased, lunatic, etc. . . . . § 578
  - accused . . . . . § 579
  - co-inditees and co-defendants . . . . . § 580
  - testimony to one's own intent . . . . . § 581
  - attesting witness of a will . . . . . § 582
  - time of interest; voir dire . . . . . 583
  - burden of proof . . . . . § 584
  - mode of proof . . . . . 585
  - time of objection . . . . . § 586
  - judge determines . . . . . 587
  - see also ACCOMPLICE.

[Examine analysis of "Interest as a Testimonial Disqualification," Vol. I, p. 688.]
- (k) *marital relationship* as a disqualification . . . . . § 600-620
  - history . . . . . § 600
  - policy; statutes . . . . . 601, 602
  - general principles . . . . . 603, 604
  - mistress, bigamous marriage . . . . . § 605
  - for whom is the spouse disqualified . . . . . § 606-610
  - exceptions based on necessity . . . . . § 612
  - on statutes . . . . . § 613-617
  - statutory abolition . . . . . 619, 620

[Examine analysis of "Marital Relationship as a Testimonial Disqualification," Vol. I, p. 728.]

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Witness (*continued*).

(l) <i>knowledge as a qualification</i> . . . . .	§ 650-721
<i>knowledge as requiring observation</i> . . . . .	650
<i>distinction between experience and knowledge</i> . . . . .	558, 651
<i>knowledge of a class of things</i> . . . . .	653
<i>burden of proof of knowledge</i> . . . . .	§ 654
<i>witness specifying grounds of knowledge</i> . . . . .	§ 655
<i>personal observation required</i> . . . . .	656
<i>knowledge amounting to a belief or impression</i> . . . . .	658
<i>knowledge based on insufficient data</i> . . . . .	§ 659
<i>identity</i> . . . . .	§ 660
<i>age, etc.</i> . . . . .	§ 660
<i>state of mind</i> . . . . .	§ 661
<i>scientific improbabilities</i> . . . . .	§ 662
<i>speculative injuries</i> . . . . .	663
<i>that a thing would have been observed</i> . . . . .	§ 664
<i>scientific instruments or tables</i> . . . . .	§ 665
<i>subordinates' records or scientific books</i> . . . . .	§ 665
<i>one's own age</i> . . . . .	§ 667
<i>another person's name</i> . . . . .	§ 667
<i>interpreted conversations</i> . . . . .	668
<i>telephone conversations</i> . . . . .	§ 669
<i>hypothetical questions</i> . . . . .	§ 672-684
<i>party's admissions</i> . . . . .	§ 1053
<i>medical matters (sanity, disease, etc.)</i> . . . . .	§ 687-690
<i>foreign law</i> . . . . .	§ 690
<i>reputation</i> . . . . .	§ 691, § 692
<i>handwriting</i> . . . . .	§ 693-709
<i>by seeing the act of writing</i> . . . . .	§ 694-698
<i>by seeing genuine documents</i> . . . . .	§ 699-708
<i>by admission of genuineness of writing</i> . . . . .	700
<i>by expert comparison</i> . . . . .	709
<i>value</i> . . . . .	§ 711-721
<i>general principles</i> . . . . .	711-731
<i>land</i> . . . . .	§ 714
<i>services</i> . . . . .	§ 715
<i>personalty</i> . . . . .	§ 716
<i>sundry rules</i> . . . . .	§ 717-721
<i>dying declarant</i> . . . . .	§ 1445
<i>keeper of books of account</i> . . . . .	§ 1530, § 1555
<i>officer making public document</i> . . . . .	163
<i>notary</i> . . . . .	§ 1635

[Examine analysis of "Testimonial Knowledge," Vol. I, pp. 744, 745.]

(m) *recollection*; see RECOLLECTION.

### II. Examination

#### (a) *in general*

<i>mode of interrogation in general</i> . . . . .	§ 768-788
<i>leading questions</i> . . . . .	§ 769-779
<i>discretion of court in allowing</i> . . . . .	§ 770, 776
<i>assuming truth of controverted fact</i> . . . . .	771
<i>calling for answer "Yes" or "No"</i> . . . . .	§ 772
<i>to opponent's witness on cross-examination</i> . . . . .	§ 773
<i>to hostile, biassed, or unwilling witness</i> . . . . .	§ 774
<i>to preliminary undisputed matters</i> . . . . .	775
<i>when witness' recollection is exhausted</i> . . . . .	777
<i>when witness has immature or feeble intellect</i> . . . . .	§ 778
<i>to prove a contradiction</i> . . . . .	779
<i>misleading questions</i> . . . . .	§ 764, § 780

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

### Witness (*continued*).

	Section
annoying questions . . . . .	§ 781
repetition of questions . . . . .	§ 782
multiple examiners . . . . .	§ 783
rights of other counsel, under court rule limiting cross-examination to one counsel . . . . .	§ 783
length of examination . . . . .	§ 783
judge's questions . . . . .	§ 784
narration without questions . . . . .	§ 785
non-responsive answers . . . . .	§ 785
improper suggestions . . . . .	§ 786
prepared deposition . . . . .	787
answering by reference . . . . .	788
prior conference with attorney . . . . .	788
attorney's consultation with sequestered witness . . . . .	§ 1840
non-verbal testimony . . . . .	§ 789-797
gesture, etc. . . . .	§ 789
infirmary of witness exciting prejudice . . . . .	§ 789
models, maps, diagrams . . . . .	§ 791
photographs or maps . . . . .	§ 792-797
verification of . . . . .	793
maker of . . . . .	§ 794
production of original . . . . .	796
of handwriting . . . . .	§ 797
written testimony . . . . .	
sundry modes . . . . .	799-801
records of past recollection . . . . .	800
depositions . . . . .	§ 802-806
see also DEPOSITIONS.	
absent witness' testimony . . . . .	807
see also JUDICIAL ADMISSIONS; QUESTION TO A WITNESS.	
interpreted testimony . . . . .	§ 811, 812
aliens, deaf-mutes, persons ill or inaudible, interpreters, translations . . . . .	§ 811
confessions: see CONFESSIONS.	
testimony under duress . . . . .	§ 815
(b) <i>direct examination</i> ; see EXAMINATION, III.	
(c) <i>cross-examination</i> in general; see CROSS-EXAMINATION.	
of one's own witness; see IMPEACHMENT.	
to show bias or corruption; see IMPEACHMENT.	
to contents of a document; see ORIGINAL DOCUMENT.	
to one's own case; see EXAMINATION, III.	
refusal to answer on; see PRIVILEGE.	
[Examine analysis of "Testimonial Narration or Communication," Vol. I, p. 858.]	

### III. *Impeachment and Discredit*; see IMPEACHMENT.

### IV. *Restoring Credit*

general principles . . . . .	1100
good character in support . . . . .	§ 1104-1110
after evidence of general character . . . . .	§ 1105
particular instances . . . . .	1106, § 1116
bias, interest or corruption shown . . . . .	1107, 1119, § 1128
self-contradiction . . . . .	§ 1007, § 1044, § 1108, 1119, § 2115
contradiction by others . . . . .	1109, § 1127
discrediting the impeaching witness . . . . .	§ 1111
explaining away a self-contradiction . . . . .	§ 1044, § 2115
a contradiction . . . . .	§ 1007
the bad reputation . . . . .	1112
the misconduct . . . . .	§ 1116
the bias, etc. . . . .	1119

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### Witness (*continued*).

corroboration by similar consistent statements . . . . .	§ 1122-1144
of statements of an accomplice . . . . .	§ 1128
after impeachment by cross-examination . . . . .	§ 1131
of witnesses in general . . . . .	§ 1122-1132
contradiction of . . . . .	§ 1005
of party's admissions . . . . .	§ 1133
rape complainant . . . . .	§ 1134-1140
bastard's mother in travail . . . . .	§ 1141
owner of goods robbed . . . . .	1142
possessor of stolen goods . . . . .	1143
accused in general . . . . .	1144
utterances identifying a time or place . . . . .	416
supporting a contradicted witness . . . . .	§ 1007
an attesting witness . . . . .	1514

[Examine analysis of "Testimonial Rehabilitation," Vol. II, p. 1306.]

### V. *Witnesses required to be called before others*

(a) <i>attesting witness</i> ; see ATTESTING WITNESS.	
(b) <i>magistrate's report of testimony</i> . . . . .	§ 1326, § 1349
(c) <i>sundry witnesses</i>	
maker of document, surveyor, etc. . . . .	§ 1339
official certificates . . . . .	§ 1345-1353

### VI. *Separation of Witnesses*; see SEPARATION OF WITNESSES.

### VII. *Number of Witnesses*

(a) <i>excessive number may be rejected</i>	
experts . . . . .	1908
character witnesses . . . . .	1908
other witnesses . . . . .	1908
(b) <i>required number</i>	
treason . . . . .	§ 2036
perjury . . . . .	2040
sundry crimes . . . . .	§ 2044
divorce . . . . .	§ 2046
chancery bill . . . . .	§ 2047
will of personalty . . . . .	§ 2048
of realty . . . . .	2049
nuncupative will . . . . .	§ 2050
holographic will . . . . .	§ 2051
revocation, alteration, etc. . . . .	§ 2051
contents of lost will . . . . .	§ 2052
usage or custom . . . . .	§ 2053
miscellaneous civil cases . . . . .	§ 2054
impeaching or reforming a written instrument, in Pennsylvania, two wit- ness rule . . . . .	§ 2054
verbal declaration or admission of a trust, in Texas, corroboration of wit- ness . . . . .	2054
single witness need not be believed . . . . .	§ 2034
eye-witnesses of a crime . . . . .	§ 2079
of <i>corpus delicti</i> . . . . .	§ 2081

[Examine analysis of "Number of Witnesses Required," Vol. III, p. 2692.]

### VIII. *Kinds of Qualified Witnesses excluded or required to be corroborated for special reasons*

judge . . . . .	§ 1909
juror . . . . .	§ 1910
counsel or attorney . . . . .	§ 1911
referee, arbitrator, sheriff . . . . .	1912
opinion witness; see OPINION RULE.	
accomplice . . . . .	§ 2056

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (italics) refer to supplement; § 1678 refer to both.]

	Section
<b>Witness (continued).</b>	
prosecutrix in rape, bastardy, etc. . . . .	§ 2061
parents bastardizing issue . . . . .	§ 2063
surviving claimant against deceased . . . . .	§ 2065
children . . . . .	§ 2066
Chinese . . . . .	§ 2066
confessions	
respondent in divorce . . . . .	§ 2067
accused . . . . .	2070
<i>corpus delicti</i> . . . . .	§ 2073, § 2081
marriage in fact . . . . .	§ 2082
bigamy . . . . .	§ 2085
admissions . . . . .	§ 2086
owner, in larceny . . . . .	§ 2089
wills, contracts, etc. . . . .	2090
statute of frauds . . . . .	2091
[Examine analysis of "Quantitative Rules," Vol. I, pp. xliii, xliv.]	
<b>IX. Securing Attendance and Testimony</b>	
compulsory process	
history . . . . .	§ 2190
constitutional guarantee . . . . .	§ 2191
duty to give testimony . . . . .	§ 2192
production of documents . . . . .	§ 2193
inspection of premises, chattels, body . . . . .	§ 2194
officers having power to compel . . . . .	§ 2195
persons exempt from process . . . . .	2368-2372
liability to suit or arrest . . . . .	§ 2195
notice and summons . . . . .	§ 2199
subpoena <i>duces tecum</i> . . . . .	§ 2200
tender of expenses . . . . .	§ 2201, 2202
expert's fees . . . . .	§ 2203
ability to attend . . . . .	§ 2204
entitled <i>not</i> to be examined at home . . . . .	note one § 204
illness . . . . .	1406, 2205
merchants' books . . . . .	2205
sex and occupation . . . . .	2206
officials . . . . .	2206, 2371
official records . . . . .	§ 2373
distance from trial . . . . .	1407, § 2204
process upon the Executive . . . . .	2368-2372
<b>X. Privileged Testimony; see PRIVILEGE.</b>	
<b>XI. Sundry Topics</b>	
rules for witnesses in Federal courts . . . . .	§ 6
testimonial evidence, defined . . . . .	25, § 26, 475
accused as witness . . . . .	61
intimidation of, by examiner . . . . .	§ 781
as evidence of guilt of party . . . . .	§ 278
failure to produce, as evidence of a weak case . . . . .	§ 285-292
inference from failure of party to testify . . . . .	§ 289
subornation of, other attempts as evidence of intent . . . . .	342
action to recover expenses . . . . .	note four 2202
testimony of another, as a basis; see HYPOTHETICAL QUESTION.	
attesting witness; see ATTESTING WITNESS.	
absent witness' testimony admitted to avoid postponement 807, § 815, § 1398	
duress of, as not excluding testimony . . . . .	§ 815
preferred witnesses . . . . .	§ 1339
eye-witness preferred in some instances . . . . .	§ 1339
to contents of a document; see ORIGINAL DOCUMENT.	
to a copy of a document; see COPY.	

## INDEX OF TOPICS

[Figures set thus: 1678 refer to main treatise; 1678 (*italics*) refer to supplement; § 1678 refer to both.]  
Section

### **Witness (*continued*).**

discovery of names of witnesses; see **DISCOVERY**.  
 list of witnesses before trial . . . . . § 1850  
 indorsement of witnesses' names on indictment . . . . . § 1850-1855, § 2079  
 known to prosecutor, but not indorsed . . . . . § 1853  
 to execution, showing document to opponent . . . . . § 1861

### **XII. Absent Witnesses**

unavailable or privileged . . . . . § 285  
 prejudiced or inferior, not called . . . . . § 287  
 equally available, not called . . . . . § 288  
 testimony under hearsay exception . . . . . 670  
 excuses for not calling attesting . . . . . 1308, 1319  
 death of attesting . . . . . § 1311  
 absence of attesting, from jurisdiction . . . . . § 1312  
 inability to find attesting . . . . . § 1313  
 refusal of attesting, to testify . . . . . 1317  
 attester of recorded document need not be called . . . . . 1318  
 unobtainable, may be dispensed with . . . . . 1396, 1401  
 unavailable by reason of death . . . . . 1403  
 absence from jurisdiction . . . . . § 1404  
 disappearance, inability to find . . . . . § 1405  
 imprisonment, official duty . . . . . 1407  
 insanity or other mental incompetency . . . . . 1408  
 disqualified by interest . . . . . § 1409  
     by infamy . . . . . 1410  
 proof of unavailability . . . . . § 1414  
 declarations not to return . . . . . *note three* 1725  
 liability for non-attendance . . . . . § 2195  
 unable to attend court, entitled *not* to be examined at home . . . . . *note one* 2204  
 affidavit of testimony of, to secure continuance . . . . . § 2595  
     falsity of, to impeach the accused . . . . . *note three* § 278

see also **ATTESTING WITNESS**; **ABSENT WITNESS**; **CROSS-EXAMINATION**;  
**EXAMINATION OF A WITNESS**; **DISTANCE**; **PRIVILEGE**;  
**WIFE**; **HUSBAND**; **CHINESE**.

**Women**, qualified as witnesses . . . . . 517  
 exempt from attendance . . . . . 2206

### **Words**, interpretation of; see **PAROL EVIDENCE RULE, D**.

expert interpretation of technical . . . . . 1955  
 meaning of, judicially noticed . . . . . § 2582  
 as verbal acts; see **HEARSAY RULE, III**.  
 defamatory; see **DEFAMATION**.

**Work**, capacity of, as evidenced by instances . . . . . § 460  
 see also **SERVICES**.

**Workman**; see **EMPLOYEE**.

**Wound**; see **CORPORAL INJURY**; **WEAPON**.

**Writ**, proof of service of, without production . . . . . § 1249  
 see also **JUDICIAL RECORD**.

**Writing**, as *the act* itself . . . . . 1346  
 see also **HANDWRITING**; **DOCUMENT**.

required by law; see **PAROL EVIDENCE RULE, B**.

## X

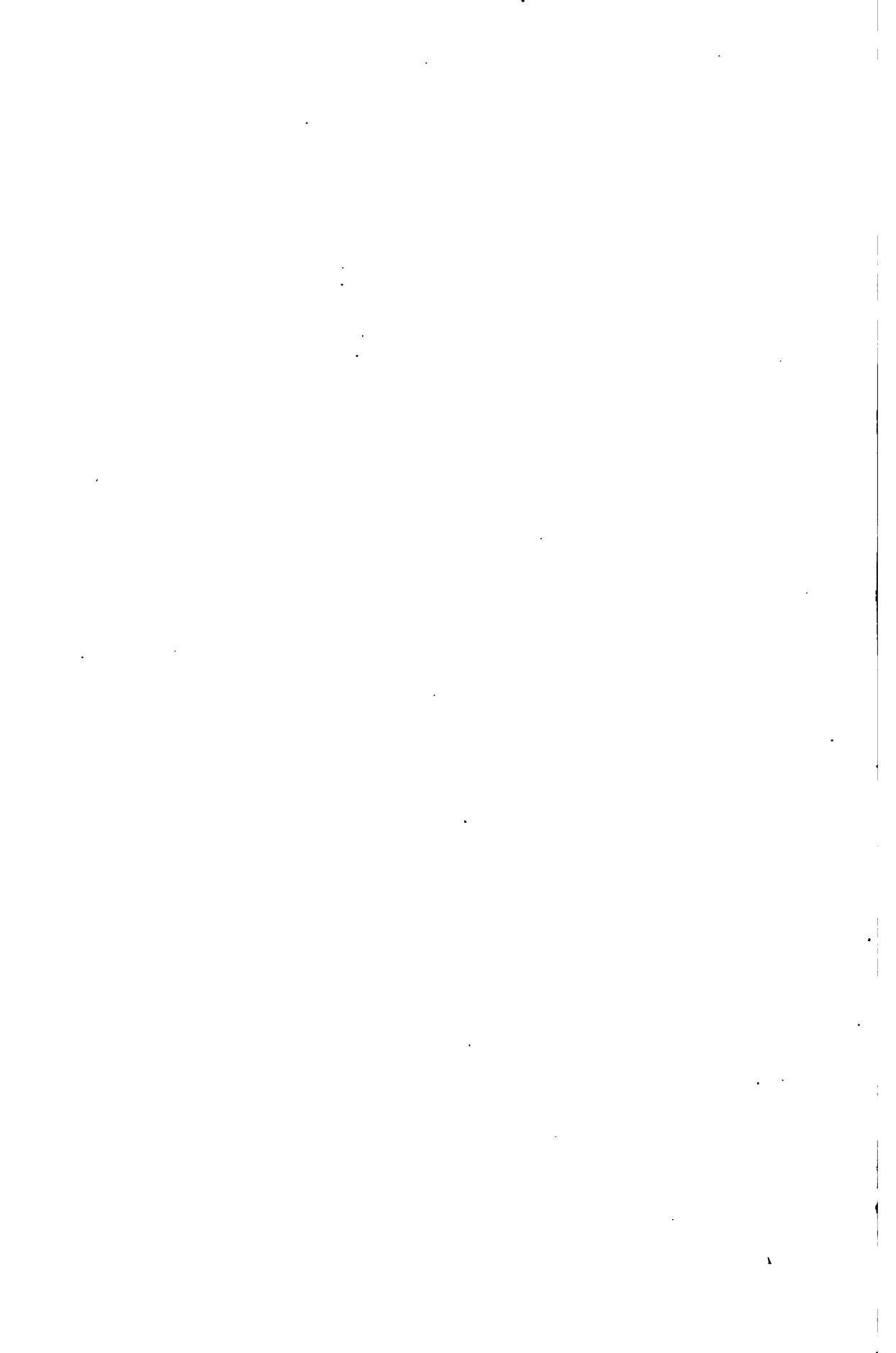
**X-ray** photograph, testimony based on . . . . . § 795  
 use of, machine . . . . . § 665  
     negligent use of . . . . . *note four* 221











Ex. C.R.P. 101.  
12/10/11.

